TAX DEPOSITION QUESTIONS: 14. CITIZENSHIP

14. CITIZENSHIP

Introduction

"U.S. citizen" or "citizen of the United States" status is the vehicle within federal statutes and "acts of Congress" that the federal government uses to illegally and wrongfully assert jurisdiction over sovereign Americans who were either born or are living in states of the Union. However, as this line of questioning will show, most Americans are not "U.S. citizens" or "citizens of the United States" within federal statutes, because of differences in meaning of the term "United States" and "State" between federal statutes and the U.S. Constitution. Most Americans born in states of the Union are instead defined in federal statutes as "nationals" or "nationals but not citizens", and this includes those who obtained their citizenship either by birth or naturalization. As "nationals", they are "nonresident aliens" for the purposes of the Internal Revenue Code and for these persons, only income from the federal United States counts as income from "sources within the United States" subject to tax.

Findings and Conclusions

With the following series of questions, we intend to prove the following facts:

- **The federal government has no "police powers" inside states of the Union. Police powers encompass nearly all legislative jurisdiction and "acts of Congress"**
- **Taxation is a "police power" because it affects the health, welfare, and morals of the people who pay it**
- **Because the federal government has no "police powers" inside states of the Union, then the term "United States" and "State" in all federal statutes can only mean the *federal* "United States" and *federal* "States" respectively.**
- **Title 8, Aliens and Nationality, is an "act of Congress", and therefore the term "United States" as used in that Title means only the *federal* "United States" or "federal zone"**
- **Income taxes are "imposed" in Section 1 of the Internal Revenue Code upon "individuals" with income from sources within the federal United States**
- **Most Americans are born outside of the *federal* "United States" and outside of the territorial jurisdiction of the United States government, which means they do not qualify as either "U.S. citizens" or "citizens of the United States" under federal statutes.**
- **Most Americans are actually "nationals" rather than "U.S. citizens" under federal statutes and "acts of Congress", which makes them "nonresident aliens" for the purposes of federal income taxes under Subtitle A of the Internal Revenue Code.**
- **The 14th Amendment, which defined the concept of "citizens of the United States", was illegally ratified and therefore null and void**
- **Government literature and government forms in most cases attempt to create a *false* and *fraudulent* presumption in favor of making most Americans into "U.S. citizens" by default, even though legally they cannot be classified as such**
- **Those persons who file 1040 federal tax forms are "U.S. persons" and "U.S. individuals", but not necessarily "U.S. citizens" under federal statutes**
- **The 1040 form only applies to "resident aliens" and *not* "U.S. citizens"**
- **Because most Americans are actually "nationals", the correct filing status is "nonresident alien" and the correct form to file is the 1040NR.**
- **For those persons who still think they are "U.S. citizens", the law provides a painless way to voluntarily and**

legally become "nationals" and "nonresident aliens" that the federal government cannot disallow.

Bottom Line: Very few Americans are either "U.S. citizens" as legally defined, and even fewer are subject to the Internal Revenue Code. Most people fit the description of being "nonresident aliens" with income from without the federal United States as defined in 26 U.S.C. §862 and the implementing regulations**.**

Section Summary

Acrobat version of this section including questions and evidence (large: 11.1Mbytes)

Further Study On Our Website:

- You're not a "citizen" under the Internal Revenue Code
- Why you are a "national" or a "state national" and not a "U.S. citizen"
- Great IRS Hoax book:
  - Section 4.11: Citizenship
  - Chapter 4: Know Your Citizenship Status and Rights!
- References on Expatriation
- Sovereignty Forms and Instructions, step 3.13: Change Your U.S. Citizenship Status

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14.1. Admit that the Supreme Court in *Dred Scott v. Sanford*, 60 U.S. 393 in 1856, ruled that negroes were *unable* to become "citizens of the United States".

- Click here for Dred Scott v. Sandford, 60 U.S. 393 (1856)

14.2. Admit that the Civil War was fought mainly over citizenship and rights of negroes in the southern states. (common knowledge)

14.3. Admit that prior to the ratification of the 14th Amendment, there was no way for a person to become a "citizen of the United States" *except* by first becoming a citizen of the state they were born in.

- Click here for Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873)

14.4. Admit that prior to the ratification of the 14th Amendment, in 1868, Congress passed Revised Statutes §1999, establishing that the right of expatriation is absolute and fundamental to the protection of liberty.

- Click here for Briehl v. Dulles, 248 F.2d 561 (1957)

14.5. Admit that the 14th Amendment was alleged by the Secretary of State of the United States to have been ratified in 1868, immediately after the Civil War in the United States.

- Click here to see Dyett v. Turner, 439 P.2d 266, 20 U.2d 403 (1968)

14.6. Admit that a large number of the states which are alleged to have ratified the 14th Amendment were occupied by armed

troops and had puppet legislatures that replaced the original legislatures and were put into place by the U.S. Congress.

- Click here to see Dyett v. Turner, 439 P.2d 266, 20 U.2d 403 (1968)

14.7. Admit that the Supreme Court of the state of Utah, in *Dyett v. Turner*, ruled that the 14th Amendment was fraudulently ratified at gunpoint by a large number of states.

> *"I cannot believe that any court in full possession of all its faculties, would ever rule that the (14th) Amendment was properly approved and adopted." State v. Phillips, 540 P.2d. 936; Dyett v. Turner, 439 P.2d. 266. [The court in this case was the Utah Supreme Court.]*

- Click here to see Dyett v. Turner, 439 P.2d 266, 20 U.2d 403 (1968)

14.8. Admit that one purpose of the 14th Amendment was to give the status of "citizen of the United States" to free negroes in the southern states who otherwise were unable to become citizens of their states.

> *"...**the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure," and "to put citizenship beyond the power of any governmental unit to destroy**," 387 U.S. at 263. Perez v. Brownell, 356 U.S. 44 (1958), a five-to-four holding within the decade and precisely to the opposite effect, was overruled."*
>
> *[...]*
>
> *"3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Art. II, § 1, cl. 5, we have, in the Civil Rights Act of April 9, 1866, 14 Stat. 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native born:"*
>
> > *"A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . ."*
>
> *"This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868, with expansion to "[a]ll persons born or naturalized in the United States. . . ." As has been noted above, the amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure," and not subject to change by mere statute. Afroyim v. Rusk, 387 U.S. at 263. See H. Flack, Adoption of the Fourteenth Amendment 88-94 (1908)."*

- Click here to see Rogers v. Bellei, 401 U.S. 815 (1971)

14.9. Admit that the 14th Amendment is the authority by which at least one type of "citizen of the United States" is legally defined in the country called the United States.

14.10. Admit that Section 1 of the 14th Amendment states the following:

> *"Section. 1. **All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

- Click here for Annotated Fourteenth Amendment

14.11. Admit that the Supreme Court in the case of *Downes v. Bidwell*, 182 U.S. 244 (1901) distinguished the term "subject to ***their*** jurisdiction" found in the Thirteenth Amendment as being different from the term "subject to ***the*** jurisdiction" found in the Fourteenth Amendment by saying:

> *"The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to **their** jurisdiction,' is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these states were not a part of the Union, they were still subject to the jurisdiction of the United States.*
>
> *Upon the other hand, the 14th Amendment, upon the subject of citizenship, declares only that 'all persons born or naturalized in the United States, and subject to **the** jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.' **Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.**"*

- Click here for Downes v. Bidwell, 182 U.S. 244 (1901)

14.12. Admit that the U.S. Supreme Court in the case of *Hooven and Allison v. Evatt*, in 1945 ruled that there are three definitions of the term "United States":

> *"The term [United States] has several meanings. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations, it may designate territory over which the sovereignty of the United States extends, or it may be the collective name of the States which are united by and under the Constitution."* ***Hooven & Allison Co. v. Evatt****, 324 U. S. 652 (1945).*

- Click here for Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)

14.13. Admit that because there are three distinct and different definitions of "United States", that there could conceivably be more than one type of "citizen of the United States" within federal statutes or "acts of Congress". (common sense)

14.14. Admit that Constitution does not define which of the three definitions of "United States" applies in the case of the Fourteenth Amendment.

- Click here for Annotated Fourteenth Amendment

14.15. Admit that the Fourteenth Amendment only defines one of possibly several types of "citizens of the United States".

14.16. Admit that the United States Department Foreign Affairs Manual, 7 FAM 1116-1 (d) states that there was no statutory definition of the term "United States" in the context of citizenship and nationality prior to January 13 1941.

> *d. Prior to January 13, 1941, there was no statutory definition of "the United States" for citizenship purposes. Thus there were varying interpretations. Guidance should be sought from the Department (CA/OCS) when such issues arise.*

- Click here for U.S. Department of State Foreign Affairs Manual, 7 FAM 1116-1

14.17. Admit that the U.S. Supreme Court said in the case of U.S. v. Wong Kim Ark, 169 U.S. 649:

> "**It is impossible** to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or **to hold that persons 'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.**'" [U.S. v. Wong Kim Ark, 169 U.S. 649 (1898)]

- Click here for U.S. v. Wong Kim Ark, 169 U.S. 649 (1898)

14.18. Admit that under the the doctrine of Conflict of Laws, no state or nation can exercise penal jurisdiction over persons or property outside of its territorial jurisdiction except by treaty:

> "By the law of England and of the United States ***the penal laws of a country do not reach beyond its own territory*** [127 U.S. 265, 290] **except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country.** Wheat. Int. Law, (8th Ed.) 113, 121. Chief Justice MARSHALL stated the rule in the most condensed form, as an incontrovertible maxim, 'the courts of no country execute the penal laws of another.' The Antelope, 10 Wheat. 66, 123. **The only cases in which the courts of the United States have entertained suits by a foreign state have been to enforce demands of a strictly civil nature.** [...] The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Whart. Confl. Law, 833; [127 U.S. 265, 291] West. Pr. Int. Law, (1st Ed.) 388; Pig. Judgm. 209, 210. Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in his Commentaries on the Conflict of Laws, after having said: '**The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself,' and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages, adds. 'But this includes not a decree decerning for a penalty, because no court reckons itself bound to punish, or to concur in punishing, any delict committed extra territorium.**' 2 Kames, Eq. (3d Ed.) 326, 366; Story, Confl. Law, 600, 622." [State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)]

- Click here for State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)

14.19. Admit that 40 U.S.C. §255 denies federal civil and criminal jurisdiction of all "acts of Congress" and federal statutes within a state except by express consent of the state legislature over the area in question.

- Click here for 40 U.S.C. §255

14.20. Admit that the federal jurisdiction described in 40 U.S.C. §255 includes jurisdiction to determine the citizenship status of persons born within the state in question. (common sense)

14.21. Admit that Black's law dictionary, Sixth Edition, page 1473 defines the term "territories" as follows:

> *"**Territory**: A part of a country separated from the rest, and subject to a particular jurisdiction.*

Geographical area under the jurisdiction of another country or sovereign power.

***A portion of the United States not within the limits of any state**, which has not yet been admitted as a state of the Union, but is organized with a separate legislature, and with executive and judicial powers appointed by the President."*

- Click here for Black's Law Dictionary, Sixth Edition, page 1473

14.22. Admit that the 50 union states of the country called the United States are *not* territories of the federal government of the United States, but instead are sovereign nations under the Law of Nations, except in respect to those matters specifically delegated to the federal government.

*"**The States between each other are sovereign and independent**. They are distinct and separate sovereignties, except so far as they have parted with some of the attributes of sovereignty by the Constitution.* **They continue to be nations, *with all their rights, and under all their national obligations, and with all the rights of nations in every particular***; *except in the surrender by each to the common purposes and objects of the Union, under the Constitution. The rights of each state, when not so yielded up, remain absolute. Congress have never provided for the proof of the laws of the states when they are brought forward in the Courts of the United States, or in the Courts of the states; and they are proved as foreign laws are proved." [Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519; 10 L.Ed. 274 (1839)]*

- Click here for Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519;10 L.Ed. 274 (1839)

14.23. Admit that the U.S. Supreme Court said in the case of *Elk v. Wilkins*, 112 U.S. 94:

*"The persons declared [by the Fourteenth Amendment, Section 1] to be citizens are ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES AND SUBJECT TO THE JURISDICTION THEREOF. **The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction.**" Elk v. Wilkins, 112 U.S. 94 (1884)*

- Click here for Elk v. Wilkins, 112 U.S. 94 (1884)

14.24. Admit that "political jurisdiction" as used above is not the same as "legislative jurisdiction", and that "political jurisdiction" can exist where "legislative jurisdiction" does not.

14.25. Admit that the legal encyclopedia American Jurisprudence, in section 3A Am Jur 2d §2689 defines "U.S. citizens" under federal statutes as follows:

3C Am Jur 2d §2689, Who is born in United States and subject to United States jurisdiction** "A person is born* subject to the jurisdiction of **the** United States, *for purposes of acquiring citizenship at birth, if his or her birth occurs in territory over which the United States is sovereign, even though another country provides all governmental services within the territory, and the territory is subsequently ceded to the other country."**

- Click here 3C Am Jur 2d §2689

14.26. Admit that Article 1, Section 8, Clause 4 of the U.S. Constitution gives Congress the right to establish "an uniform Rule of Naturalization":

Article 1, Section 8, Clause 4

"Congress shall have the power...To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"

14.27. Admit that *nowhere* in the Constitution is conferred upon Congress the authority to determine the citizenship status derived from birth in a state of the Union, and that by implication, this matter is to be decided by the states individually under their own laws under the authority of the Ninth and Tenth Amendments to the U.S. Constitution.

14.28. Admit that the rules of comity prescribe whether the federal government must recognize in Title 8 of the U.S. Code the citizenship status of persons born in states of the Union to parents who were born or naturalized in a state of the Union.

14.29. Admit that the federal government of the United States has no police powers within states of the Union:

"By the tenth amendment, 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.' **Among the powers thus reserved to the several states is what is commonly called the 'police power,'-that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty, and crime. 'The police power belonging to the states in virtue of their general sovereignty,' said Mr. Justice STORY, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the states, and has never been conceded to the United States.'** Prigg v. Pennsylvania, 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire test is beyond the constitutional power of congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any state; but that it is within the constitutional power of a state to pass such a statute, even as to oils manufactured under letters patent from the United States. U. S. v. Dewitt, 9 Wall. 41; Patterson v. Kentucky, 97 U.S. 501 . [135 U.S. 100, 128] **The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals.** It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets. Slaughter-House Cases, 16 Wall. 36, 62, 87; Fertilizing Co. v. Hyde Park, 97 U.S. 659 ; Phalen v. Virginia, 8 How. 163, 168; Stone v. Mississippi, 101 U.S. 814 . **This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice WAITE, referring to earlier decisions to the same effect: 'No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' Stone v. Mississippi, 101 U.S. 814 , 819. See, also, Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U.S. 746, 753 , 4 S. Sup. Ct. Rep. 652; New Orleans Gas Co. v Louisiana Light Co., 115 U.S. 650, 672 , 6 S. Sup. Ct. Rep. 252; New Orleans v. Houston, 119 U.S. 265, 275 , 7 S. Sup. Ct. Rep. 198.**

[...]

All rights are held subject to the police power of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which

demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. " [Leisy v. Hardin, 135 U.S. 100 (1890)]

- Click here for Leisy v. Hardin, 135 U.S. 100 (1890)

14.30. Admit that federal taxation is a "police power", because it substantially affects the safety, health, welfare, and morals of the people who pay it.

14.31 Admit that the police power of the federal government extends exclusively over the "federal zone", which includes federal territories and possessions, the District of Columbia, and enclaves within states of the Union by default, unless a clear intent is expressed to the contrary.

> *"While states are not sovereign in true sense of term but only quasi sovereign, yet in respect of all powers reserved to them they are supreme and independent of federal government as that government within its sphere is independent of the states."*
>
> *"**It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U.S. 251, 275 , 38 S.Ct. 529, 3 A.L.R. 649, Ann.Cas.1918E 724, possesses no inherent power in respect of the internal affairs of the states; and emphatically not with regard to legislation.**" [Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936)]*

- Click here for Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936)

> *"**If Congress is authorized to act in a field, it should manifest its intention clearly.** It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." Schwartz v. Texas, 344 U.S. 199, 202-203 (1952). [413 U.S. 405, 414]*

- Click here for Schwartz v. Texas, 344 U.S. 199, 202-203 (1952)

14.32. Admit that because the federal government has no "police power" inside states under the Constitution, then the terms "United States" and "State" within federal statutes, including Title 8 of the U.S. Code and the Internal Revenue Code, must necessarily imply and refer exclusively to the "federal zone" by default, but not necessarily in every case.

14.33. Admit that in the event that laws cannot be interpreted by common men of ordinary intelligence, then the Supreme Court has said that such laws violate due process of law and are therefore "void for vagueness":

> *"A statute which either forbids or requires the doing of an act in terms so vague that men and women of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v General Const. Co., 269 U.S. 385 (1926).*

- Click here for Connally v General Const. Co., 269 U.S. 385 (1926)

14.34. Admit that the term "national" is statutorily defined as follows, from 8 U.S.C. §1101:

> **8 U.S.C. §1101(a)(21)**
>
> (a) (21) The term "national" means a person owing permanent allegiance to a state.

- Click here for 8 U.S.C. §1101

14.35. Admit that a "national but not citizen of the United States at birth" is defined in 8 U.S.C. §1408 as follows:

> *8 U.S.C. Sec. 1408. - **Nationals but not citizens of the United States at birth***
>
> *Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:*
>
> ...
>
> *(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;*

(Note that the "United States" term as used in the above section refers to the federal United States, also called the "federal zone".)

- Click here for 8 U.S.C. §1408

14.36. Admit that "national but not citizen of the United States" is defined in 8 U.S.C. §1101(a)(22) as follows:

> *(a) (22) The term "national of the United States" means*
>
> *(A) a citizen of the United States, or*
>
> *(B) a person who, though not a citizen of the United States, owes permanent [but not necessarily **exclusive**] allegiance to the United States.*

- Click here for 8 U.S.C. §1101

14.37. Admit that the term "naturalization" is statutorily defined in 8 U.S.C. §1101(a)(23) as follows:

> **8 U.S.C. §1101(a)(23)** naturalization defined
>
> "(a)(23) The term "naturalization" means the conferring of **nationality** [e.g. "national" and not "citizen", which means "U.S. national"] of a state upon a person after birth, by any means whatsoever."

- Click here for 8 U.S.C. §1101

14.38. Admit that even though 8 U.S.C. §1408 does not prescribe the citizenship status of persons born in a state of the Union to parents who were also born or naturalized in a state of the Union and who did not reside ever in the federal United States, it nevertheless still could be true that such persons are "nationals but not citizens of the United States" under that section.

14.39. Admit that all persons defined as "citizens of the United States" under 8 U.S.C. §1401 are also "U.S. nationals":

8 U.S.C. *Sec. 1401*. - ***Nationals and citizens*** *of United States at birth*

The following shall be ***nationals and citizens*** *of the United States at birth:*

(a) a person born in the United States, and subject to the jurisdiction thereof;

...

- Click here for 8 U.S.C. §1401

14.40. Admit that to be a "national of the United States" could also mean that one is *not* a "citizen of the United States" under federal statutes:

8 U.S.C. §1101(a)(22)

The term "national of the United States" means

(A) a citizen of the United States, or

(B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

- Click here for 8 U.S.C. §1101

14.41. Admit that federal income taxes are "imposed" upon "U.S. citizens" and "nonresident aliens" with U.S. source income in Section 1 of the Internal Revenue Code.

- Click here for 26 U.S.C. §1
- Click here for 26 CFR §1.1-1

14.42. Admit that the term "U.S. citizen" is nowhere defined in Title 26 of the U.S. Code.

14.43. Admit that the only place in 26 CFR where the term "citizen of the United States" is defined is in 26 CFR 31.3121(e)-1, and that definition is as follows:

26 CFR 31.3121(e)-1 State, United States, and citizen.

(b)...The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

- Click here for 26 CFR §31.3121(e)-1

14.44. Admit that a "nonresident alien" is defined in 26 U.S.C. §7701(b)(1)(B) as:

"An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A))."

- Click here for 26 U.S.C. §7701

14.45. Admit that a "national" who lives outside of ***territories*** of the United States as previously defined is *neither* a "U.S. citizen" nor a resident of the territories of the United States.

14.46. Admit that the "national" as described in the previous question is a "nonresident alien" as defined in 26 U.S.C. §7701 (b)(1)(B).

- Click here for 26 U.S.C. §7701

14.47. Admit that the act of either naturalizing or remaining a citizen or a national in United States is a *voluntary* act as ruled by the Supreme Court in *United States v. Cruikshank* as follows:

> ***"The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions.*** *Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship [92 U.S. 542, 551] which owes allegiance to two sovereignties, and claims protection from both.* ***The citizen cannot complain, because he has voluntarily submitted himself to such a form of government.*** ***He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.***" *United States v. Cruikshank, 92 U.S. 542 (1875) [emphasis added]*

- Click here for United States v. Cruikshank, 92 U.S. 542 (1875)

14.48. Admit that Black's Law Dictionary, Sixth Edition, on page 1575, defines the term "voluntary" as follows:

> *"**voluntary**. Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. Coker v. State, 199 Ga. 20, 33 S.E.2d 171, 174. Done by design or intention. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation. The word, especially in statutes, often implies knowledge of essential facts. Without valuable consideration; gratuitous, as a voluntary conveyance. Also, having a merely nominal consideration; as, a voluntary deed."*

- Click here for Black's Law Dictionary, Sixth Edition, page 1575

14.49. Admit that once a person becomes either a citizen or a national of the United States, the government cannot unilaterally remove either status without the voluntary consent and participation of the citizen or national.

> *"**In our country the people are sovereign and the Government cannot sever its relationship to the people***

> ***by taking away their citizenship***. *Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power.*
>
> *[...]*
>
> *"The entire legislative history of the 1868 Act makes it abundantly clear that there was a strong feeling in the Congress that the only way the citizenship it conferred could be lost was by the voluntary renunciation or abandonment by the citizen himself. And this was the unequivocal statement of the Court in the case of United States v. Wong Kim Ark, 169 U.S. 649 ." Afroyim v. Rusk, 387 U.S. 253; 87 S.Ct. 1660 (1967)*

- Click here for Afroyim v. Rusk, 387 U.S. 253; 87 S.Ct. 1660 (1967)

14.50. Admit that because the term "United States", according to the U.S. Supreme Court in *Hooven and Allison v. Evatt, 324 U. S. 652 (1945).*, has three possible definitions, then the act of expatriation can include renouncing more than one type of citizenship.

- Click here for Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)

14.51. Admit that Title 8, Aliens and Nationality, prescribes procedures for expatriating nationality in 8 U.S.C. §1481.

- Click here for 26 U.S.C. §1481

14.52. Admit that Title 8, Aliens and Nationality, *does not* prescribe or define procedures for renouncing ones status as a "citizen of the United States" under 8 U.S.C. §1401 *without* also renouncing one's nationality.

14.53. Admit that even though there are no prescribed procedures for renouncing "citizen of the United States" status under 8 U.S.C. §1401 without renouncing "nationality", that does not mean that the act of doing so is not allowed or permitted by law.

14.54. Admit that 8 U.S.C. §1452 provides a process whereby a person who is a "national" can obtain what it calls a "Certificate of U.S. non-citizen national status".

- Click here for 26 U.S.C. §1452

14.55. Admit that the Immigration and Naturalization Service (INS) form N-400 is the proper form to be used in order to become "naturalized".

- Click here for Immigration and Naturalization Service form N-400

14.56. Admit that the INS form N-400 does not use the term "U.S. national".

14.57. Admit that even though the term "national" is not used on the N-400 form, if it were substituted everywhere that the term "U.S. citizen" is used, this would constitute adequate qualification to be naturalized as a "national" but not necessarily a "U.S. citizen".

14.58. Admit that the INS N-400 form does *not* define which of the three definitions of "United States" is being used.

14.59. Admit that because the meaning of "United States" on the form is not defined and because "U.S. citizen" is everywhere used and "national" is not used, then there is at least a presumption on the part of the applicant that they are applying to become a "U.S. citizen" rather than a "national".

14.60. Admit that the term "naturalization" is statutorily defined as meaning the process of conferring "**nationality**" and not necessarily "**citizen of the United States**" status under 8 U.S.C. §1401, upon the applicant. (see question 14.36 earlier)

- Click here for 8 U.S.C. §1101

14.61. Please describe in detail for me how a person who was naturalized to obtain "national status" also obtains "U.S. citizen" status even though there is not statute authorizing this. If you think there is a law authorizing this, then please identify specifically what that law is.

14.62. Admit that the Department of State form DS-11 is the form used for obtaining a U.S. passport.

- Click here for U.S. Department of State form DS-11

14.63. Admit that blocks 15 and 16 of the DS-11 form have a check box for "U.S. citizen" but do not provide an option for "national", even though this too is a valid status which qualifies for a passport.

- Click here for U.S. Department of State form DS-11

14.64. Admit that 26 U.S.C. §6039E appears to authorize a penalty of $500 for failure to provide a social security number on a passport applications.

- Click here for 26 U.S.C. §6039E

14.65. Admit that without an implementing regulation, 26 U.S.C. §6039E cannot be enforced by the Secretary of the Treasury or the IRS.

- Click here for 26 U.S.C. §7805

14.66. Admit that there is no implementing regulation authorizing penalties against natural persons for failure to supply a Social Security Number on the DS-11 form. If you believe otherwise, please identify the regulation.

14.67. Admit that the reason there are no implementing regulations applying penalties against natural persons in the case of 26 U.S.C. §6039E is because the Constitution, Article 1, Section 9, Clause 3, forbids Bills of Attainder, which are penalties applied without a judicial trial.

- Click here for 26 U.S.C. §6039E
- Click here for Article 1, Section 9, Clause 3 of the U.S. Constitution

14.68. Admit that the First Amendment right of Free Speech includes the right to NOT communicate certain facts to the government without fear of penalty or reprisal.

- Click here for Annotated First Amendment to the U.S. Constitution

14.69. Admit that penalizing a person for not providing an SSN on a DS-11 form, if it were authorized by law, would violate the First Amendment to the U.S. Constitution by penalizing a person for refusing to communicate with their government.

14.70. Admit that because there are no penalties for failure to provide a Social Security Number on the DS-11 form without implementing regulations, then the furnishing of the SSN on the application is completely voluntary.

- Click here for Black's Law Dictionary, Sixth Edition, page 1575

14.71. Admit that the DS-11 application warns of a possible penalty of $500 for failure to provide the SSN and cites 26 U.S. C. §6039E as its authority.

- Click here for U.S. Department of State form DS-11

14.72. Admit that any mention of 26 U.S.C. §6039E and any penalties on the form, because there are no implementing regulations, constitutes a constructive fraud to fool the applicant into thinking that the furnishing of the number is subject to penalties that don't really exist.

14.73. Admit that the providing of an SSN on the DS-11 form could create a possibly *false* "presumption" on the part of the government that the applicant is a "U.S. citizen", when in fact he may be a "national" and not a "U.S. citizen".

> *26 CFR § 301.6109-1(g)*
>
> *(g) Special rules for taxpayer identifying numbers issued to foreign persons--(1) General rule--(i) Social security number.* ***A social security number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. citizen or resident alien individual.*** *A person may establish a different status for the number by providing proof of foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. Upon accepting an individual as a nonresident alien individual, the Internal Revenue Service will assign this status to the individual's social security number.*

- Click here for 26 CFR §301.6109-1(g)

14.74. Admit that a "U.S. person" is defined as follows:

> TITLE 26 > Subtitle F > CHAPTER 79 > Sec. 7701.
>
> Sec. 7701. - Definitions
>
> (a)(30) United States person
> The term "United States person" means -
> (A) a citizen or resident of the United States,
> (B) a domestic partnership,
> (C) a domestic corporation,
> (D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and
> (E) any trust if -

(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii) one or more United States persons have the authority to control all substantial decisions of the trust.

- Click here for 26 U.S.C. §7701

14.75. Admit that form 1040 was intended to be filled out by only by "U.S. persons".

- Click here for IRS form 1040

14.76. Admit that the proper income tax form for a "U.S. national" to fill out if they are paying federal income taxes is the 1040NR form if they are living outside of the territory of the United States, keeping in mind that states of the Union are not territory of the United States.

- Click here for IRS form 1040NR

14.77. Admit that the term "United States" is defined in 8 U.S.C. §1101(a)(38) for the purposes of federal citizenship status under Title 8 of the United States Code:

TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101. [Aliens and Nationality]

Sec. 1101. - Definitions

(a)(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands **of** the United States.

- Click here for 8 U.S.C. §1101(a)(38)

14.78. Admit that the phrase in 8 U.S.C. §1101(a)(38) above which says "*Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States*" is a grouping of similar objects, which implies that they are all to be regarded as territories of the United States under the rule of statutory construction "**Ejusdem generis**" listed below:

"**Ejusdem generis.** Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. U.S. v. LaBrecque, D.C. N.J., 419 F.Supp. 430, 432. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

Under "ejusdem generis" cannon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. Campbell v. Board of Dental Examiners, 53 Cal.App.3d 283, 125 Cal.Rptr. 694, 696."

[Black's Law Dictionary, Sixth Edition, p. 517]

- Click here for the definition of "Ejusdem Generis" from Black's Law Dictionary, Sixth Edition, p. 517"

14.79. Admit that the term "continental United States" is defined in 8 CFR §215.1(f) as follows, for the purposes of Title 8 of the United States Code:

> [Code of Federal Regulations]
> [Title 8, Volume 1]
> [Revised as of January 1, 2002]
> From the U.S. Government Printing Office via GPO Access
> [CITE: 8CFR215]
> TITLE 8--ALIENS AND NATIONALITY CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
> PART 215--CONTROLS OF ALIENS DEPARTING FROM THE **UNITED STATES**
>
> Section 215.1: Definitions
>
> (f) The term **continental United States** means the District of Columbia and the several **States**, except Alaska and Hawaii.

- Click here for 8 CFR §215.1

14.80. Admit that the term "State" is defined in 8 U.S.C. §1101(a)(36) for the purposes of federal citizenship status under Title 8 of the United States Code:

> 8 U.S.C. Sec. 1101(a)(36): State [Aliens and Nationality]
>
> The term "State" includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

- Click here for 8 U.S.C. §1101(a)(36)

14.81. Admit that the rule of statutory construction entitled "Expressio unius est exclusio alterius" prevents us from interpreting the word "includes" above in a way that adds or enlarges anything to the items enumerated in the definition of "States" above or adding anything but items of the same class as those listed to the definition.

> "**Expressio unius est exclusio alterius**. A maxim of statutory interpretation meaning that **the expression of one thing is the exclusion of another.** Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325; Newblock v. Bowles, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. **When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.** Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." [Black's Law Dictionary, Sixth Edition, page 581]

- Click here for the definition of "Expressio unius est exclusio alterius" from Black's Law Dictionary, Sixth Edition, p. 581

14.82. Admit that the result of substituting the definition for the term "State" from 8 U.S.C. §1101(a)(36) into the phrase "several States" found in the definition of the term "continental United States" in 8 CFR §215.1(f) results in the following definition for "continental United States" applying to Title 8 of the United States Code. **NOTE: Substituted information**

appears in red:

[Code of Federal Regulations]
[Title 8, Volume 1]
[Revised as of January 1, 2002]
From the U.S. Government Printing Office via GPO Access
[CITE: 8CFR215]
TITLE 8--ALIENS AND NATIONALITY CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
PART 215--CONTROLS OF ALIENS DEPARTING FROM THE **UNITED STATES**

Section 215.1: Definitions

(f) The term **continental United States** means the District of Columbia and **the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States**, except Alaska and Hawaii.

14.83. Admit that based on questions 77 through 82 above, a reasonable person would conclude that the term "United States" as used in Title 8 of the U.S. Code **does not** include states of the Union, because all of the "States" listed in the definition for "United States" are *federal* States and territories, and ***not*** states of the Union.

14.83. Admit that the following definitions of terms listed in the table apply within the Constitution and Federal Law by default, based on the previous questions:

Table 1: Summary of the meaning of various terms used in the Constitution and federal law

Law	Federal constitution	Federal statutes	Federal regulations	State constitutions	State statutes	State regulations
Author	**Union States/ "We The People"**	**Federal Government**		**"We The People"**	**State Government**	
"state"	Foreign country (See Note 1)	Union state	Union state	Other Union state or federal government	Other Union state or federal government	Other Union state or federal government
"State"	Union state (See Note 2)	Federal state (See Note 3)	Federal state (See Note 3)	Union state	Union state	Union state
"several States"	Union states collectively[1]	Federal "States" collectively	Federal "States" collectively	Federal "States" collectively	Federal "States" collectively	Federal "States" collectively
"United States"	states of the Union collectively	Federal United States**	Federal United States**	United States* the country	Federal United States**	Federal United States**

NOTES:

1. See:
   a. Black's Law Dictionary, Sixth Edition, p. 648:
   "Foreign states. Nations which are outside the United States. Term may also refer to another state; i.e. a sister state." [Black's Law Dictionery, Sixth, p. 648]
   b. Corpus Juris Secundum (C.J.S.) §29, legal encyclopedia:
   *"Generally, the states of the Union sustain toward each other the relationship of independent sovereigns or independent **foreign states**, except in so far as the United States is paramount as the dominating government, and in so far as the states are bound to recognize the fraternity among sovereignties established by the federal Constitution, as by the provision requiring each state to give full faith and credit to the public acts, records, and judicial proceedings of the other states..."*
2. The Constitution is a contract written by and between the States of the Union and their new servant, the Federal Government. It conveys authority to the federal government over the property under its control and stewardship, which was only the District of Columbia at the time. Since the States wrote it, the word "State" is capitalized because they are the sovereignes. Federal statutes and "acts of Congress" is written by the Congress under the authority of the Constitution. Since the servant, in that case, is writing the law, then it becomes the sovereign over the prpoperty under

its stewardship, which only includes federal "States" listed in Title 48 of the U.S. Code, to include territories and possessions of the United States *only*.

3. See 4 U.S.C. 110(d), 8 U.S.C. §1101(a)(36), 26 U.S.C. §7701(a)(10) for examples.

14.84. Admit that there are two distinct political jurisdictions within the United States the country: 1. The States of the Union united under the Constitution; 2. The territories and possessions of the United States and the District of Columbia.

14.85. Admit that one's citizenship determines which of the above two to political jurisdictions a person belongs to. (common knowledge)

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an [88 U.S. 162, 166] association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. ***He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.***

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. ***Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.***"

"***To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.***

"Looking at the Constitution itself we find that it was ordained and established by 'the people of the United States,'3 and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth,4 and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of [88 U.S. 162, 167] friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. 5

"***Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became ipso facto a citizen-a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.***" *[Minor v. Happersett, 88 U.S. 162 (1874)]*

14.86. Admit that persons born in territories of the United States or the District of Columbia are *not* citizens within the meaning of the Fourteenth Amendment, section 1.

"It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states comprising the Union. ***Those, therefore, who had been born and***

resident always in the District of Columbia or in the territories, though within the United States, were not citizens. *" [Slaughter-House Cases, 83 U.S. (16 Wall.) 36; 21 L.Ed. 394 (1873)]*

14.87. Admit that people born in the District of Columbia or the territories of the United States *are* "citizens of the United States" under 8 U.S.C. §1401.

14.88. Admit that a "citizen of the United States" under 8 U.S.C. §1401 and a "citizen of the United States" under Section 1 of the Fourteenth Amendment are therefore *not* equivalent.

- Click here for Annotated Fourteenth Amendment
- Click here for 8 U.S.C. §1401

14.89. Admit that the reason that a "citizen of the United States" under 8 U.S.C. 1401 and a "citizen of the United States" under the Fourteenth Amendment are *not* equivalent is because each of these two contexts presupposes a *different* definition of the term "United States" as defined by the Supreme Court.

"The term [United States] has several meanings. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations, it may designate territory over which the sovereignty of the United States extends, or it may be the collective name of the States which are united by and under the Constitution." [Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)]

- Click here for Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)

14.90. Admit that the two political jurisdictions within our country *do not* have governments that are identical in form. Article 4, Section 4 of the Constitution, for instance, guarantees a "republican form of government" to the states of the Union, while no such Constitutional limitation exists for territories and possessions of the United States.

Constitution of the United States

Article 4, Section 4.

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

14.91. Admit that the government of the states of the Union is republican in form while the government of the territories and possessions is a legislative democracy which is *not* required by the Constitution to be "republican in form".

14.92. Admit that inhabitants of the federal zone are *not* protected by the Bill of Rights while those living in states of the Union are.

"The idea prevails with some -- indeed, it found expression in arguments at the bar -- that we have in this country substantially or practically two national governments; one, to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress XE "U.S. GOVERNMENT: Congress" outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise."

[Downes v. Bidwell, 182 U.S. 244 (1901), supra.]

14.93. Admit that the character and nature of the people in either political jurisdiction is fundamentally different because of the political and legal differences between them.

14.94. Admit that the two political groups of people: 1. Inhabitants of the States of the Union; 2. Inhabitants of the federal zone… do *not* qualify as "peers" in the context of jury service under the Sixth Amendment. Reason: Those who enjoy Constitutionally protected rights and live under a Republic do *not* have the same attitude and values as those who live under a pure legislative democracy and have no such rights.

- Click here for Annotated Sixth Amendment

14.95. Admit that if 8 U.S.C. §1401 includes persons born in states of the Union on land that is not ceded to the federal government, then there is no way to legally distinguish between people in each of the two political jurisdictions from a U.S. citizenship standpoint.

- Click here for 8 U.S.C. §1401

14.96. Admit that without the ability to legally distinguish between people in each of the two political jurisdictions under federal law, there is no way to assemble a "jury of peers" as required by the Sixth Amendment to the Constitution of the United States.

- Click here for Annotated Sixth Amendment

14.97. Admit that a "citizen" under federal law is a person born in a territory of the United States or the District of Columbia while a "citizen" under state law is a person born in a state of the Union and that these two types of "citizens" are *not* equivalent either politically or legally.

14.98. Admit that if the average American was fully informed about the contents of this section of questions, they probably would cease to volunteer to pay federal income taxes.

14.99. Admit that because of the vast implications of the preceding question, there is a vested interest on the part of the U.S. government to prevent the average American from learning the truths contained in this deposition.

[1] See, for instance, U.S. Constitution Article IV, Section 2.

CITES BY TOPIC: U.S. citizen

You're not a "citizen" as defined in the Internal Revenue Code

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U.S. Government Sources for Citizenship Information:

Office of Overseas Citizen Services, Tom Glover, Phone 202-647-5226
Office of Policy Review and Interagency Liaison, Phone 202-312-9750

IRS Website: Pay for Independent Personal Services (Income Code 16)

U.S. National

A U.S. national is an individual who owes his sole allegiance to the United States, but who is not a **U.S. citizen (a citizen of American Samoa, or the Commonwealth of the Northern Mariana Islands).**

[Click here for PDF version]

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8 U.S.C. §1401 Nationals and citizens of the United States:

The following shall be nationals and citizens of the United States at birth:
(a) a person born in the United States, and subject to the jurisdiction thereof;
(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;
(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;
(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;
(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;
(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;
(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person

(A) honorably serving with the Armed Forces of the United States, or

(B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States

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Why you are a "national" or a "state national" and NOT a "U.S. citizen". Article on our website based on sections 4.12.6 and 4.12.6.1 of the Great IRS Hoax book.

Social Security Program Operations Manual (POM), Section RS00204.015: Developing Evidence of U.S. citizenship

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Social Security Program Operations Manual (POM), Section RS000204.010: U.S. Citizenship/Lawful Presence Payment Requirement Effective for Claims Filed Sep 1, 1997 or later

C. DEFINITIONS

1. "Alien Lawfully Present in the United States"

For title II purposes, this means the categories of aliens the Attorney General determined meet the exception to nonpayment of monthly title II benefits under section 401(B) of the Personal Responsibility Act. (See RS 00204.025 for the categories of aliens who are lawfully present in the U.S.)

2. United States Citizen

This means a person who is:

- Born in the U.S. and at the time of birth is subject to U.S. jurisdiction (which does not include children born in the U.S. to foreign diplomats); or
- Born outside the U.S. to a U.S. citizen parent or parents and who derives his/her U.S. citizenship from the U.S. citizen parent(s); or
- Naturalized after birth. (See GN 00303.100B.1. and GN 00303.100B.2. for the definition of categories of naturalized citizens.)

NOTE: See GN 00303.120 for a complete description of who is a U.S. citizen.

3. United States National

This means a person who was born in American Samoa or Swain's Island. For SSA purposes, a U.S. national is functionally equivalent to a U.S. citizen.

Social Security Handbook: Section 1725: Evidence of U.S. Citizenship-details on what the Social Security Administration "thinks" is a citizen

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Social Security Program Operations Manual (POM), Section GN00303.100: U.S. citizenship

5. SUBJECT TO THE JURISDICTION OF THE U.S.

Individuals under the purview of the Fourteenth Amendment (which states that all individuals born in the U.S. and to whom U.S. laws apply are U.S. citizens). Acquisition of citizenship is not affected by the fact that the alien parents are only temporarily in the U.S. at the time of the child's birth. Under international law, children born in the U.S. to foreign sovereigns or foreign diplomatic officers listed on the State Department Diplomatic List are not subject to the jurisdiction of the U.S.

6. UNITED STATES

When used in a geographical sense, means the [federal areas within the] 50 states, D.C., Puerto Rico, Guam, Virgin Islands of the U.S., American Samoa, Swain's Island and the Northern Mariana Islands.

NOTE: The Harcon Tract (a small tract of land that was north of the Rio Grande but is now south of the channel since it was diverted) is considered U.S. territory.

U.S. Citizenship and Immigration Services Website, Frequently Asked Questions About Form I-9

Frequently Asked Questions About Employment Eligibility

Do citizens and nationals of the U. S. need to prove, to their employers, they are eligible to work?
Yes. While citizens and nationals of the U.S. are automatically eligible for employment, they too must present proof of employment eligibility and identity and complete an Employment Eligibility Verification form (Form I-9). Citizens of the U. S. include persons born in Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. Nationals of the U.S. include persons born in American Samoa, including Swains Island.

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26 U.S.C. §2209: Certain residents of possessions considered "nonresidents not citizens of the United States"

TITLE 26 > Subtitle B > CHAPTER 11 > Subchapter C > § 2209
§ 2209. Certain residents of possessions considered nonresidents not citizens of the United States

A decedent who was a citizen of the United States and a resident of a possession thereof at the time of his death shall, for purposes of the tax imposed by this chapter, be considered a "**nonresident not a citizen of the United States**" within the meaning of that term wherever used in this title, but only if such person acquired his United States citizenship solely by reason of
(1) his being a citizen of such possession of the United States, or
(2) his birth or residence within such possession of the United States.

[**NOTE**: Note that people born in possessions are described as "U.S. nationals". They refer to them above as "nonresident not a citizen of the United States".]

3C AmJur 2d §2682 Sources of citizenship. American Jurisprudence legal encyclopedia section defining how "U. S. citizen" status is acquired

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3C AmJur 2d §2704 Procedure for acquiring citizenship "at birth". American Jurisprudence legal encyclopedia section defining how "U.S. citizen" status is acquired. Applying for a U.S. passport is all that is required.

U.S. Department of State 7 FAM (Foreign Affairs Manual) Sections 1100, 1110, and 1111 on "U.S. citizenship" vs. "U.S. nationality". If you want to see the original document on the government website, click here.

3C American Jurisprudence (AmJur) 2d, section 2689, Legal Encyclopedia:

> ***3C Am Jur 2d §2689, Who is born in United States and subject to United States jurisdiction***
>
> *"A person is born* subject to the jurisdiction of the United States, *for purposes of acquiring citizenship at birth, if his or her birth occurs in territory over which the United States is sovereign, even though another country provides all governmental services within the territory, and the territory is subsequently ceded to the other country.*"

14th Amendment:

> Section 1. All persons born or naturalized in the [federal] United States, ***and subject to the jurisdiction*** thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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26 CFR 31.3121(e)-1 State, United States, and citizen.

> (b)…The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

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26 CFR 1.1-1(c):

> **(c) Who is a citizen.**
> Every person born or naturalized in the United States and subject to **its** [that is, federal and not state] jurisdiction is a

citizen. For other rules governing the acquisition of citizenship, see Chapters 1 and 2 of Title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481-1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.

Requirements for being a commissioned officer in the U.S. military, 10 U.S.C. 532:

Sec. 532. - Qualifications for original appointment as a commissioned officer

(a) Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to a person who -

(1) is a citizen of the United States;

(2) is able to complete 20 years of active commissioned service before his fifty-fifth birthday;

(3) is of good moral character;

(4) is physically qualified for active service; and

(5) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

Citizenship Status under 8 U.S.C. v. Tax Status under 26 U.S.C

IRS Publication 3184: Documents Required for Proof of U.S. Citizenship

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Colgate v. Harvey, 296 U.S. 404 (1935):
[overruled by Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940]

Thus, the dual character of our citizenship is made plainly apparent. That is to say, **a citizen of the United States is ipso facto and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not create a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship**. 3 'In reviewing the subject,' Chief Justice White said, in the Selective Draft Law Cases, 245 U.S. 366, 377 , 388 S., 389, 38 S.Ct. 159, 165, L.R.A. 1918C, 361, Ann.Cas. 1918B, 856: 'We have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. **But to avoid all misapprehension we briefly direct attention to that**

(the fourteenth) amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate [296 U.S. 404, 428] **and derivative, and therefore operating as it does upon all the powers conferred by the Constitution leaves no possible support for the contentions made if their want of merit was otherwise not to clearly made manifest.'**

The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the Slaughter House Case, Fed.Cas. No. 8,408, 1 Woods, 21, 28:

> 'The 'privileges and immunities' secured by the original constitution, were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other states.
>
> 'But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.'

The same distinction is made by this court in Bradwell v. State of Illinois, 16 Wall. 130, 138, where, speaking of the privileges and immunities provision of the Fourth Article, it was said: 'The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.' 4 [296 U. S. 404, 429] But the court added that with respect to the Fourteenth Amendment 'there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them. ... We agree ... that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge.' The governments of the United States and of each of the several states are distinct from one another. The rights of a citizen under one may be quite different from those which he has under the other. To each he owes an allegiance; and, in turn, he is entitled to the protection of each in respect of such rights as fall within its jurisdiction. United States v. Cruikshank, 92 U.S. 542 , 549.

Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects. 5 Among those privileges, however, undoubtedly is the right to pass freely from one state to another. Crandall v. State of Nevada, supra; Williams v. Fears, 179 U.S. 270, 274 , 21 S.Ct. 128. And that privilege, obviously, is as immune from abridgment by the state from which the citizen departs as it is from abridgment by the state which he seeks to enter. This results from the essential character of national citizenship. Cf. In re Kemmler, 136 U.S. 436, 448 , 10 S.Ct. 930; Duncan v. Missouri, 152 U.S. 377, 382 , 14 S.Ct. 570; In re Quarles and Butler, [296 U.S. 404, 430] 158 U.S. 532, 536 , 15 S.Ct. 959; United States v. Cruikshank, supra, 92 U.S. 542 , at page 552.

Elk v. Wilkins, 112 U.S. 94 (1884):

> *The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution, by which 'no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president;' and 'the congress shall have power to establish an uniform rule of naturalization.' Const. art. 2, 1; art. 1, 8.* ***By the thirteenth amendment of the constitution slavery***

was prohibited. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, (Scott v. Sandford, 19 How. 393;) and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power [including a state], should be citizens of the United States and of the state in which they reside. Slaughter-House Cases, 16 Wall. 36, 73; Strauder v. West Virginia, 100 U.S. 303 , 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared [112 U.S. 94, 102] to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' ***The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other.*** *Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that 'representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. So the further provision of the second section for a propor- [112 U.S. 94, 103] tionate reduction of the basis of the representation of any state in which the right to vote for presidential electors, representatives in congress, or executive or judicial officers or members of the legislature of a state, is denied, except for participation in rebellion or other crime, to 'any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States,' cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.*

It is also worthy of remark that the language used, about the same time, by the very congress which framed the fourteenth amendment, in the first section of the civil rights act of April 9, 1866, declaring who shall be citizens of the United States, is 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' 14 St. 27; Rev. St. 1992. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being 'naturalized in the United States,' by or under some treaty or statute. The action of the political departments of the government, not only after the proposal of the amendment by congress to the states in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of states, accords with this construction. While the amendment was pending before the legislatures of the several states, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 St. 794, 796; 15 St. 513, 532, 533, 637.

Boyd v. State of Nebraska, 143 U.S 135 (1892):

"Mr. Justice Story, in his Commentaries on the Constitution, says: 'Every citizen of a state is ipso facto a citizen of the [143 U.

S. 135, 159] United States.' Section 1693. And this is the view expressed by Mr. Rawle in his work on the Constitution. Chapter 9, pp. 85, 86. Mr. Justice CURTIS, in Dred Scott v. Sandford, 19 How. 393, 576, expressed the opinion that under the constitution of the United States 'every free person, born on the soil of a state, who is a citizen of that state by force of its constitution or laws, is also a citizen of the United States.' And Mr. Justice SWAYNE, in The Slaughter-House Cases, 16 Wall. 36, 126, declared that 'a citizen of a state is ipso facto a citizen of the United States.' But in Dred Scott v. Sandford, 19 How. 393, 404, Mr. Chief Justice TENEY, delivering the opinion of the court, said: 'The words 'people of the United States' and 'citizens,' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. ... In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state; for, previous to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in [143 U.S. 135, 160] which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The constitution has conferred on congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently no state, since the adoption of the constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a state under the federal government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the state attached to that character.'

"The fourteenth amendment reads: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

In The Slaughter-House Cases, 16 Wall. 36, it was held by this court that the first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and, secondly, to give definitions of citizenship of the United States and citizenship of the states; and it recognized the distinction between citizenship of a state and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain, with certain exceptions, mentioned in the federal constitution, under the care of the state governments, while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national [143 U.S. 135, 161] government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause of the fourteenth amendment.

"In Gassies v. Ballon, 6 Pet. 761, 762, Mr. Chief Justice MARSHALL declared that 'a citizen of the United States, residing in any state of the Union, is a citizen of that state;' and the fourteenth amendment embodies that view."

United States v. Wong Kim Ark, 169 U.S. 649; 18 S.Ct. 456; 42 L.Ed. 890 (1898):

"**The words 'in the United States, and subject to the jurisdiction thereof**,' in the first sentence of the fourteenth amendment of the constitution, must be presumed to have been understood and intended by the congress which proposed the amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the wellknown case of The Exchange, and as the equivalent of the words 'within the limits and under the jurisdiction of the United States,' and the converse of the words 'out of the limits and jurisdiction of the United States,' as habitually used in the naturalization acts. This presumption is confirmed by the use of the word 'jurisdiction,' in the last clause of the same section of the fourteenth amendment, which forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws.' **It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence, as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.'"**

[...omitted section...]

"The fourteenth amendment came before the court in the Slaughter-House Cases, 16 Wall. 36, 73, at December term, 1872, -- the cases having been brought up by writ of error in May, 1870 (10 Wall. 273); and it was held that the first clause was intended to define citizenship of the United States and citizenship of a state, which definitions recognized the distinction between the one and the other; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause. "

"***And Mr. Justice Miller, delivering the opinion of the court, in analyzing the first clause, observed that "the phrase 'subject to the jurisdiction thereof' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States.***"

"The eminent judge did not have in mind the distinction between persons charged with diplomatic functions and those who were not"

[...omitted section...]

"This section [in Elk v. Wilkins] contemplates two sources of citizenship, and two sources only, --birth and naturalization. The persons declared to be citizens are all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject to some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

"***To be 'completely subject' to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of another government. [including state governments].***"

[...omitted section...]

""Born in the United States, and subject to the jurisdiction thereof," and "naturalized in the United States, and subject to the jurisdiction thereof," mean born or naturalized under such circumstances as to be completely subject to the jurisdiction,--that is, as completely as citizens of the United States, who are, of course, not subject to any foreign poser, and can of right claim the exercise of the power of the United States on their behalf wherever they may be."

14th Amendment Background, from The Great IRS Hoax, Section 3.10.10 (ver. 3.33):

Below is the text of the Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article IV of the Articles of Confederation extended privileges of citizenship to mere inhabitants, with this phrase:

"... the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states"

The Articles of Confederation uses phrases in which nouns are not capitalized proper nouns, and never use the preposition "of", examples:

- "states in this union"
- "free inhabitants"

- "free citizens"

The US Constitution omits references to free, and uses phrases with proper capitalized nouns, and often use the preposition "of":

- "Citizen of the United States"
- "Inhabitant of that State"
- "Resident within the United States"
- "People of the several States"
- "residents of the same state"

The 14th amendment did not create a new type of "citizenship" or in any way adversely affect our civil rights but it simply extended citizenship to people of all races and creeds rather than just to whites. Some people mistakenly believe that the Fourteenth Amendment Section 1 created a new inferior type of citizenship analogous to ownership. In fact, this is not the case, as we will explain exhaustively later in section 4.11 and following.

Equal protection under the law? Lawyers will tell you that the 14th amendment was the great equalizer. They will tell you that your rights to equal protection under the law come from the 14th amendment. They will then ask you why you would question such strong protections?

Compare the following two quotes that acknowledge equal protection under the law:

- The 14th Amendment section 1, "... nor shall any State deprive any person of life, liberty, or property, without due process of law... "
- The 5th Amendment "... nor be deprived of life, liberty, or property, without due process of law..."

The US Supreme Court in 1878 case of Davidson v. New Orleans stated that your Constitution is not redundant. They mean different things.

Here is how the California Supreme Court describes the purpose of the Fourteenth Amendment in ***Van Valkenburg v. Brown***, 43 Cal. 43 (1872):

> "The history and aim of the Fourteenth Amendment is well known, and the purpose had in view in its adoption well understood. **That purpose was to confer the status of citizenship upon a numerous class of persons domiciled within the limits of the United States [the federal United States], who could not be brought within the operation of the naturalization laws because native born, and whose birth, though native, had at the same time left them without the status of citizenship. These persons were not white persons, but were, in the main, persons of African descent, who had been held in slavery in this country, or, if having themselves never been held in slavery, were the native-born descendents of slaves.** Prior to the adoption of the Fourteenth Amendment it was settled that neither slaves, nor those who had been such, nor the descendants of these, though native and free born, were capable of becoming citizens of the United States. (Dread Scott v. Sanford, 19 How. 393). The Thirteenth Amendment, though conferring the boon of freedom upon native-born persons of African blood, had yet left them under an insuperable bar as to citizenship; and it was mainly to remedy this condition that the Fourteenth Amendment was adopted." [emphasis added]

Here is what some state courts have said about this amendment:

> *"I cannot believe that any court in full possession of all its faculties, would ever rule that the (14th) Amendment was properly approved and adopted." State v. Phillips, 540 P.2d. 936; Dyett v. Turner, 439 P.2d. 266. [The court in this case was the Utah Supreme Court.]*

Further, in 1967, Congress tried to repeal the 14th Amendment on the ground that it is invalid, void, and unconstitutional. CONGRESSIONAL RECORD -- HOUSE, June 13, 1967, pg. 15641.

The portion of the 14th Amendment that draws the most attention within the freedom community reads in pertinent part:

> *"All persons, born or naturalized in the United States, **and subject to the jurisdiction thereof**, are citizens of the United States and of the State wherein they reside....The validity of the public debt of the United States...shall not be questioned."*

The words "and subject to the jurisdiction thereof" were further clarified in U.S. v. Wong Kim Ark, 169 U.S. 649 (1898) as follows, and note that "subject to the jurisdiction thereof" includes people born in a state of the Union:

> *"**It is impossible** to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or **to hold that persons 'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.**'" [U.S. v. Wong Kim Ark, 169 U.S. 649 (1898)]*

In Powe v. U.S., 109 F2d 147, 149 (1940) the court determined what the term `citizen' means in federal statutes. Notice that the term ***`citizen', when used in federal laws, excludes State citizens***:

> "... a construction is to be avoided, if possible, that would render the law unconstitutional, or raise grave doubts thereabout. In view of these rules it is held that ***`citizen' means `citizen of the United States,' and not a person generally, nor citizen of a State*** ..."

Why did the framers of the Fourteenth Amendment word it the way they did? Following the end of the Civil War in 1865, several rebellious southern states refused to pass laws allowing blacks to have citizenship in the state, and if they couldn't be state citizens, then they also couldn't be U.S. nationals, vote, or serve on juries. This meant that even though blacks technically were free, they had no rights. The Fourteenth Amendment was an attempt to remedy mainly this situation by conveying the privileges of nationality and "citizen" status to blacks. If you go back and look at the Fourteenth Amendment, section 1, you will see how this was accomplished.

> *"All persons born **or naturalized** in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."*

Congress' plan was to *naturalize* all the blacks into being citizens of the *federal* United States** and then force the states to treat them like citizens of the state they resided in by virtue of them being "U.S. citizens". The other part of Section 1 of the Fourteenth Amendment confirms this:

> ***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Since Congress was empowered by Article 1, Section 8, Clause 4 of the Constitution

> *"To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"*

then they had the Constitutional authority to naturalize the blacks to be federal/U.S.** citizens, even though they weren't state citizens. The *Civil Rights Act of 1866* on April 9, 1866, 14 Stat. 27 collectively naturalized blacks so they could

be protected from state government abuses of their natural rights.

> *"By the act of April 9, 1866, entitled 'An act to protect all persons in the United States in their civil rights, and furnish means for their vindication,' (14 St. 27,) it is provided that 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.' This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. Numerous statutes and treaties previously provided for all the individual members of particular Indian tribes becoming, in certain contingencies, citizens of the United States. But the act of 1866 reached Indians not in tribal relations.* ***Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race, (excluding only 'Indians not taxed,') who were born within the territorial limits of the United States, and were not subject to any foreign power.*** *" [Elk v. Wilkins, 112 U.S. 94 (1884)]*

The most frequent confusion we see within the freedom community over the issue of Fourteenth Amendment citizenship is misunderstanding of the differences between "United States" in the Constitution and "United States" in federal statutes. In the Constitution, the term means the states of the Union, while in federal statutes, it refers to what we call the "federal zone" or federal United States. This is a direct result of the fact that the federal government has no police powers within states of the Union, as we will point out later in section 4.9. The government contributes to this confusion by using terms on their forms and in their court rulings that they refuse to define or which they define ambiguously. To prevent this problem, you can simply define the terms you are using on any form by attaching a definition of all terms to every federal form you submit. Otherwise, we can guarantee that what you put on the form will be misconstrued by the public servant reading it, usually to the injury of your rights.

Unfortunately, there was an unwanted side effect to the Fourteenth Amendment much later on because long after black slavery was eliminated in the southern states following the Civil War, our greedy elected officials used confusion over citizenship terms used in the 14th Amendment to obtain federal jurisdiction over *everyone* in the country, and that is where they got the nexus to tax us all and circumvent the Constitutional limitations on direct taxation found in 1:9:4 and 1:2:3 of the Constitution! They did this by deceiving lawyers and people to believe that a "citizen of the United States" under the Fourteenth Amendment is the same as a "U.S. citizen" or "citizen of the United States" under federal statutes and "acts of Congress". The greedy politicians just couldn't keep their hands out of your pocket, could they? In order to spread this kind of financial slavery, they relied on the ignorance of an ill-informed populace to spread the myth that everyone was a "U.S. citizen", instead of a "national", and that is where our troubles began, because this created a new pecking order that took away our Constitutional rights in the context of federal income taxes. This made us all second class federal "U.S. citizens" subject to "acts of Congress" instead of "Natural Born Sovereign Citizens".

Because of the differences in meaning of the term "United States" in the Constitution and "United States" in federal statutes, you must be careful how you describe your citizenship. We'll get into that in much more detail later in section 4.11 and following. For now, however, we must understand what a "citizen of the United States" is under federal statutes, and particularly under 8 U.S.C. §1401, keeping in mind that "United States" in that context and as defined in 8 U.S.C. §1101 (a)(38) and 8 CFR §215.1(f) means **only** the *federal* United States. A "citizen of the United States" under federal statutes can be any one of the following types of people:

1. **Persons who are actually "nationals" but who *volunteer or elect* to be treated as U.S. citizens, which fits the vast majority of persons in this country at this time.** These people live in the 50 states and outside of federal enclaves in those states, but are treated by the federal government as federal territory or property (slaves).
2. **Persons who were born on federal property subject to the jurisdiction of the United States and who are living on federal property**. The only time these people can have an occasion to invoke the protection of the 14th Amendment is when the federal property they are living in is part of a federal enclave within a state that comes under *both* federal and state law under either the Buck Act (4 U.S.C. §105 through 4 U.S.C. §113).
3. **People who are federal property/territory (slaves)**. These people can properly be described as "federal property" or "territory over which the United States is sovereign" coming under article 4, Section 3, Clause 2 of the Constitution.

You thought the Thirteenth Amendment outlawed slavery, didn't you? Well it didn't outlaw *voluntary slavery*, and that is what you become if you elect to be a "U.S. citizen".

If you closely examine the citizenship application forms used by the Bureau of Citizenship and Immigration Services (BCIS):

http://uscis.gov/graphics/formsfee/forms/index.htm

then you will find that the sneaky federal government doesn't even mention a word about "U.S. nationals" on their form N-400, which is entitled "Application for Naturalization". If you call them up like we did and ask them how to become a "U. S. national" *instead* of the taxable "U.S. citizen" they desperately want you to be and what you should put on the form in order to guarantee that, they will refuse to directly answer your question and run you in circles hoping you'll just give up!

If you research the terms "resident" and "legal residence", you find that it is the nexus that binds us all to the state and federal enforcement of commercial law statutes today. "Resident" is the short form of "Resident Alien" and is used in State statutes to mean someone who exhibits actual presence in an area belonging to one nation while retaining a domicile/citizenship status within another foreign nation [The United States/District of Columbia]. The federal income tax under Title 26, in fact, defines the term "individual" as either an alien or a nonresident alien and does not even refer to citizens![1] The term "legal residence" further indicates that these two terms may be applied either to a geographical jurisdiction, or, a political jurisdiction. An individual may reside in one or the other, or in both at the same time. In California, Government Code, section 126, sets forth the essential elements of a compact between this State and the federal government allowing reciprocal taxation of certain entities, and provide for concurrent jurisdiction within geographical boundaries.

If you would like to learn more about how the Fourteenth Amendment was changed from a mechanism to eliminate slavery to a mechanism to introduce federal slavery, we recommend the following two fascinating books:

- *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Raoul Berger, Second Edition, 1997, Liberty Fund, Inc.; 8335 Allison Pointe Trail, Suite 300; Indianapolis, Indiana 46250-1684; ISBN 0-86597-143-9 (hardcover).

- *The Red Amendment*, 2001 Edition, by L.B. Bork, People's Awareness Coalition, POB 313; Kieler, Wisconsin [53812]; http://www.pacinlaw.org/inside/red.htm.

[1] See 26 CFR §1.1-1(a)(2)(ii) and 26 CFR §1.1441-1(c)(3) for confirmation of this fact.

Pannill v. Roanoke, 252 F. 910, 914

... citizens of the District of Columbia [see 8 U.S.C. 1401] were not granted the privilege of litigating in the federal courts on the ground of diversity of citizenship. Possibly no better reason for this fact exists than **such citizens were not thought of when the judiciary article [III] of the federal Constitution was drafted**. ... citizens of the United States** ... were also not thought of; but in any event **a citizen of the United States** , who is not a citizen of any state, is not within the language of the** [federal] **Constitution**. [Pannill v. Roanoke, 252 F. 910, 914]

State v. Fowler, 41 La. Ann. 380; 6 S. 602 (1889), emphasis added]

"A person who is a citizen of the United States** is necessarily a citizen of the particular state in which he resides. **But a person may be a citizen of a particular state and not a citizen of the United States**.** To hold otherwise would be to deny to the state the highest exercise of its sovereignty, -- the right to declare who are its citizens. " [State v. Fowler, 41 La. Ann. 380; 6 S. 602 (1889), emphasis added]

Maxwell v. Dow, 176 U.S. 581 (1900)

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunites of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the Federal government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The Sauvinet Case is an authority in favor of the contention that the amendment [176 U.S. 581, 597] does not preclude the states by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480 , L. ed. 478, although that case was decided with special reference to the 'due process of law' clause.

In Re Kemmler, 136 U.S. 436, 448 , 34 S. L. ed. 519, 524, 10 Sup. Ct. Rep. 930, it was stated that it was not contended and could not be that the Eighth Amendment to the Federal Constitution was intended to apply to the states. This was said long after the adoption of the Fourteenth Amendment, and also subsequent to the making of the claim that by its adoption the limitations of the preceding amendments had been altered and enlarged so as in effect to make them applicable to proceedings in the state courts.

In Presser v. Illinois, 116 U.S. 252 , 29 L. ed. 615, 6 Sup. Ct. Rep. 580, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the national government the states could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

In O'Neil v. Vermont, 144 U.S. 323, 332 , 36 S. L. ed. 450, 456, 12 Sup. Ct. Rep. 693, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the states.

In Thorington v. Montgomery, 147 U.S. 490 , 37 L. ed. 252, 13 Sup. Ct. Rep. 394, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of Federal power, and has no application to the states.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the [176 U.S. 581, 598] powers of the Federal government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

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CITES BY TOPIC: Acts of Congress

TITLE 18 > *PART III* > *CHAPTER 301* > *Sec. 4001.*

Sec. 4001. - Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

Federal Rules of Criminal Procedure, Rule 26, Notes of Advisory Committee on Rules, paragraph 2, in the middle:

"On the other hand since all Federal crimes are statutory [see United States v. Hudson, 11 U.S. 32, 3 L.ed. 259 (1812)] and all criminal prosecutions in the Federal courts are based on acts of Congress, . . ."

Rule 54(c) of the Federal Rules of Criminal Procedure, wherein is defined "Act of Congress." Rule 54(c) states:

"Act of Congress" includes any act of Congress ***locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession.****"*

[for a listing of the above locations covered by "Acts of Congress", refer to Title 48 U.S.C.]

Lyeth v. Hoey, 305 US 188, 59 S. Ct 155 (1938):

"In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nation-wide scheme of taxation'. Burnet v. Harmel, 287 U.S. 103, 110 , 53 S.Ct. 74, 77. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. Burnet v. Harmel, supra. See Burk-Waggoner Oil Association v. Hopkins, 269 U.S. 110, 111 , 114 S., 46 S.Ct. 48, 49; Weiss v. Wiener, 279 U.S. 333 , 49 S.Ct. 337; Morrissey v. Commissioner, 296 U.S. 344, 356 , 56 S.Ct. 289, 294. Compare Crooks v. Harrelson, 282 U.S. 55, 59 , 51 S.Ct. 49, 50; Poe v. Seaborn, 282 U.S. 101, 109 , 110 S., 51 S.Ct. 58; Blair v. Commissioner, 300 U.S. 5, 9 , 10 S., 57 S. Ct. 330, 331."

CITES BY TOPIC: United States

AN INVESTIGATION INTO THE MEANING OF THE TERM "UNITED STATES"- by Alan Freedman

- PDF Version
- HTML Version

WORD STUDY OF "UNITED STATES" v. "UNITED STATES OF AMERICA" IN THE U.S. CODE

WORDS AND PHRASES: "UNITED STATES" -detailed analysis of the words "United States" from THE AUTHORITY

IRS Publication 521, p. 7: Definition of United States-this definition will surprise you!

Wikipedia Encyclopedia Definition of "United States"-excellent

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Uniform Commercial Code, Section 9-307

> *Uniform Commercial Code (U.C.C.)*
>
> *§ 9-307. LOCATION OF DEBTOR.*
>
> *(h) [Location of United States.]*
>
> *The United States is located in the **District of Columbia**.*
>
> *[SOURCE: http://www.law.cornell.edu/ucc/search/display.html?terms=district%20of%20columbia&url=/ucc/9/article9.htm#s9-307]*

Downes v. Bidwell, 182 U.S. 244 (1901):

> *"The earliest case is that of Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word 'state.' in that connection, was used simply to denote a distinct political society. 'But,' said*

the Chief Justice, 'as the act of Congress obviously used the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. ***The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution , . . . and excludes from the term the signification attached to it by writers on the law of nations.' This case was followed in Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825, and quite recently in Hooe v. Jamieson, 166 U.S. 395 , 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. The same rule was applied to citizens of territories in New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that 'neither of them is a state in the sense in which that term is used in the Constitution.'*** *In Scott v. Jones, 5 How. 343, 12 L. ed. 181, and in Miners' Bank v. Iowa ex rel. District Prosecuting Attorney, 12 How. 1, 13 L. ed. 867, it was held that under the judiciary act, permitting writs of error to the supreme court of a state in cases where the validity of a state statute is drawn in question, an act of a territorial legislature was not within the contemplation of Congress." [Downes v. Bidwell, 182 U. S. 244 (1901)]*

O'Donohue v. United States, 289 U.S. 516, 53 S.Ct. 740 (1933):

"As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, ***if Congress authorizes the creation of courts and the appointment of judges for limited time, it must act independently of the Constitution upon territory which is not part of the United States within the meaning of the Constitution.*** *" [O'Donohue v. United States, 289 U.S. 516, 53 S.Ct. 740 (1933)]*

American Jurisprudence 2d, Volume 77, Section 2: "United States"

"[T]he term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government wherever located."
[77 Am.Jur.2d, §2, "United States"]

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8 U.S.C. §1101 Definitions

TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101. [Aliens and Nationality]

Sec. 1101. - Definitions

(a)(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands **of** the United States.

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26 U.S.C. §7701 Definitions

TITLE 26 > Subtitle F > CHAPTER 79 > Sec. 7701. [Internal Revenue Code]

Sec. 7701. - Definitions

(a)(9) United States

The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

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28 U.S.C. §1603 Definitions

TITLE 28 > PART IV > CHAPTER 97 > Sec. 1603. [Judiciary and Judicial Procedure]

Sec. 1603. - Definitions

For purposes of this **chapter** [Chapter 97] -

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

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28 U.S.C. §3002 Definitions

TITLE 28 > PART VI > CHAPTER 176 > SUBCHAPTER A > Sec. 3002.

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART VI - PARTICULAR PROCEEDINGS
CHAPTER 176 - FEDERAL DEBT COLLECTION PROCEDURE
SUBCHAPTER A - DEFINITIONS AND GENERAL PROVISIONS

Sec. 3002. Definitions
(15) **"United States" means** -
(A) **a Federal corporation**;
(B) an agency, department, commission, board, or other entity of the United States; or
(C) an instrumentality of the United States.

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19 Corpus Juris Secundum (CJS) §§883-884: Foreign Corporations-The United States government is a foreign corporation with respect to a state.

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26 U.S.C. §3121 Definitions

TITLE 26 > Subtitle C > CHAPTER 21 > Subchapter C > Sec. 3121. [Employment Taxes: FICA]

Sec. 3121. - Definitions

(e) State, United States, and citizen

For purposes of this **chapter** [Chapter 21]-

(1) State

The term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) United States

The term ''United States'' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

An individual who is a citizen of the Commonwealth of Puerto Rico (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

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26 U.S.C. §4612 Definitions and special rules

TITLE 26 > Subtitle D > CHAPTER 38 > Subchapter A > Sec. 4612. [Environmental Taxes: Taxes on Petroleum]

Sec. 4612. - Definitions and special rules

(a) Definitions

For purposes of this **subchapter [subchapter A]**-

(4) United States

(A) In general

The term "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(B) United States includes continental shelf areas

The principles of section 638 shall apply for purposes of the term "United States".

(C) United States includes foreign trade zones

The term "United States" includes any foreign trade zone of the United States.

U. S. v. Curtis-Wright Corp. 299 U. S. 304, 57 S. Ct. 216 (1936).

"With respect to the free white de jure citizens of the States the United States is sovereign in respect to foreign affairs; domestically only powers granted or reasonably implied from the Constitution LIMIT its sovereignty to certain specific spheres."

Hooven & Allison Co. v. Evatt, 324 U. S. 652, (1945)

"The term 'United States' may be used in any one of several senses. [Definition 1, abbreviated "United States" in our Great IRS Hoax book] It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. [Definition 2, abbreviated "United States**" or "federal United States" or "federal zone" in our Great IRS Hoax book] It may designate the territory over which the sovereignty of the United States extends, or [Definition 3, abbreviated "United States***" in our Great IRS Hoax book] it may be the collective name of the states which are united by and under the Constitution."*

*[**WARNING**: You should NOT assume or presume that when you see the term "United States" used in a law, that it simultaneously has ALL the above three definitions associated with it. The definition depends on the context it is used, and as you can see from the article below, if it is the Constitution, then it implies Definitions 1 and 3 above, while if it is a federal statute or an "Act of Congress", it instead implies only Definition 2 above in most cases.]*

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49 U.S.C. 13102: Definitions

(20) United states. - The term "United States" means the States of the United States and the District of Columbia.

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26 CFR §31.3306(j)-1: State, United States, and citizen

Title 26: Internal Revenue
PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE
Subpart D—Federal Unemployment Tax Act (Chapter 23, Internal Revenue Code of 1954)

§ 31.3306(j)-1 State, United States, and citizen.

(a) When used in the regulations in this subpart, the term "State" includes the District of Columbia, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to remuneration paid after 1960 for services performed after 1960) the Commonwealth of Puerto Rico.

(b) When used in the regulations in this subpart, the term "United States", when used in a geographical sense, means the several States (including the Territories of Alaska and Hawaii before their admission as States), and the District of Columbia. When used in the regulations in this subpart with respect to remuneration paid after 1960 for services performed after 1960, the term "United States" also includes the Commonwealth of Puerto Rico when the term is used in a geographical sense, and the term "citizen of the United States" includes a citizen of the Commonwealth of Puerto Rico.

[T.D. 6658, 28 FR 6641, June 27, 1963]

United States- Definition from Wikipedia Online Encyclopedia

THE DEFINITION OF "UNITED STATES" -LANGDELL'S ARTICLE "THE STATUS OF OUR NEW TERRITORIES"

The supreme court case of Hooven & Allison Co. v. Evatt, 324 U.S. 653 (1945) is often cited within the tax honesty movement for the definition of the term "United States" ...

"The term 'United States' may be used in any one of several senses. [Definition 1, abbreviated "United States" in our Great IRS Hoax book] It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. [Definition 2, abbreviated "United States**" or "federal United States" or "federal zone" in our Great IRS Hoax book] It may designate the territory over which the sovereignty of the United States extends, or [Definition 3, abbreviated "United States***" in our Great IRS Hoax book] it may be the collective name of the states which are united by and under the Constitution. (6)"*

Hooven, supra

There is a footnote to the Hooven cite:

[Footnote 6] See Langdell, 'The Status of our New Territories', 12 Harv.L.Rev. 365, 371; see also Thayer, 'Our New Possessions', 12 Harv.L.Rev. 464; Thayer, 'The Insular Tariff Cases in the Supreme Court', 15 Harv.L.Rev. 164; Littlefield, 'The Insular Cases', 15 Harv.L.Rev. 169, 281.

The first article cited by the Supreme Court is the one relied on for the definition of the term "United States."
Therefore, knowing what this article has to say would give the proper interpretation of the definitions mentioned by the court.

THE STATUS OF OUR NEW TERRITORIES

What extent of territory do the United States of America comprise? In order to answer this question intelligently, it is necessary to ascertain the meaning of the term "United States."

[Definition 3 in Hooven & Allison above] ***First. -- It is the collective name of the States which are united together by and under the Constitution of the United States****; and, prior to the adoption of that Constitution, and subsequently to the Declaration of Independence, it was the collective name of the thirteen States which made that declaration, and which from the time of the adoption of the Articles of Confederation to that of the adoption of the Constitution, were united together by and under the former. This, moreover, is the original, natural, and literal meaning of the term. Between the time of the first meeting of the Continental Congress, and that of the Declaration of Independence, the term "United*

Colonies" came into general use, and, upon independence being declared, as the thirteen colonies became the thirteen States, the term was of course changed to "United States." In the declaration of Independence both terms are used. When the articles of Confederation were framed, "United States of America" was declared to be the name and style of the confederation created by those articles. This, however, had no other effect than to confirm the existing practice, and to increase the use of the term in the sense which it had already acquired; and accordingly, during the whole period of Confederation, "United States" meant the same as "the thirteen United States," and the primary reason for using either term was to save the necessity of enumerating the thirteen States by name.

Indeed, the Articles of Confederation were merely an agreement between the thirteen States in their corporate capacity, or, more correctly, an agreement by each of the thirteen States with all the others. There were, therefore, thirteen parties to the confederation, and no more, and the people of the different States as individuals had directly no relations with it. Accordingly, it was the States in their corporate capacity that voted in the Continental Congress, and not the individual members of the Congress; and hence the voting power of a State did not at all depend upon the number of its delegates in Congress, and in fact each State was left to determine for itself, within certain limits, how many delegates it would send. Hence also each State had the same voting power. Even the style of the Continental Congress was "The United States in Congress assembled," -- not (as the present style would suggest) "The Delegates of the United States in Congress assembled"; and if the style had been "The Thirteen United States in Congress assembled," the meaning would have been precisely the same.

Evidence to the same effect, as to the sense in which the term "United States" was used prior to the time of the adoption of the Constitution, is furnished by the treaties made during the period of the Confederation. Thus, the Treaty of Alliance made with France, February 6, 1778, begins: "The Most Christian King and the United States of North America, New Hampshire," etc. So the Treaty of Amity and Commerce made with Holland, October 8, 1782, begins: "Their High Mightinesses, the States-General of the United Netherlands, and the United States of America, namely, New Hampshire," etc. Sot the Treaty of Amity and Commerce made with Sweden, April 3, 1783, begins: "The King of Sweden and the thirteen United States of North America, namely, New Hampshire," etc. Lastly, the Definitive Treaty of Peace with England, September 3, 1783, by which our independence was established, after a recital, proceeds thus: "Art. I. His Britannic Majesty acknowledges the said United States, namely, New Hampshire, &c., to be free, sovereign and independent States; that he treats with them as such; and relinquishes all clams to the government, propriety, and territorial rights."

With the adoption of the Constitution there came a great change; for the Constitution was not an agreement, but a law, -- a law, too, superior to all other laws, coming as it did from the ultimate source of all laws, namely, the people, and being expressly declared by them to be the supreme law of the land. At the same time, however, it neither destroyed not consolidated the States, nor even affected their integrity; and though it was established by the people of the United States; yet it was not established by them as one people, nor was its establishment a single act; but on the contrary, its establishment in each State was the act of the people of that State; and if the people of any State had finally refused to ratify and adopt it, the consequence would have been that that State would have ceased to be one of the United States. Indeed, the Constitution and the Articles of Confederation differ from each other, in respect to the source of their authority, in one particular only, namely, that, while the former proceeded from the people of each State, the latter proceeded from the Legislature of each State. In respect to their effect and operation also, the two instruments differ from each other in one particular way only, namely, that, while the Articles of Confederation merely imposed an obligation upon each State, in its corporate and sovereign capacity, in favor of the twelve other States, the Constitution binds as a law, not each State, but all persons and property in each State. These differences, moreover, fundamental and important as they undoubtedly are, do not, nor does either of them , at all affect either the meaning or use of the term "United States"; and therefore, the conclusion is that the meaning or the use of the term had the day after Independence was declared, it still retains, and that this is its natural and literal meaning.

Regarded, then, as simply the collective names of the States, do the United States comprise territory? Directly, they certainly do not; indirectly, they do comprise the territory of the forty-five States, and no more. That they comprise

this territory only indirectly, appears from the fact that such territory will always be identified with the territory of all the States in the aggregate, -- will increase as that increases, and diminish as that diminishes.

[Definition 1 in Hooven & Allison above] ***Secondly. -- Since the adoption of the Constitution, the term "United States" has been the name of the sovereign****, and that sovereign occupies a position analogous to that of the personal sovereignties of most European countries. Indeed the analogy between them is close, at least in one respect, than at first sight appears; for a natural person who is also a sovereign has two personalities, one natural, the other artificial and legal, and it is the latter that is sovereign. It is as true, therefore, of England (for example) as it is of this country, that her sovereign is an artificial and legal person (i.e., a body politic and corporate), and, therefore, never dies. The difference between the two sovereigns is, that, while the former consists of a single person, the latter consists of many persons, each of whom is a member of the body politic. In short, while the former is a corporation sole, the latter is a corporation aggregate.*

Who, then, are those persons of whom the United States as a body politic consists, and who constitute its members? Clearly, they must be either the States in their corporate capacity, i.e., artificial and legal persons, or the citizens of all the States in the aggregate; and it is not difficult to see that they are the former. Indeed, the latter do not form a political unit for any purpose. The citizens of each State form the body politic of that State, and the States form the body politic of the United States. The latter, therefore, consisted at first of the original thirteen States, just as the Confederation did; but, as often as a new State was admitted, a new member was received into the body politic, -- which, therefore, now consists of forty-five members. It will be seen, therefore, that, while the United States, in its second sense, signifies the body politic created by the Constitution, in its first sense it signifies the members of that body politic in the aggregate. A consequence is that, while in its first sense the term "United States" is always plural, in its second sense it is in strictness always singular.

The State of New York furnishes a good illustration of the two senses in which the term "United States" is used under the Constitution; for the style of that State, as a body politic, is "The People of the State of New York," and the members of that body politic are the citizens of the State. The term "people," therefore, in that State, means, first, all the citizens of the State in the aggregate (i.e., the members of the body politic), and secondly, the body politic itself; and while in the former sense it is plural, in the latter sense it is singular.

The term "United States" is used in its second sense whenever it is used for the purpose of expressing legal or political relations between the United States and the particular States, or between the former and foreign sovereigns or states, or legal relations between the former and private persons, while it is used in its first and original sense whenever it is desired to designate the particular States collectively, either as such or as members of the body politic of the United States It is also used in that sense whenever it is used to designate the territory of all the States in the aggregate.

As a substitute for the term "United States," when used in its second sense, the term "Union" is often employed*. The original difference between "United States" and "Union" was that, while the former was concrete, the latter was abstract; and hence it is that the latter cannot be substituted for the former when used in its original sense.*

When used in its second sense, it is plain that the term "United States" has no reference to extent of territory, either directly or indirectly. Regarded as a body politic, the United States may and does own territory, and may be and is a sovereign over territory, but to speak of its constituting or comprising territory would be no less absurd than to predicate the same thing of a personal sovereign, though the absurdity would be less obvious.

[Definition 2 in Hooven & Allison above] ***Thirdly. -- Since the treaty with England of September 3, 1783, the term "United States" has often been used to designate all territory over which the sovereignty of the United States extended*** [under Article 1, Section 8, Clause 17 of the federal Constitution]. ***The occasion for so using the term could not of course arise until the United States acquired the sovereignty over territory outside the limits***

of any State, and they first acquired such territory by the treaty just referred to *. For although, as has been said, that treaty was made with each of the thirteen States, yet, in fixing the boundaries, the thirteen States were treated as constituting one country, England not being interested in the question how that country should be divided among the several States. Moreover, the boundaries established by the treaty embraced a considerable amount of territory in the Northwest to which no State had any separate claim, and which, therefore, belonged to the united States; and the territory thus acquired was enlarged from time to time by cessions from different States, until at length it embraced the entire region within the limits of the treaty, and west of Pennsylvania, Virginia, North Carolina, and Georgia, as the western boundaries of those States were afterwards established, with the exception of the territory now constituting the States of Kentucky. Then followed in succession the acquisitions from France, Spain, Texas, and Mexico. Out of all the territory thus acquired, twenty-eight great States have been from time to time carved; and yet there has never been a time, since the date of the treaty before referred to, when the United States had not a considerable amount of territory outside the limits of the any State.*

It is plain, therefore, that for one hundred and fifteen years there has been more or less need of some word or term by which to designate as well the territories of the United States as the States themselves; and such word or term ought, moreover to have been one signifying directly not territory, but sovereignty, sovereignty being the only thing that can be predicated alike of States and territories*. The same need was long since felt by England as well as by other European countries, and the word "empire" was adopted to satisfy it; and perhaps we should have adopted the same word, if we had felt the need of a new word or term more strongly.* ***Two peculiarities have, however, hitherto characterized the territory held by the United States outside the limits of any State: first, such territory has been a virtual wilderness; secondly, it has been looked upon merely as material out of which new States were to be carved just as soon as there was sufficient population to warrant the taking of such a step; and hence the need of a single term which would embrace territories as well as States has not been greatly felt. At all events, no such term has been adopted; and hence "United States" is the only term we have had to designate collectively either the States alone, or the States and territories****; and accordingly, while it has always been used for the former of these two purposes, it has also been used for the latter.*

It is very important, however, to understand that the use of the term "United States" to designate all territory over which the United States is sovereign, is, like the similar use of the word "empire" in England and other European countries, purely conventional; and that it has, therefore, no legal or constitutional significance*. Indeed, this use of the term has no connection whatever with the Constitution of the United States, and the occasion for it would have been precisely the same if the Articles of Confederation had remained in force to the present day, assuming that, in other respects, our history had been what is has been.*

The conclusion, therefore, is that, while the term "United States" has three meanings, only the first and second of these are known to the Constitution; and that is equivalent to saying that the Constitution of the United States as such does not extend beyond the limits of the States which are united by and under it, *-- a proposition the truth of which will, it is believed, be placed beyond doubt by an examination of the instances in which the term "United States" is used in the Constitution.*

Its use first occurs in the preamble, in which it is used twice. The first time it is plainly used in its original sense, i.e., as the collective name of the States which should adopt it. If the words had been "We, the people of the thirteen United States respectively," the sense in which "United States" was used would have been precisely the same. Nor is there any doubt that it is used in the same sense at the end of the preamble. Of course there is a very strong presumption that when a constitution is made by a sovereign people, it is made exclusively for the country inhabited by that people, and exclusively for that people regarded as a body politic, and so having perpetual succession; and the same is true, mutatis mutandis, of a constitution made by the people of the several sovereign States united together for that purpose. The preamble, however, does not leave it to presumption to determine for what regions of country and what people the Constitution of the United States was made; for it expressly declares that its purposes and objects are, first, to form a more perfect union (i. e., among the thirteen States, or as many of them as shall adopt it). The follow four other objects which, though in

terms indefinite as to their territorial scope, are by clear implication limited to the same States; and lastly its purpose and object are declared to be to secure the blessings of liberty to the people by whom it is ordained and established, and their successors; for though the word is "posterity," it is clearly not used with literal accuracy, but in the sense of "successors." According to the preamble, therefore, the Constitution is limited to the thirteen States which were united under the Articles of Confederation; and it is by virtue of Art. 4, sect. 3, subsect. I, and in spite of the preamble, that new States have been admitted upon an equal footing with the original thirteen.

In the phrases, "Congress of the United States," "Senate of the United States," "President of the United States," or "Vice president of the United States," "office under the United States," "officers of the United States," "on the credit of the United States," "securities and current coin of the United States," "service of the United States," "government of the United States," "granted by the United States," "Treasury of the United States," "Constitution of the United States," "army and navy of the United States," "offences against the United States," "judicial power of the United States," "laws of the United States," "controversies to which the United States shall be a party," "treason against the United States," "territory or other property belonging to the United States," "claims of the United States," "the United States shall guarantee," "shall be valid against the United States," "under the authority of the United States," "court of the United States," "delegated to the United States," "public debt of the United States," "insurrection or rebellion against the United States," "shall not be denied or abridged by the United States," "neither the United States nor any State shall assume or pay," the term "United States is used in its second sense [as the name of the sovereign.] It seems also to be used in the same sense in the phrase "citizen of the United States;" for it is only as a unit, a body politic, and a sovereign, that the United States can have citizens, - not as the collective name of forty-five States. In the phrase, "common defence and general welfare of the United States," it seems to be used in its first or original sense, [the States united under the Constitution] especially as "common defence" and "general welfare" are taken from the preamble. Certainly there is no pretence for saying it is used in its third sense [territory over which the sovereignty of the United States extends.] In the phrase "throughout the United States," there is believed to be no doubt that it is used in its original sense, though it may be claimed that it is used in the third sense. That it is used in its original sense in one instance is certain; and when the phrase is used in different parts of the Constitution, a strong presumption arises that it is always used in the same sense.

In the phrase, "resident within the United States," there can be no doubt that "United States" is used in its original sense, the meaning being the same as if the words had been, "resident in one or more of the United States."

The phrase, "one of the United States," affords a good instance of the use of the "United States" in its original sense.

In the phrase, "shall not receive any other emolument from the United States or any one of them," it is certain that "United States" is used in its second sense, though it is also certain that the draughtsman supposed he was using it in its original sense.

***In the phrase, "all persons born or naturalized in the United States," it seems clear that "United States" is used in its original sense**; for, first, it is either used in that sense, or in its third sense, and as the latter is not a constitutional or legal sense, there is a presumption that the term is not used in that sense in an amendment of the Constitution; secondly, it is declared that the same persons shall be citizens of the State in which they reside, and this shows that the authors of the amendment contemplated only States, for, if they would have contemplated Territories as well, they would have said "citizen of the State or Territory in which they reside"; thirdly, the whole of the 14th Amendment had reference exclusively to the then late war, and was designed to secure its results, - in particular to secure to persons of African descent certain political rights, and to take from the States respectively in they might reside the power to deprive them of those rights. Moreover, the amendment consists mainly of prohibitions, and these are all (with a single exception which need not be mentioned) aimed exclusively against the States. It was no part of the object of the amendment to restrain the power of Congress (which its authors did not distrust), and hence there was no practical reason for extending its operations to the Territories, in which all the power resided in Congress. What is the true meaning of the "United States" in the phrase under consideration is certainly a question of great moment, for on its answer depends the question whether all persons hereafter born in any of our recently acquired islands will be by birth citizens of the United States.*

The foregoing comprise all the instances but one in which the term "United States" is used either in the original Constitution, or in any of its amendments. The other instance is found in the 13th Amendment, - in which "United States" is plainly used in its original sense, if the words which follow it are to have any meaning; and yet, if the authors of that amendment had understood the term "United States," when used in the Constitution to express extent of territory, had its third meaning, they would have omitted the words, "or any place subject to their jurisdiction."

Harvard Law Review - Vol. XII, NO. 6 - January 25, 1899

Great IRS Hoax, Preface: Definitions:

United States — means by default, all places and waters, continental or insular, subject to the sovereign jurisdiction of the United States under Article 1, Section 8, Clause 17 of the Constitution of the United States of America. This is the default definition for "United States" in all federal statutes and regulations. This area is also commonly called the "federal zone". See the U.S. Supreme Court ruling of *Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)* for the three proper definitions of this term. Very few legal dictionaries define this term because the legal profession doesn't want you to know the definition, since it helps to reveal the very limited jurisdiction of the federal courts. Below is a summary of the meaning of the term "United States" as found in various sources.

Table 1: Summary of meaning of term "United States

Context	Author	Meaning of "United States" in referenced context	Notes
Federal Constitution	Union States/"We The People"	States of the Union	See: http://famguardian.org/TaxFreedom/CitesByTopic/UnitedStates.htm
Federal statutes	Federal government	Federal zone	See sections 4.6 through 4.9, 5.2 through 5.2.14.
Federal regulations	Federal government	Federal zone	See sections 4.6 through 4.9, 5.2 through 5.2.14.
State constitutions	"We The People"	Federal zone	See sections 4.6 through 4.9, 5.2 through 5.2.14.
State statutes	State Government	Federal zone	See sections 4.6 through 4.9, 5.2 through 5.2.14.
State regulations	State Government	Federal zone	See sections 4.6 through 4.9, 5.2 through 5.2.14.

So what the above table clearly shows is that the word "United States", in most cases, means only the federal zone. This is a direct consequence of the fact that:

1. The federal government has no police powers inside the states. See Great IRS Hoax section 4.9.
2. The states of the union are "foreign states" with respect to the federal government for the purpose of private or special law, which includes nearly all Acts of Congress and nearly all federal statutes and regulations. See Great IRS Hoax sections 5.2.2-5.2.3, 5.2.7, and 5.2.13.
3. The separation between federal and state jurisdiction is a result of the "separation of powers doctrine", which divides power between the state and federal government in order to protect individual liberties from tyranny. See Great IRS Hoax section 6.1.

CITES BY TOPIC: State

Black's Law Dictionary, Sixth Edition, p. 1407:

*"**State**. **A people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic** exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe. United States v. Kusche, D.C.Cal., 56 F.Supp. 201 207, 208. The organization of social life which exercises sovereign power in behalf of the people. Delany v. Moralitis, C.C.A.Md., 136 F.2d 129, 130. **In its largest sense, a "state" is a body politic or a society of men.** Beagle v. Motor Vehicle Acc. Indemnification Corp., 44 Misc.2d 636, 254 N.Y.S.2d 763, 765. **A body of people occupying a definite territory and politically organized under one government.** State ex re. Maisano v. Mitchell, 155 Conn. 256, 231 A.2d 539, 542. A territorial unit with a distinct general body of law. Restatement, Second, Conflicts, §3. Term may refer either to body politic of a nation (e.g. United States) or to an individual government unit of such nation (e.g. California).*

[…]

***The people of a state, in their collective capacity**, considered as the party wronged by a criminal deed; the public; as in the title of a cause, "The State vs. A.B." [Black's Law Dictionary, Sixth Edition, p. 1407]*

WORDS AND PHRASES: "STATE"-detailed analysis of the word "STATE" from THE AUTHORITY

"State" defined in 18 Stat 3140-definition back when politicians and lawyers were more honest

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DISTINCTION BETWEEN "State"/"Territory" v. "state", FROM GREAT IRS HOAX, SECTION 4.8:

Let us carefully clarify the important distinctions between "States", "territories", and "states" in the context of federal statutes to make our analysis crystal clear. Remember that federal "territories" and "States" are synonymous as per 4 U.S.C. §110(d). Keep in mind also that Indian reservations, while considered "sovereign nations" are also federal "States":

Table 4-5: Attributes of "State"/"Territory" v. "state"

#	Attribute	Authority	"State" or "Territory" of the "United States"	"state"/ Union state
1	Federal government has "police powers" (e.g. criminal jurisdiction) here?	Tenth Amendment to U.S. Constitution	Yes	No
2	Constitution Article 1, Section 8, Clause 17 jurisdiction?	U.S. v. Bevans, 16 U.S. 336 (1818)	Yes	No
3	"foreign state" relative to the federal government?	Black's Law Dictionary, Sixth Edition definition of "foreign state" and "foreign laws"	No	Yes

4	No "legislative jurisdiction" (federal statutes, like IRC) jurisdiction without state cession?	40 U.S.C. §255	No	Yes
5	Federal courts in the region act under the authority of what Constitutional provision?:	Constitution Articles II and III.	Article II *legislative* courts (no mandate for trial by jury)	Article III *Constitutional* courts (mandatory trial by jury)
6	Diversity of citizenship applies here?	28 U.S.C. §1332	No	Yes
7	Citizenship of persons born here:	8 U.S.C. §1401 and 8 U.S.C. §1408	"U.S. citizen"	"U.S. national"
8	Bill of rights (first ten amendments to the U.S. Constitution) applies here?	Downes v. Bidwell, 182 U.S. 244 (1901)	No	Yes
9	Listed in Title 48 as a "Territory or possession"?	Title 48, U.S. Codes	Yes	No
10	Local governments here have "sovereign immunity" relative to federal government?	28 U.S.C. §1346(b) Eleventh Amendment to U.S. Const.	No	Yes

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4 U.S.C. §110(d)

TITLE 4 - FLAG AND SEAL, SEAT OF GOVERNMENT, AND THE STATES
CHAPTER 4 - THE STATES

Sec. 110. Same; definitions
(d) The term ''State'' includes any Territory or possession of the United States.

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8 U.S.C. Sec. 1101(a)(36)

(a) Definitions

(36) State [Aliens and Nationality]

The term "State" includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

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26 U.S.C. Sec. 7701(a)(10)

(a) Definitions

(10)State

The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

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28 U.S.C. 1332(d)

TITLE 28 > PART IV > CHAPTER 85 > Sec. 1332. [Judiciary and Judicial Procedure]

Sec. 1332. - Diversity of citizenship; amount in controversy; costs

(d) The word "**S**tates", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico

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40 U.S.C. §319c

TITLE 40 > CHAPTER 4 > Sec. 319c.

Sec. 319c. - Definitions for easement provisions

As used in sections 319 to 319c of this title -

(a) The term "State" **means** the **States of the Union**, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States.

Uniform Commercial Code (UCC) Section 9 -102 (76)

(76) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Eisenberg v. Commercial Union Assurance Company, 189 F.Supp. 500 (1960)

(d) the word "States", as used in this section [Title 28 §1332 as amended in 1958] includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

It is to be noted that the statute differentiates between **S**tates of the United States and foreign states by the use of the **capital S** for the word when applied to a State of the United States."

Cherokee Nation v. The State of Georgia, 30 U.S. 1; 8 L.Ed. 25 (1831):

"The Cherokee Nation is not a foreign state, in the sense in which the term 'foreign state' is used in the Constitution of the United States."

"The Cherokees are a State."

"The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts."

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49 U.S.C. §13102: Definitions

(18) State. - The term "State" means the 50 States of the United States and the District of Columbia.

U.S. v. Reese, 92 U.S. 214 (1875):

The word 'State' 'describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. It is not difficult to see, that, in all these senses, the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the State. . . . In the Constitution, the term 'State' most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States, and makes of the people and States which compose it one people and one country.' Texas v. White, 7 Wall. 720, 721.

That the word 'State' is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited, but from a reference to the various places in which it is used in the Constitution of the United States. A few only of these will be referred to.

Words and Phrases, Vol. 40, p. 20:

United States

"The classical designation to clearly indicate the states as individual governmental entities making up the United Nation, dating form the Constitution and coming down through various acts of Congress and pronouncements of the courts, is the word "states". Twin Falls County v. Hulbert, 156 P.2d 319, 324, 325, 66 Idaho 128.

"Generally the word "state" when used by court or Legislature [in federal statutes, for instance, of which the Internal Revenue Code is a part] denotes one of the members of the federal Union. Twin Falls County v. Hulbert, 156 P.2d 319, 324, 235, 66 Idaho 128."

"**The word "state" is generally used in connection with constitutional law in United States as meaning individual states making up the Union in contradistinction to United States as a nation, but United States is a "state" as such word is frequently used in international law, or to carry out legislative intent expressed in statute. McLaughlin v. Poucher, 17 A.2d 767, 770, 127 Conn. 441.**"

Downes v. Bidwell, 182 U.S. 244 (1901)

"The earliest case is that of Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word 'state.' in that connection, was used simply to denote a distinct political society. 'But,' said the Chief Justice, 'as the act of Congress obviously used the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. **The result of that examination is a conviction that the members of the American confederacy**

only are the states contemplated in the Constitution , . . . and excludes from the term the signification attached to it by writers on the law of nations.' This case was followed in Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825, and quite recently in Hooe v. Jamieson, 166 U.S. 395 , 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. The same rule was applied to citizens of territories in New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that 'neither of them is a state in the sense in which that term is used in the Constitution.' In Scott v. Jones, 5 How. 343, 12 L. ed. 181, and in Miners' Bank v. Iowa ex rel. District Prosecuting Attorney, 12 How. 1, 13 L. ed. 867, it was held that under the judiciary act, permitting writs of error to the supreme court of a state in cases where the validity of a state statute is drawn in question, an act of a territorial legislature was not within the contemplation of Congress." [Downes v. Bidwell, 182 U.S. 244 (1901)]

Albert J. Nock, America Mercury Magazine, march 1939:

"[T]he State's criminality is nothing new and nothing to be wondered at. It began when the first predatory group of men clustered together and formed the State, and it will continue as long as the State exists in the world, because the State is fundamentally an anti-social institution, fundamentally criminal. The idea that the State originated to serve any kind of social purpose is completely unhistorical. It originated in conquest and confiscation -- that is to say, in crime. It originated for the purpose of maintaining the division of society into an owning-and-exploiting class and a propertyless dependent class -- that is, for a criminal purpose. No State known to history originated in any other manner, or for any other purpose. Like all predatory or parasitic institutions, its first instinct is that of self-preservation. All its enterprises are directed first towards preserving its own life, and, second, towards increasing its own power and enlarging the scope of its own activity. For the sake of this it will, and regularly does, commit any crime which circumstances make expedient." [Albert Jay Nock (1870-1945), Source: The Criminality of the State, America Mercury Magazine, March, 1939]

BACKGROUND ON "STATE" FROM THE PREFACE OF THE GREAT IRS HOAX:

State — in the context of federal statutes, federal court rulings, and this book means a federal State of the United States, the District of Columbia, Guam, Puerto Rico, Virgin Islands, Northern Marina Islands, and includes areas within the external boundaries of a state owned by or ceded to the United States of America. Federal "States" are defined in 4 U.S.C. §110(d) and 26 U.S.C. §7701(a)(10). In the context of the U.S. Constitution only, "State" means a sovereign "state" as indicated below. The reason the constitution is different is because of who wrote it. The states wrote it so they are capitalized. Federal statutes are not written by the sovereign states so they use the lower case "state" to describe the sovereign 50 union states, which are foreign to the federal government and outside its territorial jurisdiction.

"It is to be noted that the statute differentiates between States of the United States and foreign states by the use of a capital S for the word when applied to a State of the United States" Eisenberg v. Commercial Union Assurance Company, 189 F.Supp. 500 (1960)

state — in the context of federal statutes, federal court rulings, and this book means a sovereign state of the Union of America under the Constitution for the United States of America 1789-1791. In the context of the U.S. Constitution only, "State" means a sovereign "state" as defined here. Below is a further clarification of the meaning of "states" as defined by the U.S. Supreme Court in the case of ***O'Donoghue v. United States***, 289 U.S. 516 (1933), where they define what is *not* a "state":

After an exhaustive review of the prior decisions of this court relating to the matter, the following propositions, among others, were stated as being established:

*'1. That the District of Columbia and the territories are **not states** within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;*

*'2. That territories are **not states** within the meaning of Rev. St. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;*

*'3. That **the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property**;*

'4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish.'

Below is a summary of the meanings of "state" and "State" in the context of both federal and state laws:

Table 1: Summary of meaning of "state" and "State"

Law	**Federal constitution**	**Federal statutes**	**Federal regulations**	**State constitutions**	**State statutes**	**State regulations**
Author	**Union States/ "We The People"**	**Federal Government**		**"We The People"**	**State Government**	
"state"	Foreign country	Union state	Union state	Other Union state or federal government	Other Union state or federal government	Other Union state or federal government
"State"	Union state	Federal state	Federal state	Union state	Union state	Union state
"in this State" or "in the State"[1]	NA	NA	NA	NA	Federal enclave within state	Federal enclave within state
"State"[2] (State Revenue and taxation code only)	NA	NA	NA	NA	Federal enclave within state	Federal enclave within state

So what the above table clearly shows is that the word "State" in the context of federal statutes and regulations means (not includes!) federal States only under Title 48 of the U.S. Code[3], and these areas do not include any of the 50 union states. This is true in *most cases and especially in the Internal Revenue Code*, but there are a few minor exceptions: For example in 40 U.S.C. §319c. The word "State" in the context of federal statutes and regulations means one of the 50 union states, which are "foreign states", and "foreign countries" with respect to the federal government as clearly explained later in section 5.2.11 of this book. In the context of the above, a "Union State" means one of the 50 Union states of the United States* (the country, not the federal United States**). The capitalization of the word "State" therefore ***always*** depends on the context in which it is used.

"Text, without context, is error."

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[1] See California Revenue and Taxation Code, section 6017 at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=rtc&group=06001-07000&file=6001-6024

[2] See California Revenue and Taxation Code, section 17018 at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=rtc&group=17001-18000&file=17001-17039.1

[3] See http://www4.law.cornell.edu/uscode/48/

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- Twelfth Amendment - Election of President
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- Fifteenth Amendment - Rights of Citizens to Vote
- Sixteenth Amendment - Income Tax
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- Nineteenth Amendment - Woman's Suffrage Rights
- Twentieth Amendment - Commencement of the Terms of the President, Vice President and Members of Congress.
- Twenty-First Amendment - Repeal of the Eighteenth Amendment
- Twenty-Second Amendment - Presidential Tenure
- Twenty-Third

    - Amendment - Presidential Electors for the District of Columbia
    - Twenty-Fourth Amendment - Abolition of the Poll Tax Qualification in Federal Elections
    - Twenty-Fifth Amendment - Presidential Vacancy, Disability, and Inability
    - Twenty-Sixth Amendment - Reduction of Voting Age Qualification
    - Twenty-Seventh Amendment - Congressional Pay Limitation

- Original Senate Document Available in text and acrobat (.pdf) format from the US Government Printing Office Web Site.
- U.S. Constitution From Cornell Law School.
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- U.S. Supreme Court Opinions Since 1893.

The Congressional Research Service, Library of Congress prepared this document, *The Constitution of the United States of America: Analyis and Interpretation*. Johnny H. Killian and George A. Costello edited the 1992 Edition. Johnny H. Killian, George A. Costello and Kenneth R. Thomas edited the 1996 and 1998 Supplements. George A.

Costello and Kenneth R. Thomas edited the 2000 Supplement.

FindLaw has divided the document up into smaller sections for the Web and added hyperlinks between the sections, as well as links to Supreme court cases cited in the annotations. FindLaw also incorporated the 1996, 1998 and 2000 Supplements into the 1992 Edition text.

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CITES BY TOPIC: U.S. National

IMPORTANT NOTE!:

1. A "U.S. National" is defined in 8 U.S.C. 1408
2. A "national but not a citizen" defined in 8 U.S.C. 1101(a)(21) or 8 U.S.C. 1101(a)(22)(B) and 8 U.S.C. 1452
3. A "U.S. national" and a "national but not a citizen" are NOT the same thing in law!
4. In terms of tax status under the Internal Revenue Code, however, "U.S. nationals" and "nationals but not citizens" are equivalent, and both are "nonresident aliens" defined in 26 U.S.C. 7701(b)(1)(B)
5. See "Why you are a "national" or a 'state national' and NOT a 'U.S. citizen'" pamphlet for supporting details

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IRS Website: Pay for Independent Personal Services (Income Code 16)

U.S. National

A U.S. national is an individual who owes his sole allegiance to the United States, but who is not a **U.S. citizen (a citizen of American Samoa, or the Commonwealth of the Northern Mariana Islands).**

[Click here for PDF version]

Why you are a "national" or a "state national" and NOT a "U.S. citizen". Article on our website based on sections 4.12.6 and 4.12.6.1 of the Great IRS Hoax book.

Title 26: Internal Revenue Code:

The word 'national' or 'national of the United States' is used only three times in the Internal Revenue Code.

- Section 152 [Dependant Defined]
- Section 896 [Adjustments of tax on nationals, residents, and corporations of certain foreign countries]

IRS Form 1040NR: Note it identifies "U.S. nationals" as "nonresident aliens"!

3C Am Jur 2d §2732-2752-detailed background on "U.S. national" status right from the American Jurisprudence legal encyclopedia

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Citizenship Status under 8 U.S.C. v. Tax Status under 26 U.S.C

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8 U.S.C. §1101: Definitions

TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101.

Sec. 1101. - Definitions

(a) (22) The term "national of the United States" means

(A) a citizen of the United States, or

(B) a person who, though not a citizen of the United States, owes permanent [*but not necessarily exclusive*] allegiance to the United States.

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22 U.S.C. §4309a: United States responsibilities for employees of the United Nations

TITLE 22 > CHAPTER 53 > Sec. 4309a.

Sec. 4309a. - United States responsibilities for employees of the United Nations

(d) United States nationals

This section shall not apply with respect to any United States national.

"U.S. National" defined:

Means a person born or naturalized outside the federal United States (federal zone) but inside the country United States and not subject to the jurisdiction of the federal government at the time of birth as the Fourteenth Amendment (illegally ratified) requires. Typically, the U.S. government allows and even encourages "U.S. nationals" to incorrectly declare that they are "U.S. citizens" so that they can volunteer to become completely subject to the jurisdiction of the federal courts and become the proper subjects of the Internal Revenue Code, but technically, they are *not* "U.S. citizens" as legally defined. "U.S. nationals" are defined in 8 U.S.C. §1401. 8 U.S.C. §1408 defines who are "Nationals but not citizens of the United States at birth". The following portion of that section of Title 8 defines the type of "U.S. National" that most Americans born in the 50 states outside of the federal zone qualify as:

8 U.S.C. Sec. 1408. - ***Nationals but not citizens of the United States at birth***

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

...

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to

the birth of such person;

Note that the "United States" term as used in the above section refers to the federal United States, also called the "federal zone".

"national" defined in 8 U.S.C. §1101(a)(21)

(a) (21) The term "national" means a person owing permanent allegiance to a state.

Great IRS Hoax, Section 4.6: The Three Definitions of "United States"

Another important distinction needs to be made. Definition 1 [in Hooven and Allison v. Evatt, 324 U.S. 652 (1945)] refers to the country "United States", but this country is *not* a "nation", in the sense of international law. This very important point was made clear by the U.S. Supreme Court in 1794 in the case of *Chisholm v. Georgia*, 2 Dall. (U.S.) 419, 1 L.Ed. 440 (1794), when it said:

> *This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign.* ***The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this 'do the people of the United States form a Nation?'***
>
> *A cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight. I shall examine it; 1st. By the principles of general jurisprudence. 2nd. By the laws and practice of particular States and Kingdoms.* ***From the law of nations little or no illustration of this subject can be expected. By that law the several States and Governments spread over our globe, are considered as forming a society, not a NATION.*** *It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3rdly. and chiefly, I shall examine the important question before us, by the Constitution of the United States, and the legitimate result of that valuable instrument.*
>
> *[Chisholm v. Georgia, 2 Dall. (U.S.) 419, 1 L.Ed. 440 (1794)]*

Black's Law Dictionary further clarifies the distinction between a nation and a society by clarifying the the differences between a ***national*** government and a ***federal*** government, and keep in mind that our government is called "federal government":

> *"**NATIONAL GOVERNMENT**. The government of a whole nation, as distinguished form that of a local or territorial division of the nation, and also as distinguished form that of a league or confederation.*
>
> *"A national government is a government of the people of a single state or nation, united as a community by what is termed the "social compact,' and possessing complete and perfect supremacy over persons and things, so far as they can be made the lawful objects of civil government.* ***A federal government is distinguished from a national government by its being the government of a community of independent and sovereign states, united by compact.*** *" Piqua Branch Bank v. Knoup, 6 Ohio St. 393." [Black's Law Dictionary, Revised Fourth Edition, 1968, p. 1176]*

So the "United States*" the country is a "society" and a "sovereignty" but not a "nation" under the law of nations, by the Supreme Court's own admission. Because the supreme Court has ruled on this matter, it is now incumbent upon each of us to always remember it and to apply it in all of our dealings with the Federal Government. If not, we lose our individual Sovereignty by default and the Federal Government assumes jurisdiction over us. So, while a sovereign Citizen will want to be the third type of Citizen and on occasion the first, he would never want to be the second.

Miller v. Albright, 523 U.S. 420 (1998):

"2. Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U.S.C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island. See T. Aleinikoff, D. Martin, & H. Motomura, Immigration: Process and Policy 974-975, n. 2 (3d ed. 1995). The provision that a child born abroad out of wedlock to a United States citizen mother gains her nationality has been interpreted to mean that the child gains her citizenship as well; thus, if the mother is not just a United States national, but also a United States citizen, the child is a United States citizen. See 7 Gordon § 93.04[2][b], p. 93-42; id., § 93.04[2][d][viii], p. 93-49."

Jose Luis Perdomo-Padilla v. John Ashcroft, Attorney General, 9th Cir, No. 01-71454, June 23, 2003-meaning of "national of the United States"

Jose Napoleon Marquez-Almanzar v. Immigration and Naturalization Service, 2nd Cir, No. 03-4395, August 8, 2005-meaning of "U.S. national"

Great IRS Hoax, section 4.11.6.5: Rebutted arguments against those who believe people born in the states of the Union are not "nationals"

A few people have disagreed with our position on the "U.S. national" citizenship status of persons born in states of the Union. These people have sent us what appear to be contradictory information from websites maintained by the federal government. We thank them for taking the time to do so and we will devote this section to rebutting all of their incorrect views. Below are some of the arguments against our position on "U.S. national" citizenship that we have received and enumerated to facilitate rebuttal. We have boldfaced the relevant portions to make the information easier to spot.

1. U.S. Supreme Court, *Miller v. Albright*, 523 U.S. 420 (1998):

   "2. Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen. 8 U.S.C. § 1101(a)(22). The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island. See *T. Aleinikoff, D. Martin, & H. Motomura, Immigration: Process and Policy 974-975, n. 2 (3d ed. 1995). The provision that a child born abroad out of wedlock to a United States citizen mother gains her nationality has been interpreted to mean that the child gains her citizenship as well; thus, if the mother is not just a United States national, but also a United States citizen, the child is a United States*

citizen. See *7 Gordon § 93.04[2][b], p. 93-42;* id., *§ 93.04[2][d][viii], p. 93-49."*

[Miller v. Albright, 523 U.S. 420 (1998)]

2. Volume 7 of the Foreign Affairs Manual (FAM) section 1111.3 published by the Dept. of States at http://foia.state.gov/REGS/Search.asp says the following about nationals but not citizens of the United States:

c. Historically, Congress, through statutes, granted U.S. nationality, but not citizenship, to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals.

d. Under current law (the Immigration and Nationality Act of 1952, as amended through October 1994), only persons born in American Samoa and the Swains Islands are U.S. nationals (Secs. 101(a)(29) and 308(1) INA).

3. The *Social Security Program Operations Manual System (POMS)* at http://policy.ssa.gov/poms.nsf/poms says the following:

RS 02001.003 "U.S. Nationals"

Most of the agreements refer to "U.S. nationals."

The term includes both U.S. citizens and persons who, though not citizens, owe permanent allegiance to the United States. ***As noted in RS 02640.005 D., the only persons who are nationals but not citizens are American Samoans and natives of Swain's Island.***

4. The USDA Food Stamp Service, website says at http://www.fns.usda.gov/fsp/rules/Memo/Support/02/polimgrt.htm:

Non-citizens who qualify outright

There are some immigrants who are immediately eligible for food stamps without having to meet other immigrant requirements, as long as they meet the normal food stamp requirements:

- **Non-citizen nationals (people born in American Samoa or Swain's Island).**
- American Indians born in Canada.
- Members (born outside the U.S.) of Indian tribes under Section 450b(e) of the Indian Self-Determination and Education Assistance Act.
- Members of Hmong or Highland Laotian tribes that helped the U.S. military during the Vietnam era, and who are legally living in the U.S., and their spouses or surviving spouses and dependent children.

The defects that our detractors fail to realize about the above information are the following points:

1. The term "United States" as used in 8 U.S.C. §1408 means the federal zone based on the definitions provided in 8 U.S.C. §1101(a)(36), 8 U.S.C. §1101(a)(38), and 8 CFR §215.1(f). See our *IRS Deposition Questions*, section 14, questions 77 through 82 at the following address for more details: http://famguardian.org/TaxFreedom/Forms/Discovery/Deposition/Section 14.htm

2. The federal government is not authorized under our Constitution or under international law to prescribe the citizenship status of persons who neither reside within nor were born within its territorial jurisdiction. The only thing

that federal statutes can address are the status of persons who either reside in, were born in, or resided in the past within the territorial jurisdiction of the United States. People born within states of the Union do not satisfy this requirement and their citizenship status is determined under state and not federal law. The quote below confirms this, keeping in mind that Title 8 of the U.S. Code qualifies as "legislation":

> *"While states are not sovereign in true sense of term but only quasi sovereign, yet in respect of all powers reserved to them [including the citizenship status of people born but not naturalized there] they are supreme and independent of federal government as that government within its sphere is independent of the states."*
>
> ***"It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U.S. 251, 275, 38 S.Ct. 529, 3 A.L.R. 649, Ann.Cas.1918E 724, possesses no inherent power in respect of the internal affairs of the states; and emphatically not with regard to legislation."*** *[Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936)]*

3. The quotes of our detractors above recognize only *one* of the *four* different ways of becoming a "national but not citizen of the United States" described in 8 U.S.C. §1408.

4. Information derived from informal publications or advice of employees of federal agencies are not admissible in a court of law as evidence upon which to base a good faith belief. The only basis for good-faith belief is a reading of the actual statute or regulation that implements it. The reason for this is that employees of the government are frequently wrong, and frequently not only say wrong things, but in many cases the people who said them had no lawful delegated authority to say such things. See http://famguardian.org/Subjects/Taxes/Articles/reliance.htm for an excellent treatise from an attorney on why this is.

5. People writing the contradictory information falsely "presume" that the term "citizen" in a general sense that most Americans use is the same as the term "citizen" as used in the definition of "citizens and nationals of the United States" found in 8 U.S.C. §1401. In fact, we conclusively prove later in section 5.2.14 that this is emphatically not the case. A "citizen" as used in the Internal Revenue Code and most federal statutes means a person born in a territory or possession of the United States, and *not* in a state of the Union. Americans born in states of the Union are a different type of "citizen", and we show in section 5.2.14 that these types of people are "U.S. nationals" and not "citizens" or "U.S. citizens" in the context of any federal statute. We therefore challenge those who make this unwarranted presumption to provide law and evidence proving us wrong on this point. We request that you read section 4.11.10 **before** you prepare your rebuttal, because it clarifies several important definitions that you might otherwise be inclined to overlook that may result in misunderstanding.

6. Whatever citizenship we enjoy we are entitled to abandon. This is our right, as declared both by the Congress and the Supreme Court. See Revised Statutes, section 1999, page. 350, 1868 and section 4.11.9. "citizens **and** nationals of the United States" as defined in 8 U.S.C. §1401 have two statuses: "citizen" and "national". We are entitled to abandon either of these two. If we abandon nationality, then we automatically lose the "citizen" part, because nationality is where we obtain our allegiance. But if we abandon the "citizen" part, then we still retain our nationality under 8 U.S.C. §1101(a)(22)(B). This is the approach we advocated earlier in section 4.11.6.1. Because all citizenship must be consensual, then the government must respect our ability to abandon those types of citizenship we find objectionable. Consequently, if either you or the government believe that you are a "citizen and national of the United States" under 8 U.S.C. §1401, then you are entitled by law to abandon only the "citizen" portion and retain the "national" portion, and 8 U.S.C. §1452 tells you how to have that choice recognized by the Department of State.

Item 2 above is important, because it establishes that the federal government has no authority to write law that prescribes the citizenship status of persons born ***outside*** of federal territorial jurisdiction and ***within*** the states of the Union. The U. S. Constitution in Article 1, Section 8, Clause 4 empowers Congress to write "an uniform Rule of Naturalization", but "naturalization" is only one of ***two*** ways of acquiring citizenship. Birth is the other way, and the states have

exclusive jurisdiction and legislative authority over the citizenship status of those people who acquire their federal citizenship by virtue of birth within states of the Union. Here is what the Supreme Court said on this subject:

> *"The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.* ***The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.*** *" [U.S. v. Wong Kim Ark, 169 U.S. 649 (1898)]*

The rules of comity prescribe whether or how this citizenship is recognized by the federal government, and by reading 8 U.S. C. §1408, it is evident that the federal government chose *not* directly recognize within Title 8 of the U.S.C. the citizenship status of persons born within states of the Union to parents neither of whom were "U.S. citizens" under 8 U.S. C. §1401 and neither of whom "resided" inside the federal zone prior to the birth of the child. We suspect that this is because not only does the Constitution not give them this authority, but more importantly because doing so would spill the beans on the true citizenship of persons born in states of the Union and result in a mass exodus from the tax system by most Americans.

As we said, there are four ways identified in 8 U.S.C. §1408 that a person may be a "national but not citizen of the United States" at birth. We have highlighted the section that our detractors are ignoring, and which we quote frequently on our treatment of the subject of citizenship.

> TITLE 8 > CHAPTER 12 > SUBCHAPTER III > Part I > Sec. 1408.
>
> *Sec. 1408. - Nationals but not citizens of the United States at birth*
>
> *Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:*
>
> *(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;*
>
> ***(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;***
>
> *(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and*
>
> *(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years -*
>
> *(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and*
> *(B) at least five years of which were after attaining the age of fourteen years.*
>
> *The proviso of section 1401(g) of this title shall apply to the national parent under this paragraph in the same manner as*

it applies to the citizen parent under that section

Subsections (1), (3), and (4) above deal with persons who are born in outlying possessions of the United States, and Swain's Island and American Samoa would certainly be included within these subsections. These people would be the people who are addressed by the information cited by our detractors from federal websites above. Subsection (2), however, deals with persons who are born *outside* of the *federal* United States (federal zone) to parents who are "U. S. nationals" and who resided at one time in the *federal* United States. Anyone born overseas to American parents is a "non-citizen U.S. national" under this section and this status is one that is not recognized in any of the cites provided by our detractors but is recognized by the law itself. Since states of the Union are outside the *federal* United States and outside the "United States" used in Title 8, then parents born in states of the Union satisfy the requirement for "national but not citizen of the United States" status found in 8 U.S.C. §1408(2).

One of the complaints we get from our readers is something like the following:

> *"Let's assume you're right and that 8 U.S.C. §1408(2) prescribes the citizenship status of persons born in a state of the Union. The problem I have with that view is that 'United States' means the federal zone in that section, and subsection (2) requires that the parents must reside within the 'United States' prior to the birth of the child. This means they must have 'resided' in the federal zone before the child was born, and most people don't satisfy that requirement."*

Let us explain why the above concern is unfounded. According to 8 U.S.C. §1408(2), the parents must also reside in the *federal* United States prior to the birth of the child. We assert that most people born in states of the Union do in fact meet this requirement and we will now explain why. They can meet this requirement by any one of the following ways:

1. Serving in the military or residing on a military base or occupied territory.

2. Filing an IRS form 1040 (not a 1040NR, but a 1040). The federal 1040 form says "U.S. individual" at the top left. A "U.S. individual" is defined in 26 CFR §1.1441-1(c)(3) as either an "alien" residing within the federal zone or a "nonresident alien" with income from within the federal zone. Since "nonresident aliens" file the 1040NR form, the only thing that a person who files a 1040 form can be is a "resident alien" as defined in 26 U.S.C. §7701(b) and 26 CFR §1.1-1(a)(2)(ii) or a "citizen" residing abroad who attaches a form 2555 to the 1040. See section 5.2.11 for further details on this if you are curious. Consequently, being a "resident alien" qualifies you as a "resident". You are not, in fact a resident because you didn't physically occupy the federal zone for the year covered by the tax return, but if the government is going to treat you as a "resident" by accepting and processing your tax return, then they have an obligation to treat either you or your parents as "residents" in all respects, including those related to citizenship. To do otherwise would be inconsistent and hypocritical.

3. Spending time in a military hospital.

4. Visiting federal property or a federal reservation within a state routinely as a contractor working for the federal government.

5. Working for the federal government on a military reservation or inside of a federal area.

6. Sleeping in a national park.

7. Spending time in a federal courthouse.

The reason why items 3 through 7 above satisfy the requirement to be a "resident" of the federal United States is because the term "resident" is nowhere defined in Title 8 of the U.S. Code, and because of the definition of "resident" in Black's

Law Dictionary:

> *"**Resident.** Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the **genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature.**" [Black's Law Dictionary, Sixth Edition, p. 1309]*

The key word in the above is "permanent", which is defined as it pertains to citizenship in 8 U.S.C. §1101(a)(31) below:

> TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101
>
> *Sec. 1101. - Definitions*
>
> *(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.*

Since Title 8 does not define the term "lasting" or "ongoing" or "transitory", we referred to the regular dictionary, which says:

> *"**lasting:** existing or continuing a long while: ENDURING." [Webster's Ninth Collegiate Dictionary, 1983, ISBN 0-87779-510-X, p. 675]*
>
> *"**ongoing:** 1. being actually in process 2: continuously moving forward; GROWING" [Webster's Ninth Collegiate Dictionary, 1983, ISBN 0-87779-510-X, p. 825]*
>
> *"**transitory**: 1: tending to pass away: not persistent 2: of brief duration: TEMPORARY syn see TRANSIENT."*

No period of time is specified in order to meet the criteria for "permanent", so even if we lived there a day or a few hours, we were still there "permanently". The Bible also says in Matt. 6:26-31 that we should not be anxious or presumptuous about tomorrow and take each day as a new day. The last verse in that sequence says:

> *"Therefore **do not worry about tomorrow**, for tomorrow will worry about its own trouble." [Matt. 6:31, Bible, NKJV]*

In fact, we are not allowed to be presumptuous at all, which means we aren't allowed to assume or intend anything about the future. Our future is in the hands of a sovereign Lord, and we exist by His good graces alone.

> *"Come now, you who say, 'Today or tomorrow we will go to such and such a city, spend a year there, buy and sell, and make a profit'; whereas you do not know what will happen tomorrow. For what is your life? It is even a vapor that appears for a little time and then vanishes away. Instead you ought to say, 'If the Lord wills, we shall live and do this or that.' But now you boast in your arrogance. All such boasting is evil." [James 4:13-16, Bible, NKJV]*
>
> *"But **the person who does anything presumptuously, whether he is native-born or a stranger, that one brings reproach on the Lord, and he shall be cut off from among his people**." [Numbers 15:30, Bible, NKJV]*

Consequently, the Christian's definition of "permanent" is anything that relates to what we intend for today only and *does not* include anything that might happen starting tomorrow or at any time in the future beyond tomorrow. Being presumptuous about the future is "boastful" and "evil", according to the Bible! The future is uncertain and our lives are definitely not "permanent" in God's unlimited sense of eternity. Therefore, wherever we are is where we "intend"

to permanently reside as Christians.

Even if you don't like the above analysis of why most Americans born in states of the Union are "nationals but not citizens of the United States" under 8 U.S.C. §1408(2), we still explained above that you have the right to abandon only the "citizen" portion and retain the "national" portion of any imputed dual citizenship status under 8 U.S.C. §1401. We also show you how to have that choice formally recognized bye the U.S. Department of State in section 3.5.3.13 of our *Tax Freedom Solutions Manual* under the authority of 8 U.S.C. §1452, and we know people who have successfully employed this strategy, so it must be valid.

Furthermore, even if you don't want to believe that any of the preceding discussion is valid, we also explained that the federal government cannot directly prescribe the citizenship status of persons born within states of the Union under international law. To illustrate this fact, consider the following extension of a popular metaphor:

> *"If a tree fell in the forest, and Congress refused to pass a law recognizing that it fell and forced the agencies in the executive branch to refuse to acknowledge that it fell because doing so would mean an end to income tax revenues, then did it **really** fall?"*

The answer to the above questions is emphatically "yes". We said that the rules of comity prevail in that case the federal government recognizing the citizenship status of those born in states of the Union. But what indeed is their status under federal law? 8 U.S.C. §1101(a)(21) defines a "national" as:

> TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101.
>
> *Sec. 1101. - Definitions*
>
> (21) *The term "national" means a person owing permanent allegiance to a state.*

If you were born in a state of the Union, you are a "national of the United States" because the "state" that you have allegiance to is the confederation of states called the "United States". As further confirmation of this fact, if "naturalization" is defined as the process of ***conferring*** "nationality" under 8 U.S.C. §1101(a)(23), and "expatriation" is defined as the process of ***abandoning*** "nationality and allegiance" by the Supreme Court in *Perkins v. Elg*, 307 U.S. 325 (1939), then "nationality" is the key that determines citizenship status. What makes a person a "national" is "allegiance" to a state. The only type of citizenship which carries with it the notion of "allegiance" is that of "U.S. national", as shown in 8 U.S.C. §1101(a)(22)(B). You will not find "allegiance" mentioned anywhere in Title 8 in connection with those persons who claim to be "citizens and nationals of the United States" as defined in 8 U.S.C. §1401:

> *TITLE 8 > CHAPTER 12 > SUBCHAPTER I > Sec. 1101.*
>
> *Sec. 1101. - Definitions*
>
> *(a) (22) The term "national of the United States" means*
>
> *(A) a citizen of the United States, or*
>
> *(B) a person who, though not a citizen of the United States, owes permanent [*but not necessarily exclusive*] allegiance to the United States.*

People born in states of the Union can and most often do have allegiance to the confederation of states called the

"United States" just as readily as people who were born on federal property, and the federal government under the rules of comity should be willing to recognize that allegiance *without* demanding that such persons surrender their sovereignty, become tax slaves, and come under the exclusive jurisdiction of federal statutes by pretending to be people who live in the federal zone. Not doing so would be an injury and oppression of their rights, and would be a criminal conspiracy against rights, because remember, people who live inside the federal zone have no rights, by the admission of the Supreme Court in *Downes v. Bidwell*, 182 U.S. 244 (1901):

> TITLE 18 > PART I > CHAPTER 13 > Sec. 241.
>
> Sec. 241. - Conspiracy against rights
>
> *If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or*
>
> *If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured -*
>
> *They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death*

It would certainly constitute a conspiracy against rights to force or compel a person to give up their true citizenship status in order to acquire any kind of citizenship recognition from a corrupted federal government. The following ruling by the Supreme Court plainly agrees with these conclusions:

> *"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.* ***It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of Constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*** *" [Frost v. Railroad Commission, 271 U. S. 583; 46 S.Ct. 605 (1926)]*

CITES BY TOPIC: citizenship

EXPATRIATION FROM FEDERAL GOVERNMENT

- 15 Statutes at Large- 1868 statute that is current government policy on Expatriation and Repatriation
- 8 U.S.C. Chapter 12: Immigration and Nationality
- 8 U.S.C. 1481: Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions
- 8 CFR: CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
- IRC 877: Expatriation to Avoid Tax
- IRC 871(d): Nonresident Aliens and Foreign Corporations
- 26 C.F.R. 1.871-10(d): Election to treat real property income as effectively connected with U.S. business
- ***Briehl v. Dulles***, 248 F2d 561, 583 (1957).-Identifies that the the ability to expatriate is a natural right and shall not be infringed by the government.
- USA the Republic is the House Nobody Lives In--***(HOT!)*** Fascinating background on 14th Amendment U. S. citizenship, how to expatriate, the burden of proof, and presumptions involved.
- The 14th Amendment, Law or Contract?-How did we move from the *"Common Law"* where we are innocent until proven guilty and into the *"Roman Civil Law"* where we must prove our innocence before government agencies? This Treatise shows us how the *14th Amendment* was used (as a Contract) to move the people out from under the *Common Law* and into the *Roman Civil Law.*

EXPATRIATION FROM STATE OF CALIFORNIA

- Revenue and Taxation Code § 17024.5(e), Elections

U.S. Citizenship and Immigration Services: Citizenship

IRS Deposition Questions: Section 14, Citizenship

3C American Jurisprudence (AmJur) 2d, section 2689, Legal Encyclopedia:

3C Am Jur 2d §2689, Who is born in United States and subject to United States jurisdiction

"A person is born subject to the jurisdiction of the United States, *for purposes of acquiring citizenship at birth, if his or her birth occurs in territory over which the United States is sovereign, even though another country provides all governmental services within the territory, and the territory is subsequently ceded to the other country.*"

3C American Jurisprudence (AmJur) 2d, pages 204-208: Proving, Obtaining, or Losing Citizenship; Citizenship Documents (283 KBytes)

Tells how to prove you are a non-Citizen U.S. national

Invisible Contracts: The Citizenship Contract, by George Mercier

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Slaugherhouse Cases, 83 U.S. 36 (1872):

"The first of these questions is one of vast importance, and lies at the very foundations of our government. **The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons.** A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, [83 U.S. 36, 113] and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. **Citizenship of the United States ought to be, and, according to the Constitution, is, a surt and undoubted title to equal rights in any and every States in this Union**, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States." [Slaughterhouse Cases, 83 U.S. 36 (1872)]

Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874):

"There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment 'all persons born or naturalized in the United States and subject to the jurisdiction thereof' are expressly declared to be 'citizens of the United States and of the State wherein they reside.' **But, in our opinion, it did not need this amendment to give them that position.** Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, **yet there were necessarily such citizens without such provision.** There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an [88 U.S. 162, 166] association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. **Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.**" [Minor v. Happersett, 88 U.S. (21 Wall.) 162, 166-168 (1874)]

Perkins v. Elg, 307 U.S. 325; 49 S.Ct. 884; 83 L.Ed 1320 (1939):

"As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality. 1 And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, at citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action

in conformity with applicable legal principles.

[...]

To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.

Petitioners stress the American doctrine relating to expatriation. By the Act of July 27, 1868,8 Congress declared that 'the right of expatriation is a natural and inherent right of all people'. Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. 9 It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it.

[...]

'The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles.'

"And after referring to the Fourteenth Amendment, U.S.C.A.Const., and the Act of February 10, 1855, R.S. 1993, 8 U.S.C.A. 6, the instructions continued: [307 U.S. 325, 345] 'It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States should respect its claim to allegiance. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim. The statutory law of the United States affords some guidance but not all that could be desired, because it fails to announce the circumstances when the child who resides abroad within the territory of a State reasonably claiming his allegiance forfeits completely the right to perfect his inchoate right to retain American citizenship."

Baker v. Keck, 13 F.Supp. 486 (1936):

"Citizenship and domicile are substantially synonymous. Residency and inhabitance are too often confused with the terms and have not the same significance. Citizenship implies more than residence. It carries with it the idea of identification with the state and a participation in its functions. As a citizen, one sustains social, political, and moral obligation to the state and possesses social and political rights under the Constitution and laws thereof. Harding v. Standard Oil Co. et al. (C. C.) 182 F. 421; Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 763, 32 L.Ed. 766; Scott v. Sandford, 19 How. 393, 476, 15 L. Ed. 691." [Baker v. Keck, 13 F.Supp. 486 (1936)]

Black's Law Dictionary, Sixth Edition, Page 244:

citizenship. The status of being a citizen. There are four ways to acquire citizenship: by birth in the United States, by Birth in U.S. territories, by birth outside the U.S. to U.S. parents, and by naturalization. See Corporate citizenship; Diversity of citizenship; Dual citizenship; Federal citizenship; Naturalization; Jus sanguinis; Jus soli.

Trop v. Dulles, 356 U.S. 86 (1958)

In Perez v. Brownell, supra, I expressed the principles that I believe govern the constitutional status of United [356 U.S. 92] States citizenship. It is my conviction that citizenship is not subject to the general powers of the National Government, and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. Section 401(g) is not limited to cases of desertion to the enemy, and there is no such element in this case. This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war, the citizen's duties include not only the military defense of the Nation, but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship [356 U.S. 93] is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone, the judgment in this case should be reversed.

[. . .]

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.{35} It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.{36}

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance.{37} Even statutes of this sort are generally applicable primarily [356 U.S. 103] to

naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.{38} In this country, the Eighth Amendment forbids this to be done.

In concluding, as we do, that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that, in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes, but neither can they sanction as being merely unwise that which the Constitution forbids.
We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we [356 U.S. 104] do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established, it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the cause is remanded to the District Court for appropriate proceedings.

[Trop v. Dulles, 356 U.S. 86 (1958)]

Relationship of citizenship to Taxation

"Unless the defendant can prove he is not a citizen of the United States, the IRS has the right to inquire and determine a tax liability." U.S. v. Slater, 545 Fed. Supp. 179,182 (1982).

Derived from race and birth

"State Citizenship is a vested substantial property right, and the State has no power to divest or impair these rights." Favot v. Kingsbury, (1929) 98 Cal. App. 284, 276 P. 1083.

"For this you have every inducement of sympathy and interest. Citizens by birth or choice, of a common country, that country has a right to concentrate your affections. The name of AMERICAN, which belongs to you in your national

capacity, must always exalt the just pride of patriotism, more than any appellation derived from local discriminations. With slight shades of difference you have the same religion, manners, habits, and political principle. You have, in a common cause, fought, and triumphed together; the independence and liberty you possess, are the work of joint councils, and joint efforts -- of common dangers, sufferings and success." George Washington, "Farewell Address", delivered September 17, 1796. (Emphasis added.)

"A Citizen of one state is a citizen of every state in the Union." Butler v. Farnsworth, Fed.Cas.No. 2,240 (U.S. 3d Cir., 4 Wash.C.C. 101).

"Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot afterwards be controlled, and it also involves as Citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress." Boyd v. Thayer (1891), 143 U.S. 143.

"All white persons or persons of European descent who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of Independence up to July 4, 1776, were by the Declaration [of Independence] invested with privileges of citizenship." U. S. v. Ritchie, 58 U. S. (17 How.) 525, 539; Ingles v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99; Boyd v. Nebraska, 36 L.Ed. 103, 110. (Emphasis and insertions added.)

"In general, 'Free White Persons,' includes members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races." U. S. v. Balsara (1910), 180 F. 694, 695; In re Najour (1909), 174 F. 735; In re Ellis (1910), 179 F. 1002, 1003; In re Alverto (1912), 198 F. 688; In re Akhay Kumur Mozumdar (1913), 207 F. 115. (Emphasis added.)

"The privileges and immunities secured to citizens of each State by the first clause of the second section of the fourth article of the Constitution are only those which belong to [free white de jure State] Citizenship." Conner v. Elliott, 59 U. S. (18 How.) 591. (Insertion added.)

"It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a state, whose rights and liberties had been outraged by the English government; and who declared their independence and assumed the powers of government to defend their rights by force of arms.

"In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument." Dred Scott v. Sanford, supra, p. 407.

"We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the state constitutions and governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and Negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only to the parties but to the person who joined them in marriage. And no distinction in this respect was made between the free Negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

"We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, (were) intended to include them, or to give to them or their posterity the benefit of any of its provisions. The language
of the Declaration of Independence is equally conclusive:

"It begins by declaring that, "When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the Laws of Nature and Nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."
"It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness; that to secure these rights, Governments are instituted among men deriving their just powers from the consent of the governed."

"The general words quoted above would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted the declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed
the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

"Yet the men who framed this declaration were great men -- high in literary acquirements -- high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the Negro race which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of a trader were supposed to need protection.

"This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language." Dred Scott v. Sanford, ibid., pp. 409, 410.

"To all this mass of proof we have still to add that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the government went into operation, will be abundantly sufficient to show this. The two first are particularly of notice, because many of the men who assisted in framing the Constitution, and took no active part in procuring its
adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well considered instrument.

"The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "to aliens being free white persons."

". . . But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and they alone constituted the sovereignty in the government. . . Another of the early laws of which we have spoken is the first militia law, which was passed in 1792, at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male

citizen" shall be enrolled in the militia. . .

"The third act to which we have alluded is even still more decisive; it was passed as late as 1813. . . and it provides "(t)hat from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States." "Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word "citizens", and they are described as another and different class of persons, and authorized to be employed, if born in the United States." Dred Scott v. Sanford, supra, pp. 419-421.

"Are free negroes or free colored persons citizens within the meaning of this [Comity] clause? We think not. In recurring to the past history of the constitution, and prior to its formation, to that of the confederation, it will be found that nothing beyond a kind of quasi-citizenship has ever been recognized in the case of colored persons. . . .If citizens in a full and constitutional sense, why were they not permitted to participate in its formation? They certainly were not. The constitution was the work of the white race, the government for which it provides and of which it is the fundamental law, is in their hands and under their control; and it could not have been intended to place a different race of people in all things upon terms of equality with themselves. Indeed, if such had been the desire, its utter impracticability is too evident to admit of doubt. The two races differing as they do in complexion, habits, conformation, and intellectual endowments, could not nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human agency must change the decree. Those who framed the Constitution were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause to which we referred." Pendleton v. State, 6 Ark. 509.
(Emphasis added.)

"There are, nevertheless, inequalities of great moment in the mind of a legislator, because they have a natural and inevitable influence in society. Let us enumerate some of them: 1. There is an inequality of wealth. . . 2. BIRTH. Let no man be surprised that this species of inequality is introduced here. Let the page in history be quoted where any nation, ancient or modern, civilized or savage, is mentioned, among whom no difference was made between the citizens on account of extraction. The truth is that more influence is allowed to this advantage in free republics than in despotic governments, or than would be allowed to it in simple monarchies, if severe laws had not been made from age to age to secure it." John Adams, A Defense of the American Constitutions, 1787, from The Political Writings of John Adams, published by Bobbs-Merrill Co., 1954, p. 134. (Emphasis added.)

"These sources of inequality, which are common to every people and can never be altered by any because they are founded in the constitution of nature -- this natural aristocracy among mankind has been dilated on because it is a fact essential to be considered in the institution of government. It forms a body of men which contains the greatest collections of virtues and abilities in a free government, is the brightest ornament and glory of the nation, and may always be made the greatest blessing of society if it be judiciously managed in the constitution. But if this be not done, it is always the most dangerous; nay, it may be added, it never fails to be the destruction of the commonwealth [sovereignty]." John Adams, A Defense of the American Constitutions, from The Political Writings of John Adams, published by Bobbs-Merrill Co., 1954, p. 139. (Emphasis and Insertion added.)

"Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural born subjects. . . . The better opinion, I should think, was that Negroes or other slaves, born within and under the allegiance of the United States, are natural born subjects, but not citizens. Citizens, under our Constitution and laws, mean free inhabitants, born within the United States or naturalized under the laws of Congress. . . " James Kent, Commentaries on American Law, 7th ed., Volume II, pp. 275-278. (Italics added.)

"But birth will not confer these advantages upon a Negro or an Indian. If so, a man may acquire, by the accident of birth,

what the government itself has no right to grant. No Negro, or descendant of Negroes, is a citizen of the Union, or any of the States. They are mere "sojourners in the land", inmates, allowed usually by tacit consent, sometimes by legislative enactment, certain specific rights. Their status and that of the citizen is not the same. Vattel, Book 1, para. 213. But the clause of the Constitution in question applies to citizens, not to sojourners or inmates." State v. Clairborne, 1 Meig's Rep. 331, 335.

"It results, then, that the plaintiff cannot have been a citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society upon which, by the institutions of the states, was conferred a right to enjoy all the privileges and immunities appertaining to the state. That this was the case there
is no evidence in the record to show, and the presumption is against it. Free Negroes and mulattoes are, almost everywhere, considered and treated as a degraded race of people; insomuch so, that, under the Constitution and laws of the United States, they cannot become citizens of the United States." Amy v. Smith, 1 Litt. Ky. R. 334.

"Again, according to a well established principle of the common law, now in force, none but citizens can hold our lands." Amy v. Smith, supra, p. 339.

"The American colonies brought with them the common, and not the civil law; and each state, at the revolution, adopted either more or less of it, and not one of them exploded the principle that the place of birth conferred citizenship." Ibid., pp. 337, 338.

"Hence I conclude that every white person at least, born within the United States, whether male or female, is, by birth, a citizen within the meaning of our Constitution, and as such has rights secured by it. . ." Ibid., p. 341.

Attorney-General of the United States, one William Wurtz, in an opinion dated November 7, 1821:

> *I presume that the description, "citizen of the United States", used in the Constitution, has the same meaning that it has in the several acts of Congress*
> *passed under the authority of the Constitution; otherwise there will arise a vagueness and uncertainty in our laws which will make their execution, if not impracticable, at least extremely difficult and dangerous.*
>
> *Looking to the Constitution as the standard of meaning, it seems very manifest that no person is included in the description of "citizen of the United States" who has not the full rights of a citizen in the state of his residence. Among other proofs of this, it will be sufficient to advert to the constitutional provision that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states".*
>
> *Now, if a person born and residing in Virginia but possessing none of the high characteristic privileges of a citizen of the state is nevertheless a citizen of Virginia in the sense of the Constitution, then, on his removal into another state, he acquires all the immunities and privileges of a citizen of that other state, although he possessed none of them in the state of his nativity; a consequence which certainly could not have been in the contemplation of the Convention. Again: the only qualification required by the Constitution to render a person eligible as President, Senator, or Representative of the United States is that he shall be a "citizen of the United States" of a given age and residence. Free Negroes and mulattoes can satisfy the requisites of age and residence as well as the white man; and if nativity, residence, and allegiance combined (without the rights and privileges of a white man) are sufficient to make him a "citizen of the United States" in the same sense of the Constitution, then free Negroes and mulattoes are eligible to those high offices, and may command the purse and the sword of the nation.*
>
> *For these and other reasons, which might easily be multiplied, I am of the opinion that the Constitution, by the description of "citizens of the United States", intended those only who enjoyed the full and equal privileges of white citizens in the state of their residence. If this be correct, and if I am right also in the other position -- that we must affix the same sense to this description when found in an act of Congress, as it manifestly has in the Constitution -- then free people of color*

in Virginia are not citizens of the United States in the sense of our shipping laws, or any other laws, passed under the authority of the Federal Constitution; for such people have very few of the privileges of the citizens of Virginia.

1. They can vote at no election, although they might be freeholders.

2. They are incapable of any office of trust or profit, civil or military.

3. They are not competent witnesses against a white man in any case, civil or criminal.

4. They are not enrolled in the militia, are incapable of bearing arms, and are forbidden even to have in their possession military weapons, under the penalties of forfeiture and whipping.

5. They are subject to severe corporal punishment for raising their hand against a white man, except in defense of a wanton assault.

6. They are incapable of contracting marriage with a white woman, and the attempt is severely punished.

These are some of the incapacities which distinguished them from the white citizens of Virginia; but they are, I think, amply sufficient to show that such
persons could not have been intended to be embraced by the description "citizens of the United States" in the sense of the Constitution and acts of Congress.

The allegiance which the free man of color owes to the State of Virginia is no evidence of citizenship; for he owes it not in consequence of any oath of allegiance. He is not required or permitted to take any such oath; the allegiance which he owes is that which a sojourning stranger owes -- the mere consequence and return for the protection which he receives from the laws. . . . Opinions of the Attorneys General, Volume 1, pp. 506-508.
(Emphasis added.)

"But as the laws of the United States do not now authorize any but a white person to become a citizen, it marks the national sentiment upon the subject and creates a presumption that no state had made persons of color citizens. . . .And as it respects Virginia, we know that free people of color have never been
considered, or treated, either in the practice of the country or by the laws of the state, as possessing the rights and privileges of citizens." Amy v. Smith, supra, p. 334. (Emphasis added.)

"Prior to the adoption of the Constitution of the United States, each state had a right to make citizens of any persons they pleased; but as the Federal Constitution does not authorize any but white persons to become citizens of the United States, it furnishes a presumption that none other were then citizens of any state; which presumption will stand until repealed by positive testimony." id. (Emphasis added.)

"That all men are born to equal rights is true. Every being has a right to his own, as clear, as moral, as sacred as any other being has. . . . But to teach that all men are born with equal powers and faculties, to equal property and advantages through life, is as gross a fraud, as glaring an imposition on the
credulity of the people as ever was practiced by monks, by Druids, by Brahmins, by priests of the immortal Lama, or the self-styled philosophers of the late French Revolution. For Honor's sake, . . . , for truth and virtue's sake, let American philosophers and politicians despise it." John Adams, in a letter to a Mr. John Taylor, April 15, 1814 from The Political Writings of John Adams, published by Bobbs-Merrill Co., 1954, p. 201. (Emphasis added.)

U. S. Senator Robert H. Toombs of Georgia in Boston in 1856, as to the inevitable consequences of trespassing on the preamble and altering the posterity of "free white":

"Therefore, so far from being a necessary and proper means of executing a granted powers, it is an arbitrary and despotic usurpation against the letter, the spirit, and the declared purposes of the Constitution; for its exercise neither "promote(s) the general welfare", nor "secure(s) the blessings of liberty to ourselves and to our posterity", but, on the contrary, puts in jeopardy all these inestimable blessings. It loosens the bonds of Union, seeks to establish injustice, disturbs the domestic tranquility, weakens the common defense, and endangers the general welfare by sowing hatreds and discords among our people, and puts in eminent peril the liberties of the white race, by whom and for whom the Constitution was made. . . "

Stephens, A Constitutional View of the Late War between the States, National Publ., Vol. I, p. 632.

Before the 14th amendment [*sic*] in 1868: ...

[F]or it is certain, that in the sense in which the word "Citizen" is used in the federal Constitution, "Citizen of each State," and "Citizen of the United States***," are convertible terms; they mean the same thing; for "the Citizens of each State are entitled to all Privileges and Immunities of Citizens in the several States," and "Citizens of the United States***" are, of course, Citizens of all the United States***. [44 Maine 518 (1859), Hathaway, J. dissenting] [italics in original, underlines & C's added]

After the 14th amendment [sic] in 1868:

It is quite clear, then, that there is a citizenship of the United States** and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.
[Slaughter House Cases, 83 U.S. 36]
[(1873) emphasis added]

The first clause of the fourteenth amendment made negroes citizens of the United States**, and citizens of the State in which they reside, and thereby created two classes of citizens, one of the United States** and the other of the state.
[Cory et al. v. Carter, 48 Ind. 327]
[(1874) headnote 8, emphasis added]

We have in our political system a Government of the United States** and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own ....
[U.S. v. Cruikshank, 92 U.S. 542]
[(1875) emphasis added]

One may be a citizen of a State and yet not a citizen of the United States. Thomasson v. State, 15 Ind. 449; Cory v. Carter, 48 Ind. 327 (17 Am. R. 738); McCarthy v. Froelke, 63 Ind. 507; In Re Wehlitz, 16 Wis. 443.
[McDonel v. State, 90 Ind. 320, 323]
[(1883) underlines added]

A person who is a citizen of the United States** is necessarily a citizen of the particular state in which he resides. But a person may be a citizen of a particular state and not a citizen of the United States**. To hold otherwise would be to deny to the state the highest exercise of its sovereignty, -- the right to declare who are its citizens.
[State v. Fowler, 41 La. Ann. 380]
[6 S. 602 (1889), emphasis added]

The first clause of the fourteenth amendment of the federal Constitution made negroes citizens of the United States**, and citizens of the state in which they reside, and thereby created two classes of citizens, one of the United States** and the other

of the state.
[4 Dec. Dig. '06, p. 1197, sec. 11]
["Citizens" (1906), emphasis added]

There are, then, under our republican form of government, two classes of citizens, one of the United States** and one of the state. One class of citizenship may exist in a person, without the other, as in the case of a resident of the District of Columbia; but both classes usually exist in the same person.
[Gardina v. Board of Registrars, 160 Ala. 155]
[48 S. 788, 791 (1909), emphasis added]

There is a distinction between citizenship of the United States** and citizenship of a particular state, and a person may be the former without being the latter.
[Alla v. Kornfeld, 84 F.Supp. 823]
[(1949) headnote 5, emphasis added]

A person may be a citizen of the United States** and yet be not identified or identifiable as a citizen of any particular state.
[Du Vernay v. Ledbetter]
[61 So.2d 573, emphasis added]

... citizens of the District of Columbia were not granted the privilege of litigating in the federal courts on the ground of diversity of citizenship. Possibly no better reason for this fact exists than such citizens were not thought of when the judiciary article [III] of the federal Constitution was drafted. ... citizens of the United States** ... were also not thought of; but in any event a citizen of the United States**, who is not a citizen of any state, is not within the language of the [federal] Constitution.
[Pannill v. Roanoke, 252 F. 910, 914]
[emphasis added]

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Notes
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CITES BY TOPIC: police power

Black's Law Dictionary, Sixth edition, page 1156:

> **Police power**. An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of the citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.
>
> The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits and is an essential attribute of government. Marshall v. Kansas City, Mo., 355 S.W.2d 877, 883.

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981):

> "...**police power** regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)"

Reid v. Colorado, 187 U.S. 137, 148 (1902):

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." Reid v. Colorado, 187 U. S. 137, 148 .

Keller v. United States, 213 U.S. 138 (1909)

> **Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.**
>
> In Patterson v. Kentucky, 97 U.S. 501, 503 , 24 S. L. ed. 1115, 1116, is this declaration:
>
> > "In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government.' Cooley, Counst. Lom. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the existence of such a power in the states has been uniformly recognized in this court. Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; License Cases, 5 How. 504, 12 L. ed. 256; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Henderson v. New York (Henderson v. Wickham) 92 U.S. 259 , 23 L. ed. 543; Hannibal &St. J. R. Co. v. Husen, 95 U.S. 465 , 24 L. ed. 527; Boston Beer Co. v. Massachusetts, 97 U.S. 25 , 24 L. ed. 989. It is embraced in what Mr. Chief Justice Marshall, in Gibbons v. Ogden, calls that 'immense mass [213 U.S. 138, 145] of legislation' which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control.'

And in Barbier v. Connolly, 113 U.S. 27, 31 , 28 S. L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, it is said:

> 'But neither the amendment-broad and comprehensive as it is-nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'

Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601, declares:

> 'This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.'

In Houston v. Moore, 5 Wheat. 1, 48, 5 L. ed. 19, 30, Mr. Justice Story says:

> 'Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution.'

Art. 10 of Amendments; New York v. Miln, 11 Pet. 102, 133, 9 L. ed. 648, 660; License Cases, 5 How. 504, 608, 630, 12 L. ed. 256, 303, 313; United States v. Dewitt, 9 Wall. 41, 44, 19 L. ed. 593, 594; Patterson v. Kentucky, 97 U.S. 501, 503 , 24 S. L. ed. 1115, 1116; Barbier v. Connolly, 113 U.S. 27, 31 , 28 S. L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Re Rahrer (Wilkerson v. Rahrer) 140 U.S. 545, 555 , 35 S. L. ed. 572, 574, 11 Sup. Ct. Rep. 865; United States v. E. C. Knight Co. 156 U.S. 1, 11 , 39 S. L. ed. 325, 328, 15 Sup. Ct. Rep. 249; Cooley, Const. Lim. 574.

Doubtless it not infrequently happens that the same act [213 U.S. 138, 146] may be referable to the power of the state, as well as to that of Congress. If there be collision in such a case, the superior authority of Congress prevails. As said in New York v. Miln, 11 Pet. 102, 137, 9 L. ed. 648, 661:

> 'From this it appears that whilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit, although they may be the same, or so nearly the same as scarcely to be distinguishable from those adopted by Congress, acting under a different power, subject only, say the court, to this limitation, that, in the event of collision, the law of the state must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power.'

In Gulf, C. & S. F. R. Co. v. Hefley, 158 U.S. 98, 104 , 39 S. L. ed. 910, 912, 15 Sup. Ct. Rep. 802, 804, the rule is stated in these words:

> 'Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson v. New York (Henderson v. Wickham) 92 U.S. 259, 271 , 23 S. L. ed. 543, 548. 'Definitions of the police power must, however, be taken subject to the condition that

the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' New Orleans Gaslight Co. v. Louisiana Light &H. P. &Mfg. Co. 115 U.S. 650, 661 , 29 S. L. ed. 516, 520, 6 Sup. Ct. Rep. 252, 258. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined [213 U.S. 138, 147] by the Constitution, the latter must prevail.' Morgan's L. &T. R. &S. S. Co. v. Board of Health, 118 U.S. 455, 464 , 30 S. L. ed. 237, 241, 6 Sup. Ct. Rep. 1114, 1118.'

See also Lottery Case (Champion v. Ames) 188 U.S. 321 , 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

Findlaw Website, Fourteenth Amendment Annotations:

Police Power Defined and Limited .--The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, and morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state. 65

Because the police power is the least limitable of the exercises of government, such limitations as are applicable are not readily definable. These limitations can be determined, therefore, only through appropriate regard to the subject matter of the exercise of that power. 66 "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." 67 Insofar as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare. 68

A general rule often invoked is that if a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid. 69 Yet where mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use. 70 On the other hand, mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power." 71 Moreover, it is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking without due process of law. 72 Similarly, initial compliance with a regulation which is valid when adopted occasions no forfeiture of the right to protest when that regulation subsequently loses its validity by becoming confiscatory in its operation. 73

[Footnote 65] Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). See California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. Richmond, 226 U. S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58 -59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976).

[Footnote 66] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R. R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58 -59 (1915); Hadacheck v. Sebastian, 239 U. S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U. S. 613, 622 (1935).

[Footnote 67] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[Footnote 68] Liggett Co. v. Baldridge, 278 U.S. 105, 111 -12 (1928); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

[Footnote 69] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). See supra, pp. 1382-95.

[Footnote 70] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911).

[Footnote 71] Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).

[Footnote 72] New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).

[Footnote 73] Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931).

AT&T CORP. *et al. v.* IOWA UTILITIES BOARD *et al., 525 U.S. 366 (1999)*

"The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority. See, *e.g., Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992) ("presumption against the pre-emption of state police power regulations"); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) (requiring "clear and manifest" showing of congressional intent to supplant traditional state police powers)."

Leisy v. Hardin, 135 U.S. 100 (1890)

"By the tenth amendment, 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.' **Among the powers thus reserved to the several states is what is commonly called the 'police power,'-that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty, and crime. 'The police power belonging to the states in virtue of their general sovereignty,' said Mr. Justice STORY, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the states, and has never been conceded to the United States.'** Prigg v. Pennsylvania, 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire test is beyond the constitutional power of congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any state; but that it is within the constitutional power of a state to pass such a statute, even as to oils manufactured under letters patent from the United States. U. S. v. Dewitt, 9 Wall. 41; Patterson v. Kentucky, 97 U.S. 501 . [135 U.S. 100, 128] **The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public**

morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets. Slaughter-House Cases, 16 Wall. 36, 62, 87; Fertilizing Co. v. Hyde Park, 97 U.S. 659 ; Phalen v. Virginia, 8 How. 163, 168; Stone v. Mississippi, 101 U.S. 814 . **This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice WAITE, referring to earlier decisions to the same effect: 'No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' Stone v. Mississippi, 101 U.S. 814 , 819. See, also, Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U.S. 746, 753 , 4 S. Sup. Ct. Rep. 652; New Orleans Gas Co. v Louisiana Light Co., 115 U.S. 650, 672 , 6 S. Sup. Ct. Rep. 252; New Orleans v. Houston, 119 U.S. 265, 275 , 7 S. Sup. Ct. Rep. 198.**

"The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health, or the morals of the people. Gunpowder, for instance, is a subject of commerce, and of lawful use; yet, because of its explosive and dangerous quality, all admit that the state may regulate its keeping and sale. And there is no article the right of the state to control or to prohibit the sale or manufacture of which within its limits is better established than [135 U.S. 100, 129] intoxicating liquors. License Cases, 5 How. 504; Downham v. Alexandria Council, 10 Wall. 173; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U.S. 25 ; Tiernan v. Rinker, 102 U.S. 123 ; Foster v. Kansas, 112 U.S. 201 , 5 Sup. Ct. Rep. 8; Mugler v. Kansas and Kansas v. Ziebold, 123 U.S. 623 , 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U.S. 1 , 9 Sup. Ct. Rep. 6; Eilenbecker v. District Court, 134 U.S. 31 , ante, 424.

"In Beer Co. v. Massachusetts, above cited, this court, affirming the judgment of the supreme judicial court of Massachusetts, reported in 115 Mass. 153, held that a statute of the state, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the state had long before chartered, and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this court for its judgment were the following: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. **All rights are held subject to the police power of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise.** That discretion can no more be bargained away than the power itself. Since we have already held, in the case of Bartemeyer v. Iowa, that as a measure of police regulation, looking to the [135 U.S. 100, 130] preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the supreme court of Massachusetts.' 97 U.S. 32 , 33."

State of Wisconsin v. Pelican Insurance Company, 127 U.S. 265 (1888):

"By the law of England and of the United States the penal laws of a country do not reach beyond its own territory [127 U.S. 265, 290] except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they

must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheat. Int. Law, (8th Ed.) 113, 121. Chief Justice MARSHALL stated the rule in the most condensed form, as an incontrovertible maxim, 'the courts of no country execute the penal laws of another.' The Antelope, 10 Wheat. 66, 123. The only cases in which the courts of the United States have entertained suits by a foreign state have been to enforce demands of a strictly civil nature. The Sapphire, 11 Wall. 164; King of Spain v. Oliver, 2 Wash. C. C. 429, and Pet. C. C. 217, 276." [*State of Wisconsin v. Pelican Insurance Company*, 127 U.S. 265 (1888)]

In Re Quarles, 158 U.S. 532 (1895):

"**It is the duty and the right, not only of every peace officer of the United States, but of every citizen. to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.** It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen, is a privileged and con- [158 U.S. 532, 536] fidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. Vogel v. Gruaz, 110 U.S. 311 , 4 Sup. Ct. 12; U. S. v. Moses, 4 Wash. C. C. 726, Fed. Cas. No. 15,825; Worthington v. Scribner, 109 Mass. 487.

"**The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme within its sphere of action.** U. S. v. Logan, 144 U.S. 294 , 12 Sup. Ct. 617. Both are, within the concise definition of the chief justice in an earlier case, 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States.' In re Kemmler, 136 U.S. 436, 448 , 10 S. Sup. Ct. 930.

"The right of the private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground, just as do the rights of citizens voting and of officers elected, of which Mr. Justice Miller, speaking for this court, in Ex parte Yarbrough, above cited, said: 'The power in either case arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. **This duty does not rise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of congress and its president are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.**' 110 U.S. 662 , 4 Sup. Ct. 152.

"To leave to the several states the prosecution and punish- [158 U.S. 532, 537] ment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government. As was said by Chief Justice Marshall in McCulloch v. Maryland, and cannot be too often repeated: 'No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution.' 4 Wheat. 316, 424.

[...]

"**The necessary conclusion is that it is the right of every private citizen of the United States to inform a marshal of the United States or his deputy of a violation of the internal revenue laws of the United States; that this right is secured to the citizen by the constitution of the United States; and [158 U.S. 532, 538] that a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable under section 5508 of the Revised Statutes.**"

[In Re Quarles, 158 U.S. 532 (1895)]

Mugler v. Kansas, 123 U.S. 623 (1887):

The police power cannot go beyond the limit of what is necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and the legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform; and this, too, although the legislature is the judge in each case of the extent to which the evil is to be regulated or prohibited. Where the occupation is in itself immoral, there can be no question as to the right of the legislature. 2 Kent, Comm. 340. Nor is it denied that every one holds his property subject to the proper exercise of the police power. Dill. Mun. Corp. 136; Tied. Lim. Police Power, 122, 122a; Com. v. Tewksbury, 11 Metc. 55. Nor that the legislature can destroy vested rights in the proper exercise of this power. Coates v. Mayor of New York, 7 Cow. 585. But the unqualified statement that when the legislature has exercised its right of judging, by the enactment of a [626-Continued.]

prohibition, all other departments of the government are bound by the decision, which no court has a right to review, (Bish. St. Cr. 995,) cannot be true. The legislative power cannot authorize manifest injustice by positive enactment, or take away security for personal liberty or private property, for the protect on whereof government was established. Calder v. Bull, 3 Dall. 386. The state cannot deprive the citizen of the lawful use of his property if it does not injuriously effect others. Lake View v. Cemetery Co., 70 Ill. 191. The state cannot enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. Railway Co. v. City of Jacksonville, 67 Ill. 37. The constitutional guaranty of life, liberty, and pursuit of happiness is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public. Intoxicating Liquor Cases, (BREWER, J.,) 25 Kan. 765; Tenement- House Cigar Case, 98 N. Y. 98; Cooley, Const. Lim. (5th Ed.) 110, 445, 446. No proposition is more firmly established than that the citizen has the right to adopt and follow such lawful and industrial pursuit, not injurious to the community, as he may see fit. People v. Marx, 99 N. Y. 377, 386, 2 N. E. Rep. 29. The mere existence of a brewery in operation, or of beer therein in vats, or packages not intended for consumption in the state is not in any way detrimental to the safety, health, or morals of the people of Kansas; nor can it be said that there is anything immoral in the business of brewing, or in beer itself, as in gambling or lotteries. Stone v. Mississippi, 101 U.S. 814 .

There is no question that this enactment does in the sense of the law deprive appellees of their property. Pumpelly v. Green Bay Co., 13 Wall. 177; Munn v. Illinois, 94 U.S. 141 .

It is a fundamental principle that where a nuisance is to be abated, the abatement must be limited by its necessities, and no wanton injury must be committed. The remedy is to stop the use to which the building is put, not to tear down or destroy the structure itself. Babcock v. City of Buffalo, 56 N. Y. 268, affirming 1 Sheld. 317; Bridge Co. v. Paige, 83 N. Y. 188-190; Wood, Nuis. 738. The nuisance here is sale within the state. To that extent alone can the legislature authorize the nuisance to be abated or the property destroyed.

Nebia v. People of State of New York, 291 U.S. 502 (1934):

> And Chief Justice Taney said upon the same subject: 'But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.' 12
>
> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power,13 as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be [291 U.S. 502, 525] imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.
>
> [Footnote 12] License Cases, 5 How. 504, 583.

CITES BY TOPIC: federal zone

Great IRS Hoax, Section 4.10, version 2.87:

In 1818, the Supreme Court stated that:

> *"The exclusive jurisdiction which the United States have in forts and dock-yards ceded to them, is derived from the express assent of the states by whom the cessions are made. It could be derived in no other manner; because without it, the authority of the state would be supreme and exclusive therein," 3 Wheat., at 350, 351.*
>
> ***[U.S. v. Bevans**, 16 U.S. 336 (1818), reaff. 19 U.S.C.A., section 1401(h).]*

The above case establishes that the federal government only has jurisdiction over federal property that it owns within the states or coming under Article 1, Section 8, Clause 17 of the U.S. Constitution. In other places, it has no legislative or judicial jurisdiction. Places coming under the sovereignty or exclusive legislative jurisdiction of the federal government under 1:8:17 of the Constitution include the District of Columbia, federal territories, and enclaves within the state and we call these areas "the federal zone" throughout this book. When Congress is operating in its exclusive jurisdiction over the "federal zone", it is important to remember that the U.S. Government has full authority to enact legislation as private acts pertaining to its boundaries, and it is not a state of the union of States because it exists solely by virtue of the compact/constitution that created it. The U.S. Constitution does not say that the District of Columbia must guarantee a Republican form of Government to its own subject citizens within its territories. (See ***Hepburn & Dundas v. Ellzey***, 6 US. 445(1805); ***Glaeser v. Acacia Mut. Life Ass'n.***, 55 F. Supp., 925 (1944); ***Long v. District of Columbia***, 820 F.2d 409 (D.C. Cir. 1987); ***Americana of Puerto Rico, Inc. v. Kaplus***, 368 F.2d 431 (1966), among others).

Within the federal zone, there are areas where the Bill of Rights (the first ten amendments) applies and areas where it does not. The best place to go for a clarification of where it applies is the case of ***Downes v. Bidwell***, 182 U.S. 244 (1901). Below are quotes from that case establishing that we have two national governments:

> *"The idea prevails with some -- indeed, it found expression in arguments at the bar -- that we have in this country substantially or practically two national governments; one, to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise."*
>
> ***Downes v. Bidwell**, 182 U.S. 244 (1901), supra.*

The U.S. Constitution limits federal government jurisdiction over the state Citizens using the Bill of Rights. *The federal government has unlimited powers over federal citizens within territories of the United States because it is acting outside of the Constitution*. Administrative laws are private acts, also called "special law", and are not applicable to state Citizens. The Internal Revenue Code is administrative law. Here are some more quotes from ***Downes*** that establish our point:

> *"Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98, was an action of trespass or, as appears by the original record, replevin, brought in the circuit court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. at L. 216, chap. 60.* ***It was insisted that Congress could act in a double capacity: in one as legislating [182 U.S. 244, 260] for the states; in the other as a local legislature for the District of Columbia.*** *In the latter character, it was admitted that the power of levying direct taxes might be exercised,* ***but for District purposes only****, as a state legislature might tax for state purposes; but that it could not legislate for the District under art. 1, 8, giving to Congress the power 'to lay and collect taxes, imposts, and excises,' which 'shall be uniform throughout the United States,'* ***inasmuch as the District was no part of the United States****. It was held that the grant of this power was a general*

one without limitation as to place, and consequently extended to all places over which the government extends; and that it extended to the District of Columbia as a constituent part of the United States. The fact that art. 1 , 2, declares that 'representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers' furnished a standard by which taxes were apportioned, but not to exempt any part of the country from their operation. 'The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; ***but that direct taxation, in its application to states, shall be apportioned to numbers.'*** *That art. 1, 9, 4, declaring that direct taxes shall be laid in proportion to the census, was applicable to the District of Columbia, 'and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.' It was further held that the words of the 9th section did not 'in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the states. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them.'"*

*"**There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia**. This District had been a part of the states of Maryland and [182 U.S. 244, 261] Virginia. It had been subject to the Constitution, and was a part of the United States[***]. **The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void.** If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government."*

[. . .]

"Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect [182 U.S. 244, 279] that ***the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.*** *Notwithstanding its duty to 'guarantee to every state in this Union a republican form of government' (art. 4, 4), by which we understand, according to the definition of Webster, 'a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend to Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights."* ***Downes v. Bidwell***, *182 U.S. 244 (1901)*

Based on the above and further reading of ***Downes***, we can reach the following conclusions about the applicability of the Constitution within United States the country:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

2. That territories are not states within the meaning of Rev. Stat. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;
3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;
4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;
5. That *the Constitution does not apply to foreign countries or to trials therein conducted*, and that Congress may lawfully [182 U.S. 244, 271] provide for such trials before consular tribunals, without the intervention of a grand or petit jury;
6. That *where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith, or retract the applicability of the Constitution to those territories.*
7. That Article 1, Section 8, Clause 1 of the Constitution authorizing duties, imposts, and excises (indirect taxes) applies throughout the sovereign 50 states, and not just on federal land. Here is the quote from ***Downes*** confirming that:

> *"In delivering the opinion [Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98], however, the Chief Justice made certain observations which have occasioned some embarrassment in other cases. '**The power,' said he, 'to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States.** Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. **Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends through- [182 U.S. 244, 262] out the United States.' So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case."***

8. *Once a state is accepted into the union of states united under the Constitution, all lands in the state at that time are then covered by the Constitution in perpetuity excepting land under federal jurisdiction (enclaves). If the federal government then chooses to purchase state lands back after the state joins the union to set up a federal enclave, such as a military base or federal courthouse or national park, than the land that facility resides on that formerly was governed by the Constitution continues in perpetuity to be governed by the Constitution, even though it then becomes subject to the exclusive legislative jurisdiction of the federal government under Article 1, Section 8, Clause 17 of the Constitution.*

9. States east of the Mississippi had very little land that continued under federal jurisdiction at the time they were admitted to the union as states of the Union. Therefore, nearly the entire state in these cases is covered by the Constitution. The opposite is true in states west of the Mississippi, where large portions continued under federal jurisdiction after these territories were admitted as states. Those areas that were federal enclaves at the date of admission which continue to this day to be under federal jurisdiction are not subject to the Constitution or the Bill of Rights.
*10. Direct federal taxes and rights are mutually exclusive. You will note that when a new state is admitted to the Union, its lands then irrevocably have the Constitution attached to them and are covered by the Bill of Rights while at the same time, a new requirement to apportion all direct taxes is added in the former territory. The reason is that once people have **rights**, they become **sovereign** and at that point, it becomes impossible for the federal government under the Constitutional protections to encroach on those rights by trying to collect direct taxes because direct taxes then **must** be apportioned to each state as required under Article 1, Section 2, Clause 3, and Article 1, Section 9, Clause 4 of the Constitution. This is consistent with the Supreme Court's ruling in Knowlton v. Moore, 178 U.S. 41 (1900):*

> *"**Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights**; indirect taxes are levied upon the happening of an event as an exchange." [Knowlton v. Moore, 178 U.S. 41 (1900)]*

We now summarize the above findings graphically to make them *crystal clear* and useful in front of a judge and jury *in court*:

Table 4-3: Constitutional rights throughout the United States* (country)

#	Type of property	Constitutional Rights	Example	Authorities
1	Territories	No	Puerto Rico, Virgin Islands, American Samoa, etc.	1. ***Downes v. Bidwell***, 182 U.S. 244 (1901); 2. ***M'Culloch v. Maryland***, 4 Wheat. 316, 422, 4 L. ed. 579, 605, and in United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573
2	Federal enclaves *within* states:	NA	NA	NA
2.1	Ceded to federal gov. after joining union	Yes	Federal courthouses	***Downes v. Bidwell***, 182 U.S. 244 (1901);
2.2	Also enclaves at the time of admission	No	Indian reservations	***Downes v. Bidwell***, 182 U.S. 244 (1901);
3	Sovereign states	Yes	California, Texas, etc.	***Downes v. Bidwell***, 182 U.S. 244 (1901);
4	District of Columbia	Yes	District of Columbia	1. ***Downes v. Bidwell***, 182 U.S. 244 (1901). 2. ***Loughborough v. Blake***, 18 U.S. 317, 5 Wheat. 317, 5 L. ed. 98 (1820)
5	Foreign countries (nations)	No	Japan	1. ***Downes v. Bidwell***, 182 U.S. 244 (1901). 2. ***Cook v. Tait***, 265 U.S. 47 (1924) 3. ***M'Culloch v. Maryland***, 4 Wheat. 316, 422, 4 L. ed. 579, 605 (1819) 4. ***United States v. Gratiot***, 14 Pet. 526, 10 L. ed. 573 5. ***Springville v. Thomas***, 166 U.S. 707 , 41 L. ed. 1172, 17 Sup. Ct. Rep. 717 (1897)

IMPORTANT: Those areas listed above where there are no Constitutional rights are the *only* areas where direct income taxes under Subtitle A can be applied to individuals without apportionment and without violating (clauses 1:9:4 and 1:2:3 of) the Constitution. Everyplace else, it isn't a tax, but a *donation*.

The federal zone, or federal "United States**", is the area of land over which the Congress exercises an unrestricted, exclusive legislative jurisdiction. The Congress, however, does *not* have unrestricted, exclusive legislative jurisdiction over any of the 50 sovereign states. It is bound by the chains of the Constitution. This point is so very important, it bears repeating throughout the remaining chapters of this book and it also explains why the use of the word "State" in the Internal Revenue Code doesn't by default (26 U.S.C. §7701(a)(9) and (10)) mean one of the 50 sovereign states of the union. As in the apportionment rule for direct taxes and the uniformity rule for indirect taxes, Congress cannot join or divide any of the 50 sovereign states without the explicit approval of the Legislatures of the state(s) involved. This means that Congress cannot unilaterally delegate such a power to the President. Congress cannot lawfully exercise (nor delegate) a power which it simply does not have.

For further evidence of what constitutes the "federal zone" and a "State" within the IRC, we refer you to the fascinating analysis found in section 5.6.12.2 entitled "The definition of the word 'state'", key to unlocking Congress' ruse and the limited application of the Internal Revenue Code".

Last revision: April 17, 2006 10:11 AM

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CITES BY TOPIC: individual

This term individual is used in sections 26 U.S.C. §1 and 26 U.S.C. §6012(a). It is never defined anywhere in the I.R.C. The reason it is not defined is that it would give away the IRS' ruse. Therefore, we have to look in the legal dictionary for the definition. Below is the definition found in Black's Law Dictionary, Sixth Edition, on page 773:

> ***Individual***. *As a noun, this term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association;* ***but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include [be limited to] artificial persons.***

Note that this definition above does not necessarily imply a natural (biological) person. Therefore, the Internal Revenue Code cannot be said to necessarily apply to natural persons. Here is the proper definition of "individual" in the context of the IRS form 1040 and within the meaning of the code, as we understand it:

> *Individual*
>
> *An artificial federally-chartered entity, meaning a federal (but not state) chartered corporation or partnership or trust. Such an entity is a citizen of the "United States" because it must have a physical presence in the District of Columbia to be subject to the exclusive legislative or territorial jurisdiction of the United States under Article 1, Section 8, Clause 17 of the U.S. Constitution. This "individual" is NOT a natural person with income from outside the district (federal) United States who is living and working for a private employer in the 50 united States of America because of the restrictions on direct taxes imposed by Article 1, Section 9, Clause 4, and Article 1, Section 2, Clause 3 of the U.S. Constitution..[1]*

We will now examine the definition of "individual" found in 26 CFR §1.1441-1(c)(3):

> ***26 CFR 1.1441-1 Requirement for the deduction and withholding of tax on payments to foreign persons.***
>
> *(c) Definitions*
>
> *(3) Individual.*
>
> *(i) Alien individual.*
>
> ***The term alien individual means an individual who is not a citizen or a national of the United States. See Sec. 1.1-1(c).***
>
> *(ii) Nonresident alien individual.*
>
> *The term nonresident alien individual means a person described in section 7701(b)(1)(B), an alien individual who is a resident of a foreign country under the residence article of an income tax treaty and Sec. 301.7701(b)-7(a)(1) of this chapter, or an alien individual who is a resident of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa as determined under Sec. 301.7701(b)-1(d) of this chapter. An alien individual who has made an election under section 6013 (g) or (h) to be treated as a resident of the United States is nevertheless treated as a nonresident alien individual for purposes of withholding under chapter 3 of the Code and the regulations thereunder.*

The above definition ought to raise some BIG red flags! First of all, if you live in the [federal] United States** as a natural person, you aren't an "individual" because the definition of *"individual" doesn't include citizens or residents of*

*the United States***! This is the ONLY definition of the term "individual" found ANYWHERE in either the Internal Revenue Code or the 26 CFR Regulations. Therefore, the tax code can't apply to you even if you claim to be a U.S.** citizen or a U.S.** resident! This is also consistent with our findings earlier. It also explains why a U.S. citizen is defined as someone who lives in the Virgin Islands, Guam, Puerto Rico, or American Samoa, as follows:

> *26 CFR 31.3121(e) State, United States, and citizen.*
>
> *(b)…The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.*

The definition for "individual" that the government wants you to *incorrectly* ***assume***, however, is that found in 5 U.S.C. §552 (a)(2):

> *(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;*

But this definition of "individual" is superceded by the only definition of "individual" found in the Regulations for taxes in 26 CFR 1.1441-1 above. You therefore can't be a "individual" who can be the "person" against whom the income tax is imposed under 26 U.S.C. §1 unless you either reside OUTSIDE the "United States**" under 26 CFR § 1.1441-1(c)(3) or you reside INSIDE the United States** and are not a U.S.** citizen. That's why they created a definition of "U.S. citizen" that means you are living *outside* the United States (in the Virgin Islands) so they can "pretend" that you are taxable! That way, even when you tell them you live in the "United States" by giving them an address in the 50 states on your tax return, they can still claim that you live in Puerto Rico or the Virgin Islands because of your status as a "U.S. citizen"! This whole scheme can be confirmed by ordering a copy of your Individual Master File (IMF) from the IRS and looking at the transaction codes on the IMF. If you look at your IMF and you have been filing 1040 forms for a while, chances are your record reflects that you reside in the Virgin Islands, even if you really live in one of the 50 states outside the federal zone! That's why the IRS made the Publication 6209, which is used for decoding the IMF file, "For Official Use Only", which is short for "Don't let Citizens get their hands on this at all costs!". They know they are committing fraud and they don't want you, the Citizen, to know the horrible truth and expose that fraud, because then they lose their ability to claim "plausible deniability".

I bet this all sounds pretty crazy to you, right, but I swear to God it's the truth! These are the kinds of sneaky tricks that IRS lawyers make their living dreaming up in order to make the illegal fraud and extortion called the income tax look more "civilized" and believable and well hidden from public view. If they wanted it in public view, they would have put the definitions of "U.S. citizen" and "individual" in the Internal Revenue Code right? But they instead buried it deep inside regulations that few Citizens ever view and only the agency itself usually looks at because they wanted to hide it!

The above definitions of "Alien individual" and "Nonresident alien individual" in 26 CFR §1.1441(c)(3) can also seem a little confusing initially. You will find out that we suggest to people later in this book (in section 5.6.9 to be exact) that they should renounce their "U.S.** citizenship" and become "U.S.*** nationals". However, looking at 26 CFR 1.1441-1(c)(3)(i) above leads one to believe that they *cannot* be a nonresident alien if they are a U.S. national. However, 26 U.S.C. 7701 (b)(1)(B) reveals that:

> *(B) Nonresident alien*
>
> *An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).*

A person can therefore be a "U.S. national" and not a "U.S. citizen" and live outside the federal zone in a state and be a nonresident alien individual. Our guidance is sound and based on the law.

Even if you believe you are an “individual”, which you are not as a “natural person”, you *still* don’t have any income that equates to a taxable source or situs identified in 26 CFR 1.861-8(f), and so you couldn’t be liable for a tax due even if you wanted to.

---

5 U.S.C. §552a(2) Records maintained on individuals

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

CITES BY TOPIC: territory

86 C.J.S. [Corpus, Juris, Secundum, Legal Encyclopedia], Territories:

"§1. Definitions, Nature, and Distinctions

"The word 'territory,' when used to designate a political organization has a distinctive, fixed, and legal meaning under the political institutions of the United States, and does not necessarily include all the territorial possessions of the United States, but may include only the portions thereof which are organized and exercise governmental functions under act of congress."

"While the term 'territory' is often loosely used, and has even been construed to include municipal subdivisions of a territory, and 'territories of the' United States is sometimes used to refer to the entire domain over which the United States exercises dominion, the word 'territory,' when used to designate a political organization, has a distinctive, fixed, and legal meaning under the political institutions of the United States, and the term 'territory' or 'territories' does not necessarily include only a portion or the portions thereof which are organized and exercise government functions under acts of congress. The term 'territories' has been defined to be political subdivisions of the outlying dominion of the United States, and in this sense the term 'territory' is not a description of a definite area of land but of a political unit governing and being governed as such. The question whether a particular subdivision or entity is a territory is not determined by the particular form of government with which it is, more or less temporarily, invested.

"Territories' or 'territory' as including 'state' or 'states." While the term 'territories of the' United States may, under certain circumstances, include the states of the Union, as used in the federal Constitution and in ordinary acts of congress "territory" does not include a foreign state.

"As used in this title, the term 'territories' generally refers to the political subdivisions created by congress, and not within the boundaries of any of the several states."

U.S. Code Title 48: Territories and Insular Possessions

Bouvier's Law Dictionary, 1856:

"**TERRITORY**. Apart of a country, separated from the rest, and subject to a particular jurisdiction. The word is derived from terreo, and is so called because the magistrate within his jurisdiction has the power of inspiring a salutary fear. Dictum cat ab eo quod magistratus intra fines ejus terrendi jus habet. Henrion de Pansy, Auth. Judiciare, 98. In speaking of the ecclesiastical jurisdictions, Francis Duaren observes, that the ecclesiastics are said not to have territory, nor the power of arrest or removal, and are not unlike the Roman magistrates of whom Gellius says vocationem habebant non prehensionem. De Sacris Eccl. Minist. lib. 1, cap. 4. In the sense it is used in the constitution of the United States, it signifies a portion of the country subject to and belonging to the United States, which is not within the boundary of any of them. 2. The constitution of the United States, art. 4, s. 3, provides, that "the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States; and nothing in this constitution shall be construed, so as to preclude the claims of the United States or of any state." 3. Congress possesses the power to erect territorial governments within the territory of the United States; the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, 3 Story's L. U. S. 2073, under which any part of it has been settled. Story on the Const. Sec. 1322; Rawle on the Const: 237; 1 Kent's Com. 243, 359; 1 Pet. S. C. Rep. 511, 542, 517. 4. The only organized territories of the United States are Oregon, Minnesota, New Mexico and Utah. Vide Courts of the United States."

Black's Law Dictionary, Sixth Edition, page 1473:

"**Territory**: A part of a country separated from the rest, and subject to a particular jurisdiction. Geographical area under the jurisdiction of another country or sovereign power.

A portion of the United States not within the limits of any state, which has not yet been admitted as a state of the Union, but is organized with a separate legislature, and with executive and judicial powers appointed by the President."

Ballantine's Law Dictionary:

"**Territory**: 1. A geographical region over which a nation exercises sovereignty, but whose inhabitants do not enjoy political, social or legal parity with the inhabitants of other regions which are constitutional components of the nation. With respect for the United States, for example, Guam or the Virgin Islands as opposed to New York, California, or Texas."

Cunard S. S. Co. v. Mellon, 262 U.S. 100; 43 S.Ct. 504 (1923):

"**Various meanings are sought to be attributed to the term 'territory' in the phrase 'the United States and all territory subject to the jurisdiction thereof.' We are of opinion that it means the regional areas- of land and adjacent waters-over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense-that it refers to areas or districts having fixity of location and recognized boundaries**. See United States v. Bevans, 3 Wheat. 336, 390.

"It now is settled in the United States and recognized elsewhere that **the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.** Church v. Hubbart, 2 Cranch, 187, 234; The Ann, 1 Fed. Cas. No. 397, p. 926; United States v. Smiley, 27 Fed. Cas. No. 16317, p. 1132; Manchester v. Massachusetts, 139 U.S. 240, 257 , 258 S., 11 Sup. Ct. 559; Louisiana v. Mississippi, 202 U.S. 1, 52 , 26 S. Sup. Ct. 408; 1 Kent's Com. (12th Ed.) *29; 1 Moore, [262 U.S. 100, 123] International Law Digest, 145; 1 Hyde, International Law, 141, 142, 154; Wilson, International Law (8th Ed.) 54; Westlake, International Law (2d Ed.) p. 187, et seq; Wheaton, International Law (5th Eng. Ed. [Phillipson]) p. 282; 1 Oppenheim International Law (3d Ed.) 185-189, 252. This, we hold, is the territory which the amendment designates as its field of operation; and the designation is not of a part of this territory but of 'all' of it."

U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Amendment Text | Annotations

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any

State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Annotations

- Liberty of Contract
  - Regulatory Labor Laws Generally
  - Laws Regulating Hours of Labor
  - Laws Regulating Labor in Mines
  - Laws Prohibiting Employment of Children in Hazardous Occupations
  - Laws Regulating Payment of Wages
  - Minimum Wage Laws
  - Workers' Compensation Laws
  - Collective Bargaining
- Regulation of Business Enterprises: Rates, Charges, and Conditions of Service
  - "Business Affected With a Public Interest"
  - Nebbia v. New York
- Judicial Review of Publicly Determined Rates and Charges
  - Development
  - Limitations on Judicial Review
  - The Ben Avon Case
  - History of the Valuation Question
- Regulation of Public Utilities (Other Than Rates)
  - In General
  - Compulsory Expenditures: Grade Crossings, and the Like
  - Compellable Services

- **Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection**
  - Generally
  - Criminal Procedure
  - The Criminal Sentence
  - Voting
  - Access to Courts
  - Educational Opportunity
  - Abortion
- **Section 2. Apportionment of Representation**
- **Sections 3 and 4. Disqualification and Public Debt**
- **Section 5. Enforcement**
- **Generally**
- **State Action**
- **Congressional Definition of Fourteenth Amendment Rights**

'); } //

Form **1040** Department of the Treasury—Internal Revenue Service **U.S. Individual Income Tax Return** **2001** (99) IRS Use Only—Do not write or staple in this space.

OMB No. 1545-0074

Label (See instructions on page 19.) **Use the IRS label.** Otherwise, please print or type.

LABEL HERE

For the year Jan. 1–Dec. 31, 2001, or other tax year beginning , 2001, ending , 20

Your first name and initial	Last name	**Your social security number**
If a joint return, spouse's first name and initial	Last name	**Spouse's social security number**
Home address (number and street). If you have a P.O. box, see page 19.	Apt. no.	
City, town or post office, state, and ZIP code. If you have a foreign address, see page 19.		

Important! You **must** enter your SSN(s) above.

Presidential Election Campaign (See page 19.)

Note. Checking "Yes" will not change your tax or reduce your refund. Do you, or your spouse if filing a joint return, want $3 to go to this fund? . . . ▶

You	Spouse
☐ Yes ☐ No	☐ Yes ☐ No

Filing Status

Check only one box.

1 ☐ Single

2 ☐ Married filing joint return (even if only one had income)

3 ☐ Married filing separate return. Enter spouse's social security no. above and full name here. ▶

4 ☐ Head of household (with qualifying person). (See page 19.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶

5 ☐ Qualifying widow(er) with dependent child (year spouse died ▶). (See page 19.)

Exemptions

6a ☐ **Yourself.** If your parent (or someone else) can claim you as a dependent on his or her tax return, **do not** check box 6a . . . .

b ☐ **Spouse** . . . .

c **Dependents:**

(1) First name Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) ✓ if qualifying child for child tax credit (see page 20)
			☐
			☐
			☐
			☐
			☐
			☐

If more than six dependents, see page 20.

No. of boxes checked on 6a and 6b

No. of your children on 6c who:
- **lived with you**
- **did not live with you due to divorce or separation (see page 20)**

Dependents on 6c not entered above

Add numbers entered on lines above ▶

d Total number of exemptions claimed 6d

Income

Attach Forms W-2 and W-2G here. Also attach Form(s) 1099-R if tax was withheld.

If you did not get a W-2, see page 21.

Enclose, but do not attach, any payment. Also, please use **Form 1040-V.**

7	Wages, salaries, tips, etc. Attach Form(s) W-2		7
8a	**Taxable** interest. Attach Schedule B if required		8a
b	**Tax-exempt** interest. **Do not** include on line 8a	8b	
9	Ordinary dividends. Attach Schedule B if required		9
10	Taxable refunds, credits, or offsets of state and local income taxes (see page 22)		10
11	Alimony received		11
12	Business income or (loss). Attach Schedule C or C-EZ		12
13	Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶ ☐		13
14	Other gains or (losses). Attach Form 4797		14
15a	Total IRA distributions . 15a	b Taxable amount (see page 23)	15b
16a	Total pensions and annuities 16a	b Taxable amount (see page 23)	16b
17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E		17
18	Farm income or (loss). Attach Schedule F		18
19	Unemployment compensation		19
20a	Social security benefits . 20a	b Taxable amount (see page 25)	20b
21	Other income. List type and amount (see page 27)		21
22	Add the amounts in the far right column for lines 7 through 21. This is your **total income** ▶		22

Adjusted Gross Income

23	IRA deduction (see page 27)	23	
24	Student loan interest deduction (see page 28)	24	
25	Archer MSA deduction. Attach Form 8853	25	
26	Moving expenses. Attach Form 3903	26	
27	One-half of self-employment tax. Attach Schedule SE	27	
28	Self-employed health insurance deduction (see page 30)	28	
29	Self-employed SEP, SIMPLE, and qualified plans	29	
30	Penalty on early withdrawal of savings	30	
31a	Alimony paid b Recipient's SSN ▶	31a	
32	Add lines 23 through 31a		32
33	Subtract line 32 from line 22. This is your **adjusted gross income** ▶		33

Tax and Credits

Standard Deduction for—

- People who checked any box on line 35a or 35b **or** who can be claimed as a dependent, see page 31.
- All others:

Single, $4,550

Head of household, $6,650

Married filing jointly or Qualifying widow(er), $7,600

Married filing separately, $3,800

34	Amount from line 33 (adjusted gross income)			34
35a	Check if: ☐ **You** were 65 or older, ☐ Blind; ☐ **Spouse** was 65 or older, ☐ Blind. Add the number of boxes checked above and enter the total here ▶ **35a**			
b	If you are married filing separately and your spouse itemizes deductions, or you were a dual-status alien, see page 31 and check here ▶ **35b** ☐			
36	**Itemized deductions** (from Schedule A) **or** your **standard deduction** (see left margin)			36
37	Subtract line 36 from line 34			37
38	If line 34 is $99,725 or less, multiply $2,900 by the total number of exemptions claimed on line 6d. If line 34 is over $99,725, see the worksheet on page 32			38
39	**Taxable income.** Subtract line 38 from line 37. If line 38 is more than line 37, enter -0-			39
40	**Tax** (see page 33). Check if any tax is from **a** ☐ Form(s) 8814 **b** ☐ Form 4972			40
41	**Alternative minimum tax** (see page 34). Attach Form 6251			41
42	Add lines 40 and 41 ▶			42
43	Foreign tax credit. Attach Form 1116 if required	43		
44	Credit for child and dependent care expenses. Attach Form 2441	44		
45	Credit for the elderly or the disabled. Attach Schedule R	45		
46	Education credits. Attach Form 8863	46		
47	Rate reduction credit. See the worksheet on page 36	47		
48	Child tax credit (see page 37)	48		
49	Adoption credit. Attach Form 8839	49		
50	Other credits from: **a** ☐ Form 3800 **b** ☐ Form 8396 **c** ☐ Form 8801 **d** ☐ Form (specify) _____	50		
51	Add lines 43 through 50. These are your **total credits**			51
52	Subtract line 51 from line 42. If line 51 is more than line 42, enter -0- ▶			52

Other Taxes

53	Self-employment tax. Attach Schedule SE			53
54	Social security and Medicare tax on tip income not reported to employer. Attach Form 4137			54
55	Tax on qualified plans, including IRAs, and other tax-favored accounts. Attach Form 5329 if required			55
56	Advance earned income credit payments from Form(s) W-2			56
57	Household employment taxes. Attach Schedule H			57
58	Add lines 52 through 57. This is your **total tax** ▶			58

Payments

If you have a qualifying child, attach Schedule EIC.

59	Federal income tax withheld from Forms W-2 and 1099	59		
60	2001 estimated tax payments and amount applied from 2000 return	60		
61a	**Earned income credit (EIC)**	61a		
b	Nontaxable earned income **61b**			
62	Excess social security and RRTA tax withheld (see page 51)	62		
63	Additional child tax credit. Attach Form 8812	63		
64	Amount paid with request for extension to file (see page 51)	64		
65	Other payments. Check if from **a** ☐ Form 2439 **b** ☐ Form 4136	65		
66	Add lines 59, 60, 61a, and 62 through 65. These are your **total payments** ▶			66

Refund

Direct deposit? See page 51 and fill in 68b, 68c, and 68d.

67	If line 66 is more than line 58, subtract line 58 from line 66. This is the amount you **overpaid**			67
68a	Amount of line 67 you want **refunded to you** ▶			68a
▶ b	Routing number ▶ **c** Type: ☐ Checking ☐ Savings			
▶ d	Account number			
69	Amount of line 67 you want **applied to your 2002 estimated tax** ▶	69		

Amount You Owe

70	**Amount you owe.** Subtract line 66 from line 58. For details on how to pay, see page 52 ▶			70
71	Estimated tax penalty. Also include on line 70	71		

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see page 53)? ☐ **Yes.** Complete the following. ☐ **No**

Designee's name ▶ Phone no. ▶ ( ) Personal identification number (PIN) ▶

Sign Here

Joint return? See page 19.

Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	Daytime phone number
			( )
Spouse's signature. If a joint return, **both** must sign.	Date	Spouse's occupation	

Paid Preparer's Use Only

Preparer's signature	Date	Check if self-employed ☐	Preparer's SSN or PTIN
Firm's name (or yours if self-employed), address, and ZIP code		EIN	
		Phone no. ( )	

CITES BY TOPIC: U.S. person

TITLE 26 > Subtitle F > CHAPTER 79 > Sec. 7701.
Sec. 7701. - Definitions

(a)(30) United States person
The term "United States person" means -
(A) a citizen or resident of the United States,
(B) a domestic partnership,
(C) a domestic corporation,
(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and
(E) any trust if -
(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and
(ii) one or more United States persons have the authority to control all substantial decisions of the trust.

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26 CFR - CHAPTER I - PART 301
§301.6109-1 Identifying numbers

(b) Requirement to furnish one's own number -- (1) U.S. persons. Every U.S. person who makes under this title a return, statement, or other document must furnish **its** [this is a corporation, not a "he" or "she"] own taxpayer identifying number as required by the forms and the accompanying instructions.

Form **1040NR**
Department of the Treasury
Internal Revenue Service

U.S. Nonresident Alien Income Tax Return

For the year January 1–December 31, 2005, or other tax year beginning , 2005, and ending , 20

OMB No. 1545-0074

2005

Please print or type.

Your first name and initial	Last name	Identifying number (see page 8 of inst.)
Present home address (number, street, and apt. no., or rural route). If you have a P.O. box, see page 8.		Check if: ☐ Individual ☐ Estate or Trust
City, town or post office, state, and ZIP code. If you have a foreign address, see page 8.		For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see page 30.
Country ▶	Of what country were you a **citizen** or national during the tax year? ▶	
Give address **outside the United States** to which you want any refund check mailed. If same as above, write "Same."	Give address in the country where you are a **permanent resident.** If same as above, write "Same."	

Attach Forms W-2 here. Also attach Form(s) 1099-R if tax was withheld.

Filing Status and Exemptions for Individuals (see page 8)

Filing status. Check only one box (1–6 below).

		7a Yourself	7b Spouse
1	☐ Single resident of Canada or Mexico, or a single U.S. national		
2	☐ Other single nonresident alien		
3	☐ Married resident of Canada or Mexico, or a married U.S. national		
4	☐ Married resident of Japan (see page 9) or the Republic of Korea		
5	☐ Other married nonresident alien		
6	☐ Qualifying widow(er) with dependent child (see page 9)		

If you check box 7b, enter your spouse's identifying number ▶

Caution: Do not check box 7a if your parent (or someone else) can claim you as a dependent.
Do not check box 7b if your spouse had any U.S. gross income.

No. of boxes checked on 7a and 7b ▶

No. of children on 7c who:
- **lived with you** ▶
- **did not live with you due to divorce or separation** ▶

Dependents on 7c not entered above ▶

Add numbers entered on lines above ▶

7c **Dependents:** (see page 9) (1) First name / Last name	(2) Dependent's identifying number	(3) Dependent's relationship to you	(4) ✓ if qualifying child for child tax credit (see page 9)
			☐
			☐
			☐
			☐

d Total number of exemptions claimed

Enclose, but do not attach, any payment.

Income Effectively Connected With U.S. Trade/Business

8	Wages, salaries, tips, etc. Attach Form(s) W-2		8
9a	**Taxable** interest		9a
b	**Tax-exempt** interest. **Do not** include on line 9a	9b	
10a	Ordinary dividends		10a
b	Qualified dividends (see page 11)	10b	
11	Taxable refunds, credits, or offsets of state and local income taxes (see page 11)		11
12	Scholarship and fellowship grants. Attach Form(s) 1042-S or required statement (see page 11)		12
13	Business income or (loss). Attach Schedule C or C-EZ (Form 1040)		13
14	Capital gain or (loss). Attach Schedule D (Form 1040) if required. If not required, check here ☐		14
15	Other gains or (losses). Attach Form 4797		15
16a	IRA distributions 16a	**16b** Taxable amount (see page 12)	16b
17a	Pensions and annuities 17a	**17b** Taxable amount (see page 13)	17b
18	Rental real estate, royalties, partnerships, trusts, etc. Attach Schedule E (Form 1040)		18
19	Farm income or (loss). Attach Schedule F (Form 1040)		19
20	Unemployment compensation		20
21	Other income. List type and amount (see page 14)		21
22	Total income exempt by a treaty from page 5, Item M	22	
23	Add lines 8, 9a, 10a, 11–15, 16b, and 17b–21. This is your **total effectively connected income** ▶		23

Adjusted Gross Income

24	Educator expenses (see page 14)	24	
25	Health savings account deduction. Attach Form 8889	25	
26	Moving expenses. Attach Form 3903	26	
27	Self-employed SEP, SIMPLE, and qualified plans	27	
28	Self-employed health insurance deduction (see page 15)	28	
29	Penalty on early withdrawal of savings	29	
30	Scholarship and fellowship grants excluded	30	
31	IRA deduction (see page 15)	31	
32	Student loan interest deduction (see page 16)	32	
33	Domestic production activities deduction. Attach Form 8903	33	
34	Add lines 24 through 33		34
35	Subtract line 34 from line 23. Enter here and on line 36. This is your **adjusted gross income** ▶		35

Tax and Credits

36	Amount from line 35 (adjusted gross income)			36	
37	**Itemized deductions** from page 3, Schedule A, line 17			37	
38	Subtract line 37 from line 36			38	
39	Exemptions (see page 17)			39	
40	**Taxable income.** Subtract line 39 from line 38. If line 39 is more than line 38, enter -0-			40	
41	**Tax** (see page 17). Check if any tax is from: **a** ☐ Form(s) 8814 **b** ☐ Form 4972			41	
42	**Alternative minimum tax** (see page 18). Attach Form 6251			42	
43	Add lines 41 and 42 ▶			43	
44	Foreign tax credit. Attach Form 1116, if required	44			
45	Credit for child and dependent care expenses. Attach Form 2441	45			
46	Retirement savings contributions credit. Attach Form 8880	46			
47	Child tax credit (see page 19). Attach Form 8901 if required	47			
48	Adoption credit. Attach Form 8839	48			
49	Credits from: **a** ☐ Form 8396 **b** ☐ Form 8859	49			
50	Other credits. Check applicable box(es): **a** ☐ Form 3800 **b** ☐ Form 8801 **c** ☐ Form _____	50			
51	Add lines 44 through 50. These are your **total credits**			51	
52	Subtract line 51 from line 43. If line 51 is more than line 43, enter -0- ▶			52	

Other Taxes

53	Tax on income not effectively connected with a U.S. trade or business from page 4, line 88			53	
54	Social security and Medicare tax on tip income not reported to employer. Attach Form 4137			54	
55	Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required			55	
56	Transportation tax (see page 21)			56	
57	Household employment taxes. Attach Schedule H (Form 1040).			57	
58	Add lines 52 through 57. This is your **total tax** ▶			58	

Payments

59	Federal income tax withheld from Forms W-2, 1099, 1042-S, etc.	59			
60	2005 estimated tax payments and amount applied from 2004 return	60			
61	Excess social security and tier 1 RRTA tax withheld (see page 22)	61			
62	Additional child tax credit. Attach Form 8812	62			
63	Amount paid with Form 4868 (request for extension)	63			
64	Other payments from: **a** ☐ Form 2439 **b** ☐ Form 4136 **c** ☐ Form 8885	64			
65	Credit for amount paid with Form 1040-C	65			
66	U.S. tax withheld at source from page 4, line 85	66			
67	U.S. tax withheld at source by partnerships under section 1446:				
	a From Form(s) 8805	67a			
	b From Form(s) 1042-S	67b			
68	U.S. tax withheld on dispositions of U.S. real property interests:				
	a From Form(s) 8288-A	68a			
	b From Form(s) 1042-S	68b			
69	Add lines 59 through 68b. These are your **total payments** ▶			69	

Refund

Direct deposit? See page 22.

70	If line 69 is more than line 58, subtract line 58 from line 69. This is the amount you **overpaid**	70	
71a	Amount of line 70 you want **refunded to you.**	71a	
b	Routing number ▶ **c** Type: ☐ Checking ☐ Savings		
d	Account number		
72	Amount of line 70 you want **applied to your 2006 estimated tax** ▶ 72		

Amount You Owe

73	Amount you owe. Subtract line 69 from line 58. For details on how to pay, see page 23 ▶	73	
74	Estimated tax penalty. Also include on line 73 74		

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see page 24)? ☐ **Yes.** Complete the following. ☐ **No**

Designee's name ▶ Phone no. ▶ ( ) Personal identification number (PIN) ▶

Sign Here

Keep a copy of this return for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature ▶ | Date | Your occupation in the United States

Paid Preparer's Use Only

Preparer's signature ▶ | Date | Check if self-employed ☐ | Preparer's SSN or PTIN

Firm's name (or yours if self-employed), address, and ZIP code ▶ | EIN | Phone no. ( )

Schedule A—Itemized Deductions (See pages 24, 25, 26, and 27.) 07

State and Local Income Taxes

1 State income taxes 1
2 Local income taxes 2
3 Add lines 1 and 2 3

Total Gifts to U.S. Charities

Caution: *If you made a gift and received a benefit in return, see page 24.*

4a Total gifts by cash or check. If you made any gift of $250 or more, see page 24 . . . . . 4a
4b Gifts by cash or check after August 27, 2005, that you elect to treat as qualified contributions (see page 25) . 4b
5 Other than by cash or check. If you made any gift of $250 or more, see page 24. You **must** attach Form 8283 if "the amount of your deduction" (see definition on page 25) is more than $500 5
6 Carryover from prior year 6
7 Add lines 4a, 5, and 6 7

Casualty and Theft Losses

8 Casualty or theft loss(es). Attach Form 4684. See page 25 8

Job Expenses and Certain Miscellaneous Deductions

9 Unreimbursed employee expenses—job travel, union dues, job education, etc. You **must** attach Form 2106 or Form 2106-EZ if required. See page 26 ▶ 9
10 Tax preparation fees. 10
11 Other expenses. See page 26 for expenses to deduct here. List type and amount ▶ 11
12 Add lines 9 through 11 12
13 Enter the amount from Form 1040NR, line 36 13
14 Multiply line 13 by 2% (.02) 14
15 Subtract line 14 from line 12. If line 14 is more than line 12, enter -0- 15

Other Miscellaneous Deductions

16 Other—see page 26 for expenses to deduct here. List type and amount ▶ 16

Total Itemized Deductions

17 Is Form 1040NR, line 36, over $145,950 (over $72,975 if you checked filing status box 3, 4, or 5 on page 1 of Form 1040NR)?

☐ **No.** Your deduction is not limited. Add the amounts in the far right column for lines 3 through 16. Also enter this amount on Form 1040NR, line 37.

☐ **Yes.** Your deduction may be limited. See page 27 for the amount to enter here and on Form 1040NR, line 37. ▶ 17

Tax on Income Not Effectively Connected With a U.S. Trade or Business

Attach Forms 1042-S, SSA-1042S, RRB-1042S, or similar form.

Nature of income		(a) U.S. tax withheld at source	Enter amount of income under the appropriate rate of tax (see page 27) (b) 10%	(c) 15%	(d) 30%	(e) Other (specify) ____%	(e) Other (specify) ____%
75 Dividends paid by:							
a U.S. corporations	75a						
b Foreign corporations	75b						
76 Interest:							
a Mortgage	76a						
b Paid by foreign corporations	76b						
c Other	76c						
77 Industrial royalties (patents, trademarks, etc.)	77						
78 Motion picture or T.V. copyright royalties	78						
79 Other royalties (copyrights, recording, publishing, etc.)	79						
80 Real property income and natural resources royalties	80						
81 Pensions and annuities	81						
82 Social security benefits	82						
83 Gains (include capital gain from line 91 below)	83						
84 Other (specify) ▶	84						
85 **Total U.S. tax withheld at source.** Add column (a) of lines 75a through 84. Enter the total here and on Form 1040NR, line 66 ▶	85						
86 Add lines 75a through 84 in columns (b)–(e)	86						
87 **Multiply line 86 by rate of tax at top of each column**	87						
88 **Tax on income not effectively connected with a U.S. trade or business.** Add columns (b)–(e) of line 87. Enter the total here and on Form 1040NR, line 53 ▶	88						

Capital Gains and Losses From Sales or Exchanges of Property

Enter only the capital gains and losses from property sales or exchanges that are from sources within the United States and not effectively connected with a U.S. business. Do not include a gain or loss on disposing of a U.S. real property interest; report these gains and losses on Schedule D (Form 1040).

Report property sales or exchanges that are effectively connected with a U.S. business on Schedule D (Form 1040), Form 4797, or both.

89 (a) Kind of property and description (if necessary, attach statement of descriptive details not shown below)	(b) Date acquired (mo., day, yr.)	(c) Date sold (mo., day, yr.)	(d) Sales price	(e) Cost or other basis	(f) LOSS If (e) is more than (d), subtract (d) from (e)	(g) GAIN If (d) is more than (e), subtract (e) from (d)
90 Add columns (f) and (g) of line 89				90	( )	
91 **Capital gain.** Combine columns (f) and (g) of line 90. Enter the net gain here and on line 83 above (if a loss, enter -0-) ▶					91	

Other Information (If an item does not apply to you, enter "N/A.")

A What country issued your passport? .....

B Were you ever a U.S. citizen? . . . . ☐ Yes ☐ No

C Give the purpose of your visit to the United States ► .....

.....

.....

D Type of entry visa ► .....

..... and current nonimmigrant status and date of change (see page 27) ► .....

E Date you entered the United States (see page 27) ► .....

F Did you give up your permanent residence as an immigrant in the United States this year? . . . . . ☐ Yes ☐ No

G Dates you entered and left the United States during the year. Residents of Canada or Mexico entering and leaving the United States at frequent intervals, give name of country only. ► .....

.....

H Give number of days (including vacation and nonworkdays) you were present in the United States during:

2003 ....., 2004 ....., and 2005 ..... .

I If you are a resident of Canada, Mexico, the Republic of Korea (South Korea), or Japan (and you elect to have the old U.S.-Japan income tax treaty apply in its entirety for 2005) or a U.S. national, did your spouse contribute to the support of any child claimed on Form 1040NR, line 7c? . . . ☐ Yes ☐ No

If "Yes," enter amount ► $ .....

If you were a resident of the Republic of Korea (South Korea) or Japan (and you elect to have the old U.S.-Japan income tax treaty apply in its entirety for 2005) for any part of the tax year, enter in the space below your total foreign source income not effectively connected with a U.S. trade or business. This information is needed so that the exemption for your spouse and dependents residing in the United States (if applicable) may be allowed in accordance with Article 4 of the income tax treaty between the United States and the Republic of Korea (South Korea) or Article 4 of the old income tax treaty between the United States and Japan.

Total foreign source income not effectively connected with a U.S. trade or business ► $ .....

J Did you file a U.S. income tax return for any year before 2005? . . . . . ☐ Yes ☐ No

If "Yes," give the latest year and form number ► .....

.....

K To which Internal Revenue office did you pay any amounts claimed on Form 1040NR, lines 60, 63, and 65? .....

.....

L Have you excluded any gross income other than foreign source income not effectively connected with a U.S. trade or business? . ☐ Yes ☐ No

If "Yes," show the amount, nature, and source of the excluded income. Also, give the reason it was excluded. (Do not include amounts shown in item M.) ► .....

.....

M If you are claiming the benefits of a U.S. income tax treaty with a foreign country, give the following information. See page 28 for additional information.

- Country ► .....
- Type and amount of effectively connected income exempt from tax. Also, identify the applicable tax treaty article. Do not enter exempt income on lines 8, 9a, 10a, 11-15, 16b, or 17b–21 of Form 1040NR.

For 2005 (also, include this exempt income on line 22 of Form 1040NR) ► .....

.....

.....

.....

For 2004 ► .....

.....

.....

- Type and amount of income not effectively connected that is exempt from or subject to a reduced rate of tax. Also, identify the applicable tax treaty article.

For 2005 ► .....

.....

.....

For 2004 ► .....

.....

.....

- Were you subject to tax in that country on any of the income you claim is entitled to the treaty benefits? . . . . . ☐ Yes ☐ No
- Did you have a permanent establishment or fixed base (as defined by the tax treaty) in the United States at any time during 2005? . . . . . ☐ Yes ☐ No

N If you file this return to report community income, give your spouse's name, address, and identifying number.

.....

.....

O If you file this return for a trust, does the trust have a U.S. business? . . . . . ☐ Yes ☐ No

If "Yes," give name and address ► .....

.....

.....

P Is this an "expatriation return" (see page 28)? . . . . . ☐ Yes ☐ No

If "Yes," you must attach an annual information statement.

Q During 2005, did you apply for, or take other affirmative steps to apply for, lawful permanent resident status in the United States or have an application pending to adjust your status to that of a lawful permanent resident of the United States? ☐ Yes ☐ No

If "Yes," explain ► .....

.....

.....

§ 862. Income from sources without the United States

(a) Gross income from sources without United States

The following items of gross income shall be treated as income from sources without the United States:

(1) interest other than that derived from sources within the United States as provided in section 861 (a)(1);

(2) dividends other than those derived from sources within the United States as provided in section 861 (a)(2);

(3) compensation for labor or personal services performed without the United States;

(4) rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties;

(5) gains, profits, and income from the sale or exchange of real property located without the United States;

(6) gains, profits, and income derived from the purchase of inventory property (within the meaning of section 865 (i)(1)) within the United States and its sale or exchange without the United States;

(7) underwriting income other than that derived from sources within the United States as provided in section 861 (a)(7); and

(8) gains, profits, and income from the disposition of a United States real property interest (as defined in section 897 (c)) when the real property is located in the Virgin Islands.

(b) Taxable income from sources without United States

From the items of gross income specified in subsection (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as taxable income from sources without the United States. In the case of an individual who does not itemize deductions, an amount equal to the standard deduction shall be considered a deduction which cannot definitely be allocated to some item or class of gross income.

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SECTION 14-CITIZENSHIP SUMMARY

- The federal government of the United States has no "police powers" inside states of the Union
- Taxation under Subtitle A of the Internal Revenue Code is a police power
- Because the federal government has no "police powers" inside states of the Union, the terms "State" and "United States" as used in most federal statutes means a federal "State" and the federal "United States", which are part of the federal zone
- The term "United States" has *three* distinct definitions according to the U.S. Supreme Court as revealed in the case of *Hooven and Allison v. Evatt*, 324 U.S. 652 (1945). Which of these three definitions applies in each specific case where it is used in our laws depends on the context and the *subjective whims* of the court and lawyers interpreting it. This has created confusion throughout the courts and the legal profession on the issue of federal jurisdiction. This confusion is a deliberate violation of Fifth Amendment due process intended to illegally extend federal jurisdiction beyond the clear intent of the founding fathers. It has also transformed us into a society of men instead of law, and undermined our liberties and rights. Most of the deliberate confusion appearing in our tax laws and the violation of due process resulting from this confusion results from incorrect interpretation of the term "United States" in the context of citizenship and residency. Most Americans are blissfully unfamiliar with the subtle distinctions made by lawyers in our laws when this term is used. Our government benefits financially from a corrupted and improperly enforced income tax law by keeping Americans ignorant about their citizenship status and constitutional rights and by promoting this ignorance by mismanaging our public schools.
- Each of the 50 states of the United States *of America* are considered *sovereign nations* under the law of nations, and persons born in these sovereign states are "nationals" of their respective state, and by implication, the country called the "United States"
- Most persons born in one of the 50 union states are *not* "U.S. citizens", but are "nationals" under federal statutes and "acts of Congress" and are not the subject nor the object of the Internal Revenue Code. Furthermore, the term "United States" as used in the term " national of the United Statesl" implies the "United States *of America*" and not the *federal* "United States".
- The only reason the U.S. government wants to make you into a "U.S. citizen" is so that they can make you subject to the jurisdiction of the federal courts. Once they make you subject to the jurisdiction of these courts, the corrupt judges in them will do everything in their power to illegally enforce the income tax and will be rewarded for doing so by being granted "official immunity" by their golf and country club buddies in the Supreme Court and appellate court.
- The term "United States" as used in the Internal Revenue Code means the *federal* United States, which includes only those entitles listed under Title 48 of the U.S. Code plus the District of Columbia plus enclaves within the states owned by the U.S. government. These areas collectively are referred to as the "federal zone" throughout our Great IRS Hoax book.
- Because of the above, the "Internal" in the phrase "Internal Revenue Code" really means "Internal to the federal United States", which includes the territories listed under Title 48 of the U.S. Code
- If the average American fills any kind of tax form out, it ought to be a 1040NR form and it ought to contain all zeros for "income", because most "income" comes from outside of the *federal* "United States". Furthermore, even if he had "income" from the *federal* United States such as a Social Security check, it would not be "income" as we point out in section 5.6.6 of the Great IRS Hoax book because it would not be profit made by a corporation, which is the only Constitutional type of "income" as defined by the Supreme Court.
- When we fill out any kind of government form that asks us our citizenship status, we should expect that the government will try to create a false presumption that we are "U.S. citizens" on the form, even though there is no statute allowing or authorizing them to do this. Therefore, we should modify or correct every government form we fill out to replace every instance of "U.S. citizen" with "national". This includes: Applications for naturalization, passports, jury summons, and voter registration as a bare minimum.

- We need not be concerned about penalties associated with failure to provide an SSN on a passport application, since there are no implementing regulations authorizing such penalties. The warning on the DS-11 form is bogus and should be disregarded. It is a FRAUD with a capital "F".

	Last revision: April 17, 2006 08:43 AM
	This private system is NOT subject to monitoring

You're not a "citizen" under the Internal Revenue Code

Related articles:

- Why you are a "national" or a "state national" and not a "U.S. citizen"
- "citizen" defined-Sovereignty Forms and Instructions, Cites by Topic under "citizen"
- Citizenship Status v. Tax Status
- Tax Deposition Questions, Section 14: Citizenship
- Department of State scams with "Certificates of non-citizen National Status" under 8 U.S.C. §1452-part of Sovereignty Forms and Instructions, under "History" in the upper left corner
- Great IRS Hoax, section 4.11 through 4.11.11 on Citizenship

SOURCE: Great IRS Hoax, section 5.2.14, version 3.31

The term "citizen" is nowhere defined within the Internal Revenue Code and is defined twice within the implementing regulations at 26 CFR §1.1-1 and 26 CFR §31.3121(e)-1 . Below is the first of these two definitions:

> *26 CFR §1.1-1 Income tax on individuals*
>
> *(c)* **Who is a citizen.** *Every person born or naturalized in the United States and subject to* ***its*** *jurisdiction is a citizen.* ***For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459)****. For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S. C. 1481-1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U. S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.*

Notice the term "born or naturalized in the United States and subject to **its** jurisdiction", which means the exclusive legislative jurisdiction of the federal government within its territories and possessions only under Title 48 of the U.S. Code. If they meant to include states of the Union, they would have used "**their** jurisdiction" or "**the** jurisdiction" as used in section 1 of the Fourteenth Amendment instead of "**its** jurisdiction". The above definition of "citizen" applying exclusively to the Internal Revenue Code reveals that it depends on 8 U.S.C. §1401, which we said earlier in section 4.11.3 and its subsections means a person born in a U.S. territory or possession. These people possess a special "non-constitutional" class of citizenship that is not covered by the Fourteenth Amendment or any other part of the Constitution.

We also showed in section 4.11.6 that people born in states of the Union are technically not "citizens and nationals of the United States" under 8 U.S.C. §1401, but instead are "nationals but not citizens of the United States" under 8 U.S.C. §1101(a)(21) and 8 U.S.C. §1452. The term "national" is defined in 8 U.S.C. §1101(a)(21) as follows:

> *"(a) (21) The term "national" means a person owing permanent allegiance to a state."*

In the case of "nationals but not citizens of the United States" under 8 U.S.C. §1101(a)(21), these are people who owe their permanent allegiance to the confederation of states in the Union called the "United States of America".

The definition of "citizen of the United States" found in 26 CFR §31.3121(e)-1 corroborates the above conclusions, keeping

in mind that "United States" within that definition means the federal zone instead of the states of the Union, which is what "United States" or "United States of American" means in the Constitution.:

> *26 CFR §31.3121(e)-1 State, United States, and citizen*
>
> *(b)…The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.*

Puerto Rico, the Virgin Islands, Guam, and American Samoa are all U.S. *territories* and *federal* "States" that are within the federal zone. They are not "states" under the Internal Revenue Code. The proper subjects of Subtitle A of the Internal Revenue Code are *only* the people who are born in these federal "States", and these people are the *only* people who are in fact "citizens and nationals of the United States" under 8 U.S.C. §1401 and under 26 CFR §1.1-1(c).

The basis of citizenship in the United States is the English doctrine under which nationality meant "birth within allegiance of the king". The U.S. Supreme Court helped explain this concept precisely in the case of *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898) :

> *"The supreme court of North Carolina, speaking by Mr. Justice Gaston, said: 'Before our Revolution, all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens.' '**Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign [169 U.S. 649, 664] state.**' 'British subjects in North Carolina became North Carolina freemen;' 'and all free persons born within the state are born citizens of the state.' '**The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from the man to the collective body of the people; and he who before was a 'subject of the king' is now 'a citizen of the state.**'' State v. Manuel (1838) 4 Dev. & b. 20, 24-26. " [U. S. v. Wong Kim Ark, 169 U.S. 649 (1898)]*

In our country following the victorious Revolution of 1776, the "king" was therefore replaced by "the people", who are collectively and individually the "sovereigns" within our republican form of government. The group of people within whatever "body politic" one is referring to who live within the territorial limits of that "body politic" are the thing that you claim allegiance to when you claim nationality to any one of the following three distinctive political bodies:

1. A state the Union.
2. The *country* "United States", as defined in our Constitution.
3. The municipal government of the federal zone called the "District of Columbia", which was chartered as a federal corporation under 16 Stat. 419 §1 and 28 U.S.C. §3002(A).

Each of the three above political bodies have "citizens" who are distinctively their own. When you claim to be a "citizen" of any one of the three, you aren't claiming allegiance to the *government* of that "body politic", but to the *people* (the sovereigns) that the government *serves*. If that government is rebellious to the will of the people, and is outside the boundaries of the Constitution that defines its authority so that it becomes a "de facto" government rather than the original "de jure" government it was intended to be, then your allegiance to the *people* must be *superior* to that of the *government* that *serves* the people. In the words of Jesus Himself in John 15:20:

> *"Remember the word that I said to you, 'A servant is not greater than his master.'" [John 15:20, Bible, NKJV]*

The "master" or "sovereign" in this case, is the *people*, who have expressed their sovereign will through a written

and unchangeable Constitution.

> *"The glory of our American system of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions." [Downes v. Bidwell, 182 U.S. 244; 21 S.Ct. 770 (1901)]*

This is a crucial distinction you *must* understand in order to fully comprehend the foundations of our republican system of government. Let's look at the definition of "citizen" according to the U.S. Supreme Court in order to clarify the points we have made so far on what it means to be a "citizen" of our glorious republic:

> *"There cannot be a nation without a people. The very idea of a* ***political community****, such as a nation is, implies an [88 U. S. 162, 166] association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association.* ***He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.***
>
> *"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and* ***the relation he bears to the nation****. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government.* ***Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.****"*
>
> *"****To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.***
>
> *"Looking at the Constitution itself we find that it was ordained and established by 'the people of the United States,'3 and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth,4 and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of [88 U.S. 162, 167] friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. 5*
>
> *"****Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became ipso facto a citizen-a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.*** *" [Minor v. Happersett, 88 U.S. 162 (1874), emphasis added]*

The thing to focus on the above is the phrase "he owes allegiance and is entitled to its protection". People living in states of the Union have *dual* allegiance and *dual* nationality: They owe allegiance to *two* governments not one, so they are "*dual-nationals*". They are "dual nationals" because the states of the Union are independent nations[1]:

> ***Dual citizenship.*** *Citizenship in two different* ***countries****. Status of citizens of United States who reside within a state; i. e., person who are born or naturalized in the U.S. are citizens of the U.S. and the state wherein they reside. [Black's*

Law Dictionary, Sixth Edition, page 498]

Likewise, those people who live in a federal "State" like Puerto Rico also owe dual allegiance: one to the District of Columbia, which is their *municipal* government and which possesses the police powers that protect them, and the other allegiance to the government of the United States *of America*, which is the general government for the whole *country*. As we said before, Congress wears *two* hats and operates in *two* capacities or jurisdictions simultaneously, each of which covers a different and mutually exclusive geographical area:

1. As the *municipal* government for the District of Columbia and all U.S. territories. All "acts of Congress" or federal statutes passed in this capacity are referred to as "private international law". This political community is called the "National Government".
2. As the *general* government for the states of the Union. All "acts of Congress" or federal statutes passed in this capacity are called "public international law". This political community is called the "Federal Government."

Each of the two capacities above has *different* types of "citizens" within it and each is a unique and separate "body politic". Most laws that Congress writes pertain to the *first* jurisdiction above *only*. Below is a summary of these two classes of "citizens":

Table 5-10: Types of citizens

#	Jurisdiction	Land area	Name of "citizens"
1	Municipal government of the District of Columbia and all U.S. territories. Also called the "National Government"	"Federal zone" (District of Columbia + federal "States")	"citizens and nationals of the United States" as defined in 8 U.S.C. §1401
2	General government for the states of the Union. Also called the "Federal Government"	"United States *of America*" *(50 Union "states")*	"nationals but not citizens of the United States" as defined in 8 U.S.C. §1101(a)(22)(B)

As we pointed out earlier in section 4.11.6, federal statutes and "acts of Congress" *do not* and *cannot* prescribe the citizenship status of persons born in states of the Union and *outside* of the legislative reach of Congress. 8 U.S.C. §1408(2) comes the closest to defining their citizenship status, but even that definition doesn't address most persons born in states of the Union neither of whose parents ever resided in the federal zone. No federal statute or "act of Congress" directly can or does prescribe the citizenship status of people born in states of the Union because *state law*, and *not federal law*, prescribes their status under the *Law of Nations*.[2] The reason is because no government may write laws that apply *outside* of their subject matter or territorial jurisdiction, and states of the Union are "foreign" to the United States government for the purposes of police powers and legislative jurisdiction. Here is confirmation of that fact:

> *"Judge Story, in his treatise on the Conflict of Laws, lays down, as the basis upon which all reasonings on the law of comity must necessarily rest, the following maxims: First, 'that every nation possesses an exclusive sovereignty and jurisdiction within its own territory'; secondly, '**that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others.**' The learned judge then adds: 'From these two maxims or propositions there follows a third, and that is that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulation of the matter; that is to say, upon its own proper jurisdiction and polity, and upon its own express or tacit consent.' Story on Conflict of Laws, §23." [Baltimore & Ohio Railroad Co. v. Chambers, 73 Ohio St. 16; 76 N.E. 91; 11 L.R.A., N.S.,*

1012 (1905)]

Congress is given the authority under the Constitution, Article 1, Section 8, Clause 4 to write "an uniform Rule of Naturalization" and they have done this in Title 8 of the U.S. Code called the "Aliens and Nationality" code, but they were *never* given any authority under the Constitution to prescribe laws for the states of the Union relating to citizenship by birth *rather than* naturalization. That subject is, and always has been, under the *exclusive* jurisdiction of states of the Union. Naturalization is only one of *two* ways by which a person can acquire citizenship, and Congress has jurisdiction only over *one* of the two ways of acquiring citizenship.

> *"The question, now agitated, depends upon another question; whether the State of Pennsylvania, since the 26th of March, 1790, (when the act of Congress was passed) has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the constitution of the Untied States, the authority to naturalize is exclusive, or concurrent?* ***We are of the opinion, then, that the States, individually, still enjoy a concurrent authority upon this subject; but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union.***
>
> ***"The true reason for investing Congress with the power of naturalization has been assigned at the Bar: --It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship.*** *Thus, the individual States cannot exclude those citizens, who have been adopted by the United States; but they can adopt citizens upon easier terms, than those which Congress may deem it expedient to impose.*
>
> ***"But the act of Congress itself, furnishes a strong proof that the power of naturalization is concurrent.*** *In the concluding proviso, it is declared, 'that no person heretofore proscribed by any State, shall be admitted a citizen as aforesaid, except by an act of the Legislature of the State, in which such person was proscribed.'* ***Here, we find, that Congress has not only circumscribed the exercise of its own authority, but has recognized the authority of a State Legislature, in one case, to admit a citizen of the United States; which could not be done in any case, if the power of naturalization, either by its own nature, or by the manner of its being vested in the Federal Government, was an exclusive power.*** *" [Collet v. Collet, 2 U.S. 294; 1 L.Ed. 387 (1792)]*

Many freedom fighters overlook the fact that the "citizen" mentioned in 26 CFR §1.1-1 can also be a corporation, and this misunderstanding is why many of them think that they are the only proper subject of the Subtitle A federal income tax. In fact, a corporation is also a "person" and an "individual" and a "citizen" within the meaning of the Internal Revenue Code.

> *"A corporation is a citizen, resident, or inhabitant of the state or country by or under the laws of which it was created, and of that state or country only."*
>
> *[19 Corpus Juris Secundum (C.J.S.), Corporations, §886; Legal encyclopedia]*

Corporations, however, *cannot* have a legal existence outside of the sovereignty that they were created in. Consequently, the only corporations who are "citizens" and the only "corporate profits" that are subject to tax under Subtitle A of the Internal Revenue Code are those that are formed under the laws of the District of Columbia, and *not* those under the laws of states of the Union. Here is why:

> *"Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specifically provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 'It must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the*

enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." [Paul v. Virginia, 8 Wall (U.S.) 168; 19 L.Ed. 357 (1868)]

In conclusion, you ***aren't*** the "citizen" described in 26 CFR §1.1-1 who is the proper subject of Subtitle A of the Internal Revenue Code, nor are you a "resident" of the "United States" defined in 26 U.S.C. §7701(a)(9) if you were born in a state of the Union. Subtitle A of the Internal Revenue Code *only* applies within the federal zone. Consequently, the only type of "individual" you can be as a person born in a state of the Union is a "national but not citizen of the United States" as defined in 8 U.S.C. §1101(a)(21) and 8 U.S.C. §1452 and a "nonresident alien" as defined in 26 U.S.C. §7701(b)(1)(B). If you still find yourself confused or uncertain about citizenship in the context of the Internal Revenue Code after having read this section, you might want to go back and reread sections 4.11 through 4.11.11 of the Great IRS Hoax again to refresh your memory, because these sections are foundational to understanding this section.

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[1] See *Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519; 10 L.Ed. 274 (1839)*, in which the Supreme Court ruled: *"**The States between each other are sovereign and independent**. They are distinct and separate sovereignties, except so far as they have parted with some of the attributes of sovereignty by the Constitution.* **They continue to be nations, *with all their rights, and under all their national obligations, and with all the rights of nations in every particular***; *except in the surrender by each to the common purposes and objects of the Union, under the Constitution. The rights of each State, when not so yielded up, remain absolute."*

[2] See *The Law of Nations* by Vattel, available on our website at: http://famguardian.org/Publications/LawOfNations/vattel.htm

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THE GREAT IRS HOAX: WHY WE DON'T OWE INCOME TAX

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> *"That we are liable for IRC Subtitle A income tax as American Nationals living in the 50 states of the Union with earnings from within the 50 states of the Union that does not originate from the government."*

Through a detailed and very thorough analysis of both enacted law and IRS behavior unrefuted by any of the 100,000 people who have downloaded the book, including present and former (after they learn the truth!) employees of the Treasury and IRS, it reveals why Subtitle A of the Internal Revenue Code is private law/special law that one only becomes subject to by engaging in an excise taxable activity such as a "trade or business", which is a type of federal employment and agency that puts people under federal jurisdiction who would not otherwise be subject. It proves using the government's own laws and publications and court rulings that for everyone in states of the Union who has not availed themselves of this excise taxable privilege of federal employment/agency, Subtitle A of the I.R.C. is not "law" and does not require the average American domiciled in states of the Union to pay a "tax" to the federal government. The book also explains how Social Security is the de facto mechanism by which "taxpayers" are recruited, and that the program is illegally administered in order to illegally expand federal jurisdiction into the states using private law. This book does not challenge or criticize the constitutionality of any part of the Internal Revenue Code nor any state revenue code, but simply proves that these codes are being misrepresented and illegally enforced by the IRS and state revenue agencies against persons who are not their proper subject. This book might just as well be called *The Emperor Who Had No Clothes* because of the massive and blatant fraud that it exposes on the part of our public servants.

"But Dad, the emperor is naked!"

Five years of continuous research by the author(s) and their readers went into writing this very significant and incredible book. This book is *very different* from most other tax books because:

1. The book is written in part by our tens of thousands of readers and growing...***THAT'S YOU***! We invite and frequently receive good new ideas and materials from legal researchers and ordinary people like YOU, and when we get them, we add them to the book after we research and verify them for ourselves to ensure their accuracy. Please keep your excellent ideas coming, because this is a team effort, guys!
2. *We use words right out of the government's own mouth, in most cases, as evidence of most assertions we make*. If the government calls the research and processes found in this book frivolous, they would have to call the Supreme Court, the Statutes at Large, the Treasury Regulations (26 C.F.R.) and the U.S. Code frivolous, because everything derives from these sources.
3. Ever since the first version was published back in Nov. 2000, we have invited, and even *begged*, the government continually and repeatedly, both on our website and in our book and in correspondence with the IRS and the Senate Finance Committee (click here to read our letter to Senator Grassley under "Political Activism"), and in the We The People Truth in Taxation Hearings to provide a signed affidavit on government stationary along with supporting evidence that disproves *anything* in this book . We have even promised to post the government's rebuttal on our web site *unedited* because we are more interested in the truth than in our own agenda. Yet, some ***criminal public servants*** have consistently and steadfastly refused their legal duty under the First Amendment Petition Clause to answer our concerns and questions, thereby hiding from the truth and obstructing justice in violation of 18 U.S.C. Chapter 73. By their failure to answer they have defaulted and admitted to the complete truthfulness of this book pursuant to Federal Rule of Civil Procedure 8(d). If the "court of public opinion" really were a court, and if the public really were *fully educated* about the law as it is the purpose of this book to bring about, the IRS and our federal government would have been convicted long ago of the following crimes by their own treasonous words and actions thoroughly documented in this book (click here for more details):

    - Establishment of the U.S. government as a "religion" in violation of First Amendment (see section 4.3.2 of this book and our article entitled: Our Government has Become Idolatry and a False Religion)
    - Obstruction of justice under 18 U.S.C. Chapter 73
    - Conspiracy against rights under 18 U.S.C. §241
    - Extortion under 18 U.S.C. §872 .
    - Wrongful actions of Revenue Officers under 26 U.S.C. §7214
    - Engaging in monetary transactions derived from unlawful activity under 18 U.S.C. §1957

- Mailing threatening communications under 18 U.S.C. §876
- False writings and fraud under 18 U.S.C. §1018
- Taking of property without due process of law under 26 CFR §601.106(f)(1)
- Fraud under 18 U.S.C. §1341
- Continuing financial crimes enterprise (RICO) under 18 U.S.C. §225
- Conflict of interest of federal judges under 28 U.S.C. §455
- Treason under Article III, Section 3, Clause 1 of the U.S. Constitution
- Breach of fiduciary duty in violation of 26 CFR 2635.101, Executive order order 12731, and Public Law 96-303
- Peonage and obstructing enforcement under Thirteenth Amendment, 18 U.S.C. §1581 and 42 U.S.C. §1994
- Bank robbery under 18 U.S.C. §2113 (in the case of fraudulent notice of levies)

4. We keep the level of the writing to where a person of average intelligence and no legal background can understand and substantiate the claims we are making for himself.
5. We show you how and where to go to substantiate every claim we make and we encourage you to check the facts for yourself so you will believe what we say is absolutely accurate and truthful.
6. All inferences made are backed up by extensive legal research and justification, and therefore tend to be more convincing and authoritative and understandable than most other tax books. We assume up front that you will question *absolutely every assertion* that we make because we encourage you to do exactly that, so we try to defend every assertion in advance by answering the most important questions that we think will come up. We try to reach *no* unsubstantiated conclusions whatsoever and we avoid the use of personal opinions or anecdotes or misleading IRS publications. Instead, we always try to back up our conclusions with evidence or an authoritative government source such as a court cite or a regulation or statute or quotes from the authors of the law themselves, and we verify every cite so we don't destroy our credibility with irrelevant or erroneous data or conclusions. Frequent corrections and feedback from our 100,000 readers (and growing) also helps considerably to ensure continual improvements in the accuracy and authority and credibility of the document.
7. Absolutely everything in the book is consistent with itself and we try very hard not to put the reader into a state of "cognitive dissonance", which is a favorite obfuscation technique of our public dis-servants and legal profession. No part of this book conflicts with any other part and there is complete "cognitive unity". Every point made supports and enhances every other point. If the book is truthful, then this must be the case. A true statement cannot conflict with itself or it simply can't be truthful.
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10. This is also the ONLY book that explains and compares all the major theories and tax honesty groups and sifts the wheat from the chaff to extract the "best of breed" approach from each advocate which has the best foundation in law and can most easily be defended in court.
11. The entire book, we believe, completely, truthfully, and convincingly answers the following very important question:

"How can we interpret and explain the Internal Revenue Code in a way that makes it completely lawful and Constitutional, both from the standpoint of current law and from a historical perspective?"

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2	U.S. Government Background	128	1,432		
3	Legal Authority for Income Taxes in the United States	173	1,833		
4	Know Your Citizenship Status and Rights!	376	4,424		
5	The Evidence: Why We Aren't Liable to File Returns or Pay Income Tax	539	5,467		
6	History of Federal Government Income Tax Fraud, Racketeering, and Extortion in the U.S.A.	179	1,864		
7	Case Studies	45	420		

8	Resources for Tax Freedom Fighters	9	97		
9	Definitions	14	220		

The *Great IRS Hoax* book draws on works from several prominent sources and authors, such as:

1. The U.S. Constitution.
2. The Family Constitution
3. Amendments to the U.S. Constitution.
4. The Declaration of Independence.
5. The United States Code (U.S.C.), Title 26 (Internal Revenue Code), both the current version and amended past versions.
6. U.S. Supreme Court Cases.
7. U.S. Tax Court findings.
8. The Code of Federal Regulations (CFR), Title 26, both the current version and amended past versions.
9. IRS Forms and Publications (directly from the IRS Website at http://www.irs.gov).
10. U.S. Treasury Department Decisions.
11. Federal District Court cases.
12. Federal Appellate (circuit) court cases.
13. Several websites.
14. A book entitled *Losing Your Illusions* by Gordon Phillips of Private Arena (http://privatearena.com/).
15. A book entitled *IRS Humbug*, by Frank Kowalik.
16. A book entitled *Federal Mafia*, by Irwin Schiff (http://paynoincometax.com).
17. A book entitled *Constitutional Income*, by Phil Hart (http://constitutionalincome.com/).
18. Case studies of IRS enforcement tactics (http://www.neo-tech.com/irs-class-action/).
19. Case studies of various tax protester groups.
20. The IRS' own publications about Tax Protesters.
21. A book entitled *Why No One is Required to File Tax Returns* by William Conklin (http://www.anti-irs.com)
22. Writings of Thomas Jefferson, the author of the Declaration of Independence.
23. Department of Justice, Tax Division, Criminal Tax Manual
24. Several other books mentioned on our Recommended Reading page.

Below is a complete outline of the content of this very extensive work:

3.13 Treasury Decisions and Orders

3.13.1 Treasury Delegation of Authority Order 150-37: Always Question Authority!
3.13.2 Treasury Decision Number 2313: March 21, 1916

3.14 Supreme Court Cases Related To Income Taxes in the United States

3.14.1 1818: U.S. v. Bevans (16 U.S. 336)
3.14.2 1883: Butchers' Union Co. v. Crescent City Co. (111 U.S. 746)
3.14.3 1894: Caha v. United States (152 U.S. 211)
3.14.4 1895: Pollack v. Farmer's Loan and Trust Company (157 U.S. 429, 158 U.S. 601)
3.14.5 1900: Knowlton v. Moore (178 U.S. 41)
3.14.6 1901: Downes v. Bidwell (182 U.S. 244)
3.14.7 1906: Hale v. Henkel (201 U.S> 43)
3.14.8 1911: Flint v. Stone Tracy Co. (*220 U.S. 107)*
3.14.9 1914: Weeks v. U.S. (*232 U.S. 383)*
3.14.10 1916: Brushaber vs. Union Pacific Railroad (*240 U.S. 1)*
3.14.11 1916: Stanton v. Baltic Mining (240 U.S. 103)
3.14.12 1918: Peck v. Lowe (247 U.S. 165)
3.14.13 1920: Evens v. Gore (253 U.S. 245)
3.14.14 1920: Eisner v. Macomber (252 U.S. 189)
3.14.15 1922: Bailey v. Drexel Furniture Co. (259 U.S. 20)
3.14.16 1924: Cook v. Tait (265 U.S. 47)
3.14.17 1930: Lucas v. Earl (281 U.S. 111)
3.14.18 1935: Railroad Retirement Board v. Alton Railroad Company (295 U.S. 330)
3.14.19 1938: Hassett v. Welch (303 U.S. 303)
3.14.20 1945: Hooven & Allison Co. v. Evatt (324 U.S. 652)
3.14.21 1959: Flora v. U.S. (362 U.S. 145)
3.14.22 1960: U.S. v. Mersky (361 U.S. 431)
3.14.23 1961: James v. United States (366 US 213, p. 213, 6L Ed 2d 246)
3.14.24 1970: Brady v. U.S. (379 U.S. 742)
3.14.25 1974: California Bankers Association v. Shultz (416 U.S. 25)
3.14.26 1975: Garner v. U.S. (424 U.S. 648)
3.14.27 1976: Fisher v. United States (425 U.S. 391)
3.14.28 1978: Central Illinois Public Service Co. v. United States (435 U.S. 21)
3.14.29 1985: U.S. v. Doe (465 U.S. 605)
3.14.30 1991: Cheek v. United States (498 U.S. 192)
3.14.31 1992: United States v. Burke (504 U.S. 229, 119 L Ed 2d 34, 112 S Ct. 1867)
3.14.32 1995: U.S. v. Lopez (000 U.S. U10287)

3.15 Federal District and Circuit Court Cases

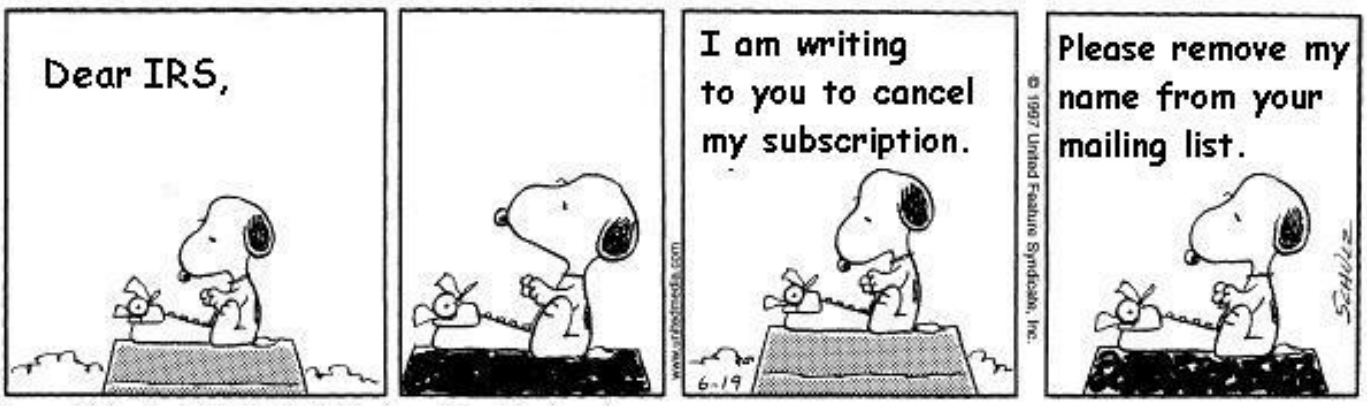
3.15.1 Commercial League Assoc. v. The People, 90 Ill. 166
3.15.2 Jack Cole Co. vs. Alfred McFarland, Sup. Ct. Tenn 337 S.W. 2d 453
3.15.3 1916: Edwards v. Keith 231 F 110, 113
3.15.4 1925: Sims v. Ahrens, 271 SW 720
3.15.5 1937: Stapler v. U.S., 21 F. Supp. AT 739
3.15.6 1937: White Packing Co. v. Robertson, 89 F.2d 775, 779 the 4th Circuit Court
3.15.7 1939: Graves v. People of State of New York (306 S.Ct. 466)
3.15.8 1943: Helvering v. Edison Brothers' Stores, 8 Cir. 133 F2d 575
3.15.9 1946: Lauderdale Cemetary Assoc. v. Mathews, 345 PA 239, 47 A. 2d 277, 280
3.15.10 1947: McCutchin v. Commissioner of IRS, 159 F2d 472 5th Cir. 02/07/1947
3.15.11 1952: Anderson Oldsmobile , Inc. vs Hofferbert, 102 F. Supp. 902

4.4 The Constitution is Supposed to Make You the SOVEREIGN and the Government Your Servant

4.5 The U.S.A. is a Republic, Not a Democracy

5.6 Why We Aren't Liable to *Pay* Income Tax

6.6 Treasury/IRS Cover-Ups, Obfuscation, and Scandals



REFERENCES ON EXPATRIATION

EXPATRIATION FROM FEDERAL GOVERNMENT

- 15 Statutes at Large- 1868 statute that is current government policy on Expatriation and Repatriation
- 8 U.S.C. Chapter 12: Immigration and Nationality
- 8 U.S.C. 1481: Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions
- 8 CFR: CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
- IRC 877: Expatriation to Avoid Tax
- IRC 871(d): Nonresident Aliens and Foreign Corporations
- 26 C.F.R. 1.871-10(d): Election to treat real property income as effectively connected with U.S. business
- ***Briehl v. Dulles***, 248 F2d 561, 583 (1957).-Identifies that the the ability to expatriate is a natural right and shall not be infringed by the government.
- USA the Republic is the House Nobody Lives In--***(HOT!)*** Fascinating background on 14th Amendment U.S. citizenship, how to expatriate, the burden of proof, and presumptions involved.
- The 14th Amendment, Law or Contract?-How did we move from the *"Common Law"* where we are innocent until proven guilty and into the *"Roman Civil Law"* where we must prove our innocence before government agencies? This Treatise shows us how the *14th Amendment* was used (as a Contract) to move the people out from under the *Common Law* and into the *Roman Civil Law.*
- Escape Artist Website-How-to website with anecdotes and experiences

EXPATRIATION FROM STATE OF CALIFORNIA

- Revenue and Taxation Code § 17024.5(e), Elections

	Last revision: April 27, 2006 07:25 PM
	This private system is NOT subject to monitoring

INSTRUCTIONS: 3.13. Correct government records documenting your citizenship Status

Related forms:

4.7 Affidavit of Rescission
4.8 Revocation of Election by Nonresident Alien to Treat Income as Effectively Connected with a Trade or Business in the United States
4.9 Voter registration attachment
4.10 Security clearance application attachment
4.13 Legal Notice of Change in Domicile/Citizenship Records and Divorce from the United States
4.16 Social Security SS-5 form
4.17 IRS Form 8854: Expatriation Information Statement
IRS Form 8854 Instructions
6.17 IRS Form W-8: Certificate of Foreign Status
4.20 Dept. of State form FS-581: Questionnaire Information for Determining U.S. citizenship
4.19 Dept. of State form DS-011 Application for U.S. Passport
4.20 Dept. of State form DS-011 Application for U.S. Passport-**MODIFIED TO REMOVE U.S. CITIZENSHIP PRESUMPTION**
4.22 Request for Certificate of non-citizen National Status from Dept. of State
4.23 Dept. of State form DS-082 Passport Renewal Form -**MODIFIED TO REMOVE U.S. CITIZENSHIP PRESUMPTION**
4.24 IRS Form W-9: Application for Taxpayer Identification Number -**MODIFIED TO REMOVE CITIZENSHIP PRESUMPTIONS**
4.29 Rebuttal letter in response to denial of "Request for Certificate of non-citizen National status" by Dept. of State
4.30 Oath (for Christians)-attached with your "Request for Certificate of non-citizen National Status"
4.32 USCIS Agent Challenge-use if USCIS blows smoke about changing your citizenship status
4.33 Expatriation Affidavit-used to abandon nationality instead of "U.S. citizen" status under 8 U.S.C. 1401
4.36 Passport Amendment Request-get an endorsement on your U.S. Passport p. 24 identifying you as a "national but not a citizen" of the United States

Related articles and links:

- Why Domicile and Income Taxes Are voluntary-excellent. Explains the relationship between domicile and citizenship
- Why You Are a "national" or a "state national" and not a "U.S. citizen"
- SECNAVINST 5510.30A-Appendix I-shows that one may be a "U.S. citizen" rather than a "national" and still get a U.S. security clearance
- 22 U.S.C. §212: Persons Entitled to Passports
- DOD Financial Management Regulation, Vol. 7B, Military Pay Policy and Procedures, Chapt. 6, Foreign Citizenship After Retirement-discusses the affect of foreign citizenship status upon your military retirement pay and benefits
- Citizenship and Sovereignty Seminar-SEDM
- Developing Evidence of U.S. Citizenship Seminar-SEDM
- References on Expatriation
- Great IRS Hoax, section 4.12.9 entitled "Expatriation"
- 8 CFR: Chapter 1, Immigration and Naturalization Service Regulations
- How to Apply for U.S. Passport as a "National"
- 8 U.S.C. 1452: Certificates of citizenship or U.S. non-citizen national status; procedure
- U.S. Dept of State 7 FAM (Foreign Affairs Manual) Sections 1100, 1110, and 1111 on Citizenship-shows the government's view of "U.S. citizenship" and "U.S. Nationality" but is NOT the law. Click here to go to the government site where you can view the original document.
- Dept of State Article on Non-citizen national certificates-local copy
- Dept of State Article on Non-citizen national certificates-Dept. of State website
- Dept of State Article entitled "How to Obtain Copies of Your Passport Records"-obtained on 4/5/04 via the Freedom of Information Act

- World Citizen Government Web-an alternative to a U.S. passport
- Department of State (DOS) Scams with "Certificates of non-citizen National Status-From Sovereignty Forms and Instructions, History section, under section 6: Department of States
- Passports, Social Security Numbers, and 26 U.S.C. §6039E-white paper by Western State University Law Review that proves that it is unconstitutional to penalize people $500 on a passport application for failure to disclose a Social Security Number
- Social Security Administration: Can a noncitizen receive Social Security Benefits?-entitlements of "nationals" but not "citizens"
- Social Security Administration: Your Payments While you are outside the U.S.-for those who do not live in the federal zone.

Passport information:

- Department of State Website: http://travel.state.gov
- Department of State Passport Services: http://travel.state.gov/passport_services.html
- National Passport Information Center: http://travel.state.gov/npicinfo.html
- Passport agencies: http://travel.state.gov/agencies_list.html
- Passport application forms: http://travel.state.gov/get_forms.html
- Passport Duty Officer (Department of State): 202-663-2465
- 18 U.S.C. Part 1, Chapt 75: Passports and Visas-note 18 U.S.C. 1542, false statements on passport
- Sharon Palmer-Royston, Chief Legal Counsel, Passport Policy, Department of States-Voice: (202) 663-2430

Sample/Example completed forms (filled out):

- Dept. of State form DS-011 Application for U.S. Passport-**MODIFIED TO REMOVE U.S. CITIZENSHIP PRESUMPTION**
- Dept. of State form FS-581: Questionnaire Information for Determining U.S. citizenship

Sample Government Responses:

- Response by Dept. of State to Request for non-citizen National Status-received by one of our readers
- Response by Social Security Administration to SS-5 form submitted with "Other" for citizenship-received by one of our readers

"It is better to trust in the Lord than to put confidence in man. It is better to trust the Lord than to put confidence in princes [the government]."
[Bible, Psalm 118:8-9]

"Put not your trust in princes [the government], [nor] in the son of man, in whom [there is] no help. "
[Bible, Psalms 146:3]

In order to restore God to his proper place on the top of our priority list, we must distance ourselves as far away from the government and its jurisdiction as we can to provide the best protection for our liberties. Before we begin our battle with the IRS, we must therefore first minimize our risk exposure by ensuring that our proper citizenship status is reflected in ALL EVIDENCE that the government and private businesses have about us. This includes the following mostly government documents:

1. Any state or federal tax returns we file (some of which as if either we or our children are "U.S. citizens").
2. State voter registration (most states require us to declare under penalty of perjury that we are a "U.S. citizen" in order to be able to register to vote).
3. State driver's license.
4. Military service record and security clearance (most security clearances ask a person if they are a "U.S. citizen")
5. Social security records.
6. Passport applications (most passport applications ask us if we are a "U.S. citizen").
7. Birth certificates.

8. The paperwork our employer maintains on us (employment applications frequently ask us if we are a "U.S. citizen").
9. The paperwork our bank and financial institutions maintain on us.

All of these sources of evidence may be subpoena'd by the government if or when we have to litigate to defend our right to not pay I.R.C. Subtitle A taxes or to obtain a refund, and we don't want to give them ANY ammunition they can use against us to prove their case that we are a citizen liable for paying such tax. First, let's define some terms:

> *8 U.S.C. Section 1101 DEFINITIONS-*
>
> *...*
> *(a)(21) The term "national" means a person owing permanent allegiance to a state.*
>
> *(a)(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.*
>
> *...*
>
> *(a)(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.*

Are you a "U.S. citizen" as defined in the Internal Revenue Code? You decide. Here's the ONLY definition of "U.S. citizen" we could find ***anywhere*** in either the Internal Revenue Code and the Implementing Regulations after an electronic search of the entire code and regulations:

> *26 CFR § 31.3121(e) State, United States, and citizen.*
>
> *(b)...The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.*

The answer is EMPHATICALLY NO! In order not to be classified as a "U.S. citizen", we must have proof, or there is a presumption that we are. The American Jurisprudence Legal Encyclopedia, at 3C AmJur 2d 204 in section 2677 entitled "Presumptions concerning citizenship" says the following:

> *As a general rule, it is presumed, until the contrary is shown, that every person is a citizen of the country in which he or she resides.[1] Furthermore, once granted, citizenship is presumably retained unless voluntarily relinquished,[2] and the burden rests upon one alleging a change of citizenship and allegiance to establish that fact. Consequently, a person born in the United States is presumed to continue to be a citizen until the contrary is shown, and where it appears that a person was once a citizen of a particular foreign country, even though residing in another, the presumption is that he or she still remains a citizen of such foreign country, until the contrary appears.*

The number one argument the government and the IRS will use against us in tax matters goes something like this:

> *"You are a **U.S. citizen** and EVERYONE knows that U.S. citizens are liable to pay income tax!"*

Here is a real-life example of that from a real trial:

> *"Unless the defendant can prove he is **not** a citizen of the United States, the IRS has the right to inquire and determine a tax liability." [U.S. v. Slater, 545 Fed. Supp. 179,182 (1982)]*

This is the main argument they use in front of juries as well. This exact statement is what the IRS revenue agent told us when we called to report that we had no income tax liability. This argument, however, falls apart if they can't

affirmatively prove your U.S.** citizenship because they don't have any evidence, and because you have evidence to the contrary! If you aren't a "U.S. citizen", then you must be a "nonresident alien" because nonresident aliens are defined in 26 U.S.C. §7701(b)(1)(B) as persons who are not "U.S. citizens". We also know from chapter 5 of the Great IRS Hoax that nonresident aliens who are not elected or appointed political officials of the U.S. government (the recipient of government privileges) don't have to pay income tax because they have no "U.S. source" income under 26 U.S.C. §871 (a)! Note from 8 U.S.C. Section 1101(a)(22)(B) that you can be a "national" without being described as a "U.S. citizen". That is the category we want to be.

The above argument derives from the idea that the federal government may tax a "U.S. citizen" wherever he is, including in geographical areas abroad and outside its general territorial jurisdiction within the federal zone. In the U.S. Constitution Annotated, under the Fifth Amendment (see http://caselaw.lp.findlaw.com/data/constitution/amendment05/13.html - 6) , here is what it says about this subject:

> *"In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the States by the Fourteenth.* ***The Federal Government may tax property belonging to its citizens [statutory "U.S. citizens" under 8 U.S.C. §1401, but not "citizens" as used in the Fourteenth Amendment or the Constitution], even if such property is never situated within the jurisdiction of the United States****,[1] and it may tax the income of a citizen or resident abroad, which is derived from property located at his residence.[2] The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the State's borders."*

This point is VERY important, because it clearly indicates from where the jurisdiction of the United States government to tax derives. It isn't mainly a geographical jurisdiction, but instead originates mainly from the taxable activities we engage in, such as a "trade or business", and also from our domicile. Calling a person a "citizen" under the Internal Revenue Code simply implies that they maintain a "domicile" in the District of Columbia. See:

http://famguardian.org/Subjects/Taxes/Articles/DomicileBasisForTaxation.htm

The jurisdiction to tax "trade or business" income doesn't extend into the sovereign 50 Union states because the power of income taxation is reserved by the states under 1:2:3 and 1:9:4 of the Constitution. However, federal jurisdiction to tax domiciliaries of the federal zone does extend to *foreign countries* under 26 U.S.C. §911. The U.S. Supreme also admitted this in *Cook v. Tait*, 265 U.S. 47 (1924). Those who are born in and domiciled in a state of the Union, however, are not counted as "citizens" under the Internal Revenue Code, as revealed in our article below:

http://famguardian.org/Subjects/Taxes/Citizenship/NotACitizenUnderIRC.htm

Instead, people domiciled in states of the Union are "nationals" or "state nationals" and should be careful to properly document their citizenship status on all government forms to ensure that the federal government is not deceived into thinking that they are domiciliaries of the federal zone.

> ***WARNING: The content of this section is THE single most important thing you need to do if you don't want to be destroyed by the federal courts. They have complete power over you and can deny your constitutional rights if you are a statutory U.S.** citizen, resident, or a U.S.** person, all of whom have in common a virtual "domicile" in the District of Columbia under the I.R.C. See 26 U.S.C. §7701(a)(39) and 26 U.S.C. §7408(c) for proof.***

Let's first start off with a definition of "expatriation":

> *"**Expatriation**: The voluntary act of abandoning or renouncing one's country, and becoming the citizen or subject of another." [Black's Law Dictionary, Sixth Edition, page 576]*

Based on the above definition, we *don't* need to abandon our NATIONALITY or allegiance to the country, we want to

abandon our "U.S.** citizen" or "citzen of the [federal] United States" status under all "acts of Congress" and federal statutes as described in 8 U.S.C. §1401, so "expatriation" is definitely *not* the right word to describe *exactly* what we want to do. Therefore, we have to invent a new word, and we'll call it "amending" or "correcting" or "converting" your citizenship status. There are two possible statuses that we can "convert" to:

1. "national" under 8 U.S.C. §1101(a)(22)(B)
2. "state national"

Which of these above two statuses you choose to convert to depends on the choice you make and your situation. Below is a table summarizing the advantages and disadvantages of each as we understand them:

Table 8-5: Citizenship Alternative Comparison

#	Description	Section(s) where discussed	Applicable laws and regulations	U.S. citizen	U.S. national	"National" or "state national"
1	Can hold a U.S. security clearance?	5.6.15.5 of *Great IRS Hoax*	SECNAVINST 5510.30A, Appendix I, page I-1	Yes	Yes	Yes
2	Can collect Social Security benefits?	5.6.15.5 of *Great IRS Hoax*	Social Security Program Operations Manual (POM) section GN 00303.001 (SSA Website) Social Security Program Operations Manual (POM) section GN 00303.001 (Local PDF, in case SSA removes this section to HIDE the truth and obstruct justice. Click here for details)	Yes	Yes	Yes
3	Can vote?	4.11.6.1 of *Great IRS Hoax*	Voting laws in most states	Yes	No	Yes
4	Can serve on jury duty?	4.11.6.3 of *Great IRS Hoax*	Jury service laws in most states	Yes	No	Yes
5	Must register for the military draft/Selective Service System?		See http://www.sss.gov/FSwho.htm	Yes	Yes	No
6	Can serve in U.S. military?		32 CFR § 1602.3(b)(1)	Yes	Yes	Yes
7	Can serve as officer in U.S. military?	4.11.6 of *Great IRS Hoax*	10 U.S.C. §532	Yes	No	No
8	Can collect U.S. military retirement benefits?		Chapter 6 of DOD 7000.14-R, Volume 7B	Yes	?	Yes
9	Can get a U.S. passport?		22 U.S.C. §212	Yes	Yes	Yes

10	Can hold a position in the civil service of the United States?		5 CFR §338.101	Yes	Yes	Yes

NOTES:

1. In the case of items 3, 4, and 9 above, some of our readers have been able to obtain these benefits as "state nationals" or "nationals" by virtue of amending the government's forms electronically and identifying themselves as "California Nationals", for instance. Another popular and successful technique is to redefine the term "U.S. citizen" used on the form to mean "California National" or to redefine the term "United States" to mean "United States***" the country, and not "United States**" the federal zone. The ignorant government clerks processing the forms have not noticed this and approved their applications anyway.

2. The table above has one question mark that we aren't sure of based on reading the instruction. That is the one under item 8 above. 32 CFR § 1602.3(b)(1) says that either "nationals" or "U.S. citizens" can serve in the U.S. military. SECNAVINST 5510.30A, Appendix I, page I-1 also says that for the purposes of security clearances, "nationals" and "U.S. citizens" are equivalent. The implication is therefore that you can be a "national" and still not lose your retirement benefits, but Chapter 6 of DOD 7000.14-R, Volume 7B doesn't explicitly say this.

The table above has one question mark that we aren't sure of based on reading the instruction. That is the one under item 7 above. 32 CFR § 1602.3(b)(1) says that either "nationals" or "U.S. citizens" can serve in the U.S. military. SECNAVINST 5510.30A, Appendix I, page I-1 also says that for the purposes of security clearances, "nationals" and "U. S. citizens" are equivalent. The implication is therefore that you can be a "national" and still not lose your retirement benefits, but Chapter 6 of DOD 7000.14-R, Volume 7B doesn't explicitly say this.

The procedures for achieving "national" rather than "U.S.** citizen" status are documented in 8 U.S.C. §1452. This section documents how to become a "national". The procedures for becoming a "state national" are almost identical. Only the citizenship correction notice in section 10.6.9 is different.

Before we discuss the "how to" of "amending" your citizenship status, we'd like to emphasize that the U.S. Court of Appeals, D.C. Circuit, has stated in a still unchallenged ruling in 1957 that *the right of expatriation is absolute* in the case of *Walter Briehl v. John Foster Dulles, 248 F2d 561, 583 (1957)*:

> *"Almost a century ago, Congress declared that "**the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,**" and decreed that "**any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.**" 15 Stat. 223-224 (1868), R.S. § 1999, 8 U.S.C. § 800 (1940).[3] Although designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress "is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." **Savorgnan v. United States**, 1950, 338 U.S. 491, 498 note 11, 70 S. Ct. 292, 296, 94 L. Ed. 287.[4] The Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 "are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed." Id., 338 U.S. at pages 498-499, 70 S. Ct. at page 296.That same light, I think, illuminates 22 U.S.C.A. § 211a and 8 U. S.C.A.§ 1185. Since expatriation is today impossible without leaving the country, the policy expressed by Congress in 1868 and never repealed precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving."*

You can read this case on our website in its entirety below:

http://famguardian.org/Subjects/LegalGovRef/Citizenship/BriehlVDulles248F2d561.htm

You will note that the 15 Statutes at large mentioned above, which authorize expatriation were passed by the U.S. Congress in 1868, just before the 14th Amendment was passed, and allows people to change their citizenship as a way to escape encroachments on their life and liberty caused by the passage of both the 13th and the 14th Amendment.

Because correcting government records falsely representing your citizenship status is undertaken for the same reasons as expatriation above, it is just as valid a thing to do as expatriation.

How do you avoid being falsely "presumed" as a domiciliary of the federal zone, which includes "U.S.** citizen" under 8 U.S.C. §1401 or a "U.S. resident" under 26 U.S.C. §7701(b)(1)(A) so you can be treated as a "nonresident alien" in the context of the income tax?…by changing government documentation containing false information you filled out in ignorance to properly reflect your status as a "national" under federal statutes, or by "expatriating" from the country altogether. Expatriation is the process of renouncing one's citizenship in a country or a political jurisdiction. Many people do it as a way to escape paying income taxes. As a matter of fact, there is a whole section of the Internal Revenue Code, found in 26 U.S.C. §877 entitled "*Expatriation to avoid tax*" that tries to limit people's ability to expatriate in order to avoid tax. Therefore, it must be an effective tool to avoid income taxes because lawmakers have tried to outlaw it! For your reference, below are a few of the laws dealing with expatriation that you might want to examine as you research the process and consequences of expatriation, which you can hotlink to from our website at http://famguardian.org/Subjects/LegalGovRef/Citizenship/Expatriation.htm:

- 8 U.S.C. Chapter 12: Immigration and Nationality
- 8 U.S.C. 1481: Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions
- 8 CFR: CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
- 26 U.S.C. 877: Expatriation to Avoid Tax
- 26 U.S.C. 871(d): Nonresident Aliens and Foreign Corporations
- 26 C.F.R. 1.871-10(d): Election to treat real property income as effectively connected with U.S. business
- Escape Artist Website: http://www.escapeartist.com/

"Expatriating" is one way we can guarantee that the federal government can never assert jurisdiction over us to impose income taxes. "Converting" our citizenship has the same affect and is less drastic. However, WHAT JURISDICTION should we "expatriate" or "convert" to, because there are three definitions of the term "United States" according to the U. S. Supreme Court in *Hooven & Allison Co. v. Evatt, **324 U.S. 652** **(1945)***? You might want to go back and review the definition of "United States" from section 4.6, entitled "The Three 'United States'" at this time.

We'd like to clarify at this point that the term "nonresident alien" is a "word of art" that only has applicability within the context of limited income tax jurisdiction found in 26 U.S.C., and that its meaning is *different* there than it is elsewhere in the U.S. codes, and especially different from the definition found in 8 U.S.C., which talks about citizenship in U.S.* *The Country,* also known as the United States *of America*. The reason is because of the definition of the term "United States" found in 26 U.S.C. §7701(a)(10), which we covered in sections 3.11.1.23 and 4.8 of the Great IRS Hoax as meaning the "federal zone"/U.S.** and not United States the country. However, we must follow the same procedures to abandon the U.S.**/federal zone and our presumed federal "U.S.** citizen" status under "acts of Congress" and federal statutes as as we would use to expatriate our nationality in the country United States, because the presumptions and burden of proof standards are the same.

What is the procedure to abandon our "U.S. citizen" status but not our "Nationality"? Below is a synopsis of the procedure, along with the reference from which that step derives based on our research:

Table 8-1: A Process to Correct your citizenship status

#	*Title*	*Reference(s)*	*Description*	*Note(s)-see below*	*Date accomplished* √

1	Do a rescission on all IRS Form 1040 signatures	None	Invalidate all signatures on all previous 1040 forms, because they represent an election to be treated as a U.S.** citizen AND a resident of the U.S.**.	1	
2	Revoke Your Election to be Treated as U.S.** citizen and resident	IRS Publication 54 for general information. 26 CFR § 1.871-10 (for method of revocation of election) 26 U.S.C. §7701(b)(4)(F) for authority 26 U.S.C. §6013(g) for background	Revocation of Election process is covered in section 5.3.4 of our *Great IRS Hoax* book. See also IRS Publication 54, page 6 (year 2000 version). See Section 10.6.5 for a sample form to do this.	2	
3	Rescind your application for Social Security by sending a revised SS-5 form and an Affidavit of Rescission to the Social Security Administration	26 CFR 301.6109-1(b)	Use the "Affidavit of Rescission" found in section 10.6.4.	7	
4	Change your voter registration	See the election laws and statutes within your state.	Some states require you to declare under penalty of perjury that you are a "U.S. citizen" and don't bother to clarify which of the three "Unites States" they are referring to. Clarify your status as a U.S.* and U.S.*** but not a U.S.** citizen. Clarify that you do not live in the "State of _____" but instead live in _____ (statename). Make your citizenship conditioned on the nonpayment of state and federal income taxes.	3	
5	Update your government security clearance application (if you have one)	None	Clarify your status as a "U.S.* national" but not a "U.S.** citizen". Renounce your 14th Amendment Citizenship. Clarify that you *do not* live in and are not a citizen of "The State of _____" but instead are a Citizen and resident of _____(statename).	4	
6	Notice the Secretary of State of the U.S. via Certified mail with a Proof of Service of Your Change in Citizenship Status. See the following website for a mailing address: http://www.state.gov/	8 U.S.C. §1481(a)(6)	Law says: "*(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense;* "	5	

7	Notice the Attorney General via Certified mail with a Proof of Service of Your Change in Citizenship Status. See the following website for a mailing address: http://www.usdoj.gov/	8 U.S.C. §1481(a)(6)	Law says: "*(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense;* "	5	
8	Publish a notice in the paper of your new citizenship status and obtain an "Affidavit of Notice" from your newspaper.	See your state's legal notice requirement in the statutes.	Use the same language as item 5 above.	6	
9	File an IRS Form W-8 with the IRS via Certified mail with a Proof of Service and ask them to update their records to reflect "nonresident alien" status for the purposes of income taxes	IRS Pub. 519-U.S. Tax Guide for Aliens	This clarifies your status with the IRS as a "nonresident alien" for the purposes of the income tax and ensures that their records reflect your proper status. See section 5.3 of the *Great IRS Hoax* entitled "Know Your Proper Filing Status" for more details.	8	
10	File an IRS Form W-8 with your employer and ask them to update their records to reflect "nonresident alien" status for the purposes of income taxes.	IRS Pub. 519-U.S. Tax Guide for Aliens	This clarifies your status with your employer as a "nonresident alien" for the purposes of the income tax and ensures that their records reflect your proper status.		
11	Update/reapply for your U.S. passport	Dept. of State form DS-011: Application for Passport	Turn in your old passport to the Secretary of State and apply for a new one with the DS-011 form. On the form, do the following: Blocks 14, 15, 16: Check no for "U. S. citizen" and replace with "U.S. National under 8 U.S.C. 1408" Block 4, Place of birth: Put your city and state (e.g. California) COUNTRY: Put your state name (e.g. California). Do not provide an SSN and use the form for a NEW passport, not a renewal.	9	

NOTES:

1. **Doing a Rescission on all IRS Form 1040 Signatures with the IRS**. This step involves stating the following:

I, _____, Citizen of _____ (state) and domiciled in _____[county], _____, one of the American union States, hereby extinguish, rescind, revoke, cancel, abrogate, annul, nullify, discharge, and make void *ab initio* all signatures, belonging to me, on all previously filed Internal Revenue Service, W-4 Forms, 1040 Forms and all State Income Tax Forms and all powers of attorneys, real and implied, connected thereto, on the grounds that my purported consent was not voluntarily and freely obtained, but was made through mistake, duress, fraud, and undue influence exercised by your agency and my employer. Pursuant to Contract Law: "All 1040 and W-4 Forms are, hereby, extinguished by this rescission.".

Rescission: (Black's 6th Edition Law Dictionary) "To abrogate, annul, avoid, or cancel a contract;

> particularly, nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the contracting party. To declare a contract void in its inception and to put an end to it as though it never were. Russel v. Stephens, 191 Wash. 314, 71 P.2d 3031…A rescission amounts to the unmaking of a contract, or an undoing of it from the beginning. It necessarily involves a repudiation of the contract and a refusal of the moving party to be bound by it…"

I was induced by fraud and duress to sign such forms and I was denied full disclosure of the voluntary nature of such forms. I was mislead by those who knew, or should have known, into believing that filing such forms was mandatory and/or implied, were inconscionable and grossly unfair to me. I was unduly influenced by the stronger bargaining power of my employer, the Internal Revenue Service and the State Tax agency, and acted under an implied threat and fear of losing my job and my property and out of fear of potential imprisonment for non-compliance. Any alleged consent is null and void as it was given under duress, by mistake, and by fraud. Notwithstanding any information which you may have to the contrary, any forms that have been filed, and any implied quasi contracts that you may feel you have with me, were filed illegally and unlawfully and are without force/and or effect.

I further revoke, rescind, and make void *ab initio* all powers of attorney pertaining to me for any and all governmental/ quasi/colorable agencies and/or Departments created under the authority of Art. I, Sec. 8, Cl. 17, and/or Art. IV, Sec. 3, Cl. 2 of the Constitution of the United States.

2. **Revoking your Election to Treat Income from Real Property as Effectively Connected to a Trade or Business in the United States**:

2.1. *WARNING*!: An election to treat income from real property as effectively connected with a trade or business in the United States is automatically made when one files an IRS form 1040 for the first time, and can only be revoked by strictly following procedures. This is discussed further in section 5.3.4 of the Great IRS Hoax, which we won't repeat hear.

2.2. 26 CFR 1.871-10(a) states:

> *The election may be made whether or not the taxpayer is engaged in trade or business in the United States during the taxable year for which the election is made or whether or not the taxpayer has income from real property which for the taxable year is effectively connected with the conduct of a trade or business in the United States, but it may be made only with respect to that income from sources within the United States which, without regard to this section, is not effectively connected for the taxable year with the conduct of a trade or business in the United States by the taxpayer.*
> *If for the taxable year the taxpayer has no income from real property located in the United States, or from any interest in such property, which is subject to the tax imposed by section **871**(a) or 881(a), the election may not be made.*
>
> *But if an election has been properly made under this section for a taxable year, **the election remains in effect, unless properly revoked, for subsequent taxable years even though during any such subsequent taxable year there is no income from the real property, or interest therein, in respect of which the election applies.***

2.3. To revoke your election, follow the procedures shown in 26 CFR 1.871-10. Below is what you need to do:

2.3.1. "*If the taxpayer revokes the initial election without the consent of the Commissioner he must file amended income tax returns, or claims for credit or refund, where applicable, for the taxable years to which the revocation applies.*" 26 CFR 1.871-10(d)

2.3.2. Revocation of election requires the consent of the Commissioner of Internal Revenue:

> "*(iii) Written request required. **A request to revoke an election made under this section when such revocation requires the consent of the Commissioner**, or to make a new election when such election requires the consent of the Commissioner, **shall be made in writing and shall be addressed to the Director of International Operations, Internal Revenue Service, Washington, DC 20225**. The request shall include the name and address of the taxpayer and shall be signed by the taxpayer or his duly authorized representative. It must specify the taxable year for which the revocation or new election is to be effective and shall be filed within 75 days after the close of the first taxable year for which it is desired to make the change. The request must specify the grounds which are considered to justify the revocation or new election. The Director of International Operations may require such other information as may be necessary in order to*

determine whether the proposed change will be permitted. A copy of the consent by the Director of International Operations shall be attached to the taxpayer's return required under section 6012 and the regulations thereunder for the taxable year for which the revocation or new election is effective. A copy of such consent may not be filed with any return under section 6851 and the regulations thereunder." 26 CFR 1.871-10(d)(2)(iii)

2.3.3. You will note that you DON'T need the IRS commissioner's consent to make a voluntary election and you can revoke it within the first taxable year you make it by filing a 1040 form, but you need his consent to revoke an election. You will also note that the regulations don't prescribe the criteria under which the commissioner may deny a Revocation of Election. This, of course, represents a violation of due process of law and the 5th Amendment property protections and represents a "trap" set by the government to suck you into the federal zone and keep you there so they can rob you blind. This is skullduggery at its finest, and there is no reason why you should need to ask for someone else's permission to have control of your assets and income back. The one-way diodes and check valves in the District of Criminals (Washington, D.C.) came up with this trick to make it easy to continue plundering your assets.

2.4. We have a sample form in section 10.6.5 for accomplishing the Revocation of Election.

3. **Changing Your Voter Registration**:

3.1. Most states require you to sign a voter registration affidavit stating that you are a "U.S. CITIZEN" in order to vote in state elections. They almost never define what they mean by this term on the form or in their election laws so you should specify what it means on the form. This form is microfilmed by the registrar of voters and made into an official recorded state document. You need to be sure that the form properly reflects your choice of citizenship status by modifying the form to add the following explanatory paragraph in any area they give you room to write on the form:

*"I, _____(your name) do declare under penalty of perjury under the laws of my state from "without" the federal United States that I do **not** reside or have a domicile on federal property or territory and that I am a **not** federal "U.S. citizen" or "citizen of the [federal] United States" under "acts of Congress" as identified in 8 U.S. C. §1401. I hereby abandon any privileges and immunities granted therein by virtue of my failure to intend or consent to having such citizenship status. I retain my natural born status as a "national of the United States of America" or a "non-citizen U.S. national" as described in 8 U.S.C. §1101(a)(22)(B). I preserve and reserve all my unalienable Rights that are inherent from my Creator, at all times. I waive no rights at any time, including by operation of any implied contract asserted by the government. UCC 1-207"*

3.2. In case what you write on the form is unclear, you also need to attach an additional page. If you attach an additional page to this affidavit, the attachment is usually *not* recorded with the original affidavit and does not become evidence, so you will need to put a note on the Affidavit form not close to the borders so it will be microfiched successfully that states "Not valid without attached additional Affidavit of Clarification and Citizenship for Voter Registration".

3.3. You will find a copy of the recommended page to attach to your voter registration in section 10.6.6 entitled Voter Registration Affidavit Attachment.

3.4. Get a notarized copy of your voter registration that includes the attachment from your county recorder after you file your affidavit in the manner above. This will become very important legal evidence should your citizenship ever be questioned in court.

4. **Update your government security clearance.** Add the Affidavit of Clarification of Citizenship for Security Clearance found in section 10.6.7 to your security clearance. If you have already made the security clearance application, come in after the fact and have them attach the affidavit to your application. This will clarify your citizenship.

5. Notice the Secretary of State of the U.S. and the Attorney General via Certified mail with a proof of service of your Citizenship Status:

5.1. Send them a letter stating the following:

"I, John [and/or Jane Doe] in the name of the Almighty Creator, By [my/our] Declaration of Independence solemnly Publish and Declare [my/our] intention and my right to abandon "citizen of the [federal] United States" status under 8 U.S.C. §1401 and under all federal statutes and to return to my natural born status as a "non-citizen national" or a "national of the United States" under 8 U.S.C. §1101(a)(22)(B). I hereby relinquish [my/our] res in trust to the foreign jurisdiction known as the municipal corporation of the District of Columbia, a democracy, and return to the Republic. Any and all past and present political ties implied by operation of law or otherwise in trust with the democracy as a consequence of any citizenship ties the government might allege, is hereby dissolved. I, John [and/or Jane Doe] have full power to contract, establish commerce as

guaranteed by the full 10 Amendments to the Bill of Rights to the Constitution of the [u]nited States of America, a Republic.

"You have 20 days to respond to this legal notice, and failure to respond shall cause a legal Notice of Default to be Served upon you attesting to my new legal and/or citizenship status."

5.2. You also might want to attach to this letter as an enclosure the Affidavit of Rescission found in section 10.6.4.

5.3. Be sure to keep a notarized copy of the letter(s) so you can use them as evidence in court of your citizenship status.

6. Publish a notice in the newspaper of new citizenship status.

6.1. Publish the following notice in your local newspaper, and conform with your State's legal notice requirements:

DECLARATION OF INDEPENDENCE

"I, John [and/or Jane Doe] in the name of the Almighty Creator, By [my/our] Declaration of Independence solemnly Publish and Declare [my/our] intention and my right to abandon "citizen of the [federal] United States" status under 8 U.S.C. §1401 and under all federal statutes and to return to my natural born status as a "non-citizen national" or a "national of the United States" under 8 U.S.C. §1101(a)(22)(B). I hereby relinquish [my/our] res in trust to the foreign jurisdiction known as the municipal corporation of the District of Columbia, a democracy, and return to the Republic. Any and all past and present political ties implied by operation of law or otherwise in trust with the democracy as a consequence of any citizenship ties the government might allege, is hereby dissolved. I, John [and/or Jane Doe] have full power to contract, establish commerce as guaranteed by the full 10 Amendments to the Bill of Rights to the Constitution of the [u]nited States of America, a Republic. http://famguardian.org/Publications/GreatIRSHoax/GreatIRSHoax.htm"

6.2. Obtain an "Affidavit of Notice" from the newspaper after you publish the above.

7. Rescind your application for Social Security and send a revised SS-5 form to the Social Security Administration

7.1. The SS-5 form is the form used to request a new or duplicate social security card. Block 3 is used to identify your citizenship. The choices are:

7.1.1. U.S.[**] citizen.
7.1.2. Legal alien allowed to work.
7.1.3. Legal alien not allowed to work
7.1.4. Other

7.2. WARNING: Do NOT check the box that says U.S. citizen! Instead, you should check the box that says "Other" and then write the word "American" next to "Other". According to the instructions on page 1 of the form, if you check "Other" then:

If you check "Other", you need to provide proof you are entitled to a federally-funded benefit for which Social Security number is required as a condition for you to receive payment.

7.3. In this case, the proof is your birth certificate listing where you were born. It should show that you were NOT born in a federal territory or military hospital, but in a location other than the U.S.**, which includes the District of Columbia or a U.S.** possession.

7.4. Make a copy of the form and write an affidavit of proof of service to attach with the form that is notarized by a notary. Keep a copy of this notarized copy for your records to prove your correct citizenship.

7.5. There is a presumption found in 26 CFR § 301.6109-1(b) that if you submit a tax return to the U.S. government, then you are by default a "U.S.** person" unless you refute this presumption with proof. As a presumed U.S.** citizen or a "U.S.** person", you have NO constitutional rights! Here is what the law says about the requirement to provide a social security number when furnishing returns:

(b) Requirement to furnish one's own number--(1) U.S. persons. Every U.S. person who makes under this title a

return, statement, or other document must furnish its own taxpayer identifying number as required by the forms and the accompanying instructions.

The point is that if you aren't a U.S.** citizen, then you AREN'T required to provide an identifying number on any tax return. That's the foundation of the reason in this section why we want you to expatriate.

7.6. Even more interestingly, under 26 CFR § 301.6109-1(g), having a social security number creates a presumption that you are a be U.S.** citizen and you therefore have to rebut the presumption. If you want to overcome the presumption that you are a U.S. citizen or U.S.** person, then you must request a change in the status of your Social Security Number! Here is what the law says about the requirement to provide a social security number when furnishing returns:

(g) Special rules for taxpayer identifying numbers issued to foreign persons--(1) General rule--(i) Social security number. A social security number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. citizen or resident alien individual. A person may establish a different status for the number by providing proof of foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. Upon accepting an individual as a nonresident alien individual, the Internal Revenue Service will assign this status to the individual's social security number.

7.7. We have a sample letter in Section 10.6.8 entitled "SSA Notice of Change in Citizenship" for you to attach to your SS-5 form.

8. IRS Form 8854: Expatriation Information Statement

8.1. Submitting this form is required to expatriate your "citizen of the United States" status under the Fourteenth Amendment. However, there is no requirement that you must fill out anything on the form other than your name and identifying number.

8.2. **WARNING**: Do not fill out the IRS Form 8854 or submit to the IRS! You aren't expatriating your "citizen of the United States" status under the Fourteenth Amendment, but are only correcting government records about you. According to the instructions for this form, failure to fill out the form can cause a penalty of $1,000 for every year of the 10 years following the expatriation, plus 5% of the tax required to be paid.

8.3. The instructions for this form DO NOT include a Privacy Act statement, and therefore completion of the form is voluntary and not mandatory as per Public Law 96-511.

8.4. According to the form, you should file with the nearest American Citizens Service Unit, Consular Section, of the nearest American Embassy.

9. Updating Your U.S. Passport

9.1. Those who are "non-citizen nationals of the United States" under 8 U.S.C. §1452 have a special endorsement or amendment on their passport, which usually appears on page 24 under the section entitled "Amendments and Endorsements". The government makes the determination that you are a "non-citizen national" based on the evidence of citizenship you submit to them. There is no block on the passport to request that status, so you should attach a sheet or explanation to the DS-11 passport application requesting that status. A good place to start in constructing that attachment is our white paper entitled "Why you are a 'national' or a "state national" and not a 'U.S. citizen'" available on our website at:

http://famguardian.org/Subjects/LawAndGovt/Citizenship/WhyANational.pdf

9.2. When you fill out this form, make sure you put in blocks 14, 15, and 16 under "U.S. CITIZEN?" the answer "NO" and then next to it write "NATIONAL, 8 U.S.C. §1101(a)(22)(B)". In the "COUNTRY" block, put the name of your state, such as "California". Note the last page, which says that 26 U.S.C. §6039E requires providing name and social security number to the IRS or else a penalty of $500 will be assessed unless a *reasonable cause* (6039E(d)) can be shown for noncompliance. This penalty ***IS BOGUS***, because:

9.2.1. 6039E applies to "U.S. passports", but the passport issued actually says "United States *of America*" and not "United States" on the front cover, so the penalty can't apply anyway. There is no such thing as a "United States" passport!

9.2.2. 6039E says in paragraph (b)(1) that the number which must be provided is "the taxpayer's TIN" if any. Well, the treasury regulations say that an SSN is **NOT** a TIN, so even though the box says "SSN" on the form, they are really asking for a TIN and you aren't required to put the SSN on the form. TIN's are only issued to aliens, and aliens DO NOT apply for passports!

26 CFR §301.6109-1(d)(3)

(3) IRS individual taxpayer identification number -- (i) Definition. The term IRS individual taxpayer identification number means a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title. The term IRS individual taxpayer identification number does not refer to a social security number or an account number for use in employment for wages. For purposes of this section, the term alien individual means an individual who is not a citizen or national of the United States.

9.2.3. There are no implementing regulations for it like the similar section 26 U.S.C. §6039 (under 26 CFR 1.6039-1) applying to corporations even though IRC 7805 mandates enforcement implementing regulations.

9.2.4. The Western State Law Review article entitled "Passports, Social Security Numbers, and 26 U.S.C. §6039E" analyzes the requirement to provide SSN's on passport applications and concludes that it is an unconstitutional Bill of Attainder which may not be enforced. In effect, including the number on the form amounts to constructive fraud and violation of rights.

9.2.5. Even if the penalty statute ***had*** implementing regulations as required, the penalty could only be assessed for corporate persons residing in the territorial jurisdiction of the *federal* United States as defined in 26 U.S.C. §7701(a)(9) and (a)(10). If it was applied to natural persons, it would violate Article 1, Section 9, Clause 3 of the U.S. Constitution prohibiting Bills of Attainder. It would also violate the First Amendment, which guarantees us the right to NOT communicate with our government as a protected type of free speech.

9.3. Therefore, for SSN put "NONE VALID" or "5th Amendment" or "Private" and put an asterisk next to it with a note at the bottom of the form saying "I.R.C. 6039E has no implementing regulations and therefore penalties may not be lawfully assessed". Also, even if you have an SSN, it is *not valid* because it was issued without your consent (in most cases) and under fraud and duress. See Asseveration of Coercion for details.

9.4. If you are issued a passport that doesn't have the "non-citizen national" endorsement in the back on page 24, you can amend the passport later by contacting the National Passport Information Center (NPIC) at:

http://travel.state.gov/npicinfo.html

9.5. If you have problems getting your status as a "non-citizen national" recognized, you can call the Legal and Advisory Services section of the Department of State at 202-263-2662. You can also call the Passport Duty Officer, who can be reached at 202-663-2465. We talked to the passport Duty Officer, David Carter, on April 15, 2004 and asked him about the relationship between being a "U.S. citizen" on a passport form and the status of being a "U.S. citizen" under federal law found in 8 U.S.C. §1401. Here are some very revealing things that he said:

a. "The 'U.S. Citizen' status on a DS-11 passport form means a 14th Amendment citizen."

b. "There is no relationship between being a Fourteenth Amendment citizen and a 'U.S. citizen' under 8 U.S.C. 1401."

c. "Native Americans can get 'U.S. passports' and are considered 'U.S. citizens'"

d. "A passport is not proof of 14th Amendment citizenship. If you say you are a 'U.S. citizen' and you present a passport, then you are. If you say you are not a 'U.S. citizen' and present a passport, then you aren't."

9.6. To amend a passport you already have to indicate that you are a "non-citizen national of the United States", you need to fill out an Amendment Validation Request, form DS-19, and attach an explanation of what you want. We have a sample Passport Amendment Request form letter intended to accomplish this in section 10.6.15.

***WARNING*:** When you call the IRS, like we did, and you remind them that you are a nonresident alien, the first question they will ask you is: "What country are you a citizen of?" They will do this to see if you are expatriating to avoid tax. They will ask the question without knowing or understanding such things as:

- The definition of the term "United States**" in federal statutes, which means the federal zone by default.
- That there are two classes of citizens defined in the U.S. codes: "Nationals" and "citizens" of the United States.

This is a trap to take the conversation off the critical issues and you ought to avoid it. The safest answer to this question that will keep the discussion focused where it needs to be is to say:

> *"That is my business and I'm not obligated to tell you anything under the First and Fifth Amendments to the U.S. Constitution."*

If you start to tell them you are a national and not a citizen of the U.S., your typical and misinformed and ignorant IRS agent, like the one we spoke with, will probably interrupt you in mid-sentence and go into a long and angry tirade and try to pull a guilt trip on you by saying such things as:

- *"I'm a taxpayer and I don't enjoy paying for freeloaders like you!"*
- *"You ought to be ashamed of yourself for accepting the blessings of living in this country and not paying form them! "*
- *"Someone has to pay for the roads you drive on, and who if it isn't you?"*
- *"I'm sorry, but I just can't control myself. This makes me mad! If you think I'm angry now, just keep talking."*

Those of you educated in psychology will recognize this type of behavior immediately as "verbal abuse" and "harassment". The only way it wouldn't be harassment and verbal abuse is if the agent was calm, reasonable, able and willing to listen and respond to opposing points of view, and willing to offer facts and evidence to support his position. If you want to learn more about how verbal abuse works, we refer you to the Family Constitution, section 3.10, which you can download for free from our website at:

http://famguardian.orgPublications/FamilyConst/FamilyConst.htm

The manipulative agent will then say he is so mad that he doesn't want to talk any longer because he might get more uncivil. He won't even give you the chance to respond or get equal time, because he isn't interested in the law or the facts…only in getting his way. He is trained to use such verbally abusive techniques because they are effective against weak-willed or budding new patriots who refuse to pay a voluntary income tax for which they aren't liable. It keeps the "sheeple" (docile and ignorant people) in line. It is the same fear and intimidation approach that DOJ lawyers who prosecute tax avoiders will use in front of juries. You should get used to it and have a good comeback for it that you have practiced on friends and associates.

If you are cornered into addressing these kinds of verbally abusive socialist arguments, the best approach to use against demagoguery of this kind is to quote the research in section 1.10, where we did a detailed analysis of the federal budget and proved that we can fund all of the core functions of the government WITHOUT mandatory income taxes, including defense, roads, courts, and jails. You should say:

- Both the U.S. Congress in the Statutes at Large and the federal courts have reiterated that I am perfectly within my rights to abandon "U.S. citizen" status under 8 U.S.C. §1401 to become a "non-citizen national" under 8 U.S.C. §1101(a)(22)(B) because all citizenship must be consentual and I don't consent, nor are you authorized to tell me what my intentions are related to citizenship. Shame on you for criticizing me for exercising rights that are protected by law. Here is what our Congress said about expatriating our citizenship:

  "the right of expatriation [including expatriation from the District of Columbia or "U.S. Inc", the corporation] is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and decreed that "**any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.**" 15 Stat. 223-224 (1868), R. S. § 1999, 8 U.S.C. § 800 (1940)

- The reason it is so hard to pay for the core functions of government is because the lazy and irresponsible Congress just doesn't have the discipline to balance the budget, so we accumulate all this debt that interferes with paying for more important government functions and this unnecessarily raises the federal budget.
- We have a moral obligation to take care of older people but should *not* have a *legal* obligation or liability, and it ought to be a function of the family and the church to do this but not the government.
- You are a true blue socialist who doesn't belong in a free country like this. There is no reason why capitalism can't work in the government like it works everywhere else. Why do you insist on forcing me to pay for benefits I don't want? Is a compelled benefit really a benefit, or just slavery disguised as government benevolence? I don't want socialist security or Medicare or unemployment insurance from the government and I will take care of myself, thank you.
- The roads are paid for by gas taxes, and if they aren't, we ought to raise those taxes! The military, the roads, and the prisons are paid for by import taxes and excise taxes other than income taxes.
- If you don't believe me, then download your free copy of the Great IRS Hoax book and read section 1.10 for yourself. Or better yet, do your own research and prove me wrong. I'm perfectly willing to engage in extended debate with you founded on real facts if you'd like. I would enjoy that. Your unwillingness to debate the real facts and research is just evidence of how unreasonable your position is. I don't need to hear your verbal abuse, I need to hear the facts you base your conclusions on.
- The only thing income taxes pay for is SOCIALISM and the welfare state, which I strongly disapprove of and object my taxpayer dollars going to. All the socialist programs, including Social Security and Medicare, are going bankrupt anyway so why do we support them? Do you honestly believe you Social Security will support you when you are old? In countries like Chile, they had to eliminate their social security program and privatize it, because it destroyed itself. I don't object to welfare programs, I just object to being forced to participate in or subsidize them. Let those people who want the programs pay for them, but don't force me to participate in them because this is a free country.

In the past, we advocated obtaining a "certificate of non-citizen National Status" under the authority of 8 U.S.C. §1452. A number of readers tried this, but eventually the Department of State discontinued the practice. The reason they gave for doing so was as follows:

> *"As the Department has received few requests, there is no justification for the creation of a non-citizen national certificate. Designing a separate document that includes anti-fraud mechanisms was seen as an inefficient expenditure of resources. Therefore, the Department determined that those who would be eligible to apply for such a certificate may apply for a United States passport that would delineate and certify their status as a national but not a citizen of the United States." [see http://travel.state.gov/noncit_cert.html]*

It's important to note that a passport is not an adequate substitute for a "certificate of non-citizen national status" under 8 U.S. C. §1452. The reason is because the only thing the passport says is "citizen/national" and doesn't distinguish which of the two that you are. The only thing that reflects your true "non-citizen national status" is the passport application itself and not the passport that they issue. Furthermore, when you get the passport, the Dept. of State agent will tell you that they aren't allowed to give you a certified copy of the original DS-11 passport application you submitted. They obviously don't want the slaves to have the key to their chains so they can escape the federal plantation. Consequently, you must send a Privacy Act Request to the U.S. Dept. of State asking for a certified copy of the original passport application. This will become the equivalent of your "certificate of non-citizen National Status" under 8 U.S.C. §1452. Below is a link to an instruction sheet we obtained through the Freedom of Information Act explaining how to get an Authenticated copy of your passport application and other records.

http://famguardian.org/TaxFreedom/Instructions/3.13ObtainingPassportRecords.pdf

To get a certified copy of your passport records, you must send a check for $30 for the first copy and $20.00 for each additional copy. There is no charge when a request is submitted in connection with a request for Federal, State, or municipal benefits or when a court of competent jurisdiction orders production of the record. Send your request to:

Department of State
Passport Services
Research and Liaison Section
Room 500
1111 19th Street, N.W.
Washington, D.C. 20524-1705

If you want to get specific legal questions answered about passports, please format your questions in a letter and send that letter to the Legal Division of the Passport Office of the Department of State at the address below:

Passport Office
Legal Division
2100 Pennsylvania Ave NW
Washington, DC 20037
Attn: Sharon Palmer-Royston, Chief Legal Assistant

You can also request documents or evidence from the Department of State FOIA, but don't ask them legal questions:

Office of Information Programs and Services
A/RPS/IPS/RL
U.S. Department of State, SA-2
Washington, D.C. 20522-6001
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[1] Shelton v. Tiffin, 47 U.S. 163, 6 How. 163, 12 L.Ed. 387 (1848).

[2] Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed. 2d 757 (1967).

[3] United States v. Bennett, 232 U.S. 299, 307 (1914).

[4] Cook v. Tait, 265 U.S. 47 (1924).

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Scott v. Sandford
60 U.S. 393

Syllabus

I

1. Upon a writ of error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before the court, and is open to inspection and revision.

2. When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor -- if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff -- and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the Circuit Court to dismiss the case for want of jurisdiction.

3. In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction -- and if this does not appear, and the judgment must be reversed by this court -- and the parties cannot be consent waive the objection to the jurisdiction of the Circuit Court.

4. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States.

5. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.

6. The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves.

7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of [60 U.S. 394] the United States, nor entitle them to the rights and privileges secured to citizens by that instrument.

8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

9. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

10. The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the State of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court.

11. This being the case, the judgment of the court below in favor of the plaintiff on the plea in abatement was erroneous.

II

1. But if the plea in abatement is not brought up by this writ of error, the objection to the citizenship of the plaintiff is still apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken by their owner to reside in a Territory where slavery is prohibited by act of Congress, and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois, and being free when he was brought back to Missouri, he was, by the laws of that State, a citizen.

2. If, therefore, the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen," and the judgment of the Circuit Court was erroneous on that ground also, without any reference to the plea in abatement.

3. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed.

The case of *Capron v. Van Noorden,* 2 Cranch 126, examined, and the principles thereby decided reaffirmed.

4. When the record, as brought here by writ of error, does not show that the Circuit Court had jurisdiction, this court has jurisdiction to review and correct the error like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here, for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment and, as in any other case of reversal, send a mandate to the Circuit Court to conform its judgment to the opinion of this court.

5. The difference of the jurisdiction in this court in the cases of writs of error to State courts and to Circuit Courts of the United States pointed out, and the mistakes made as to the jurisdiction of this court in the latter case by confounding it with its limited jurisdiction in the former.

6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdiction [60 U.S. 395] stands on the same ground, and is to be treated in the same manner as any other error upon whish its judgment is founded.

7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous is no reason why the alleged error apparent in the exception should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.

8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors and to correct them if they are found to exist. And this has been uniformly done by this court when the questions are in any degree connected with the controversy and the silence of the court might create doubts which would lead to further useless litigation.

III

1. The facts upon which the plaintiff relies did not give him his freedom and make him a citizen of Missouri.

2. The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the

old Confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation.

3. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a Territory until it has a population which, in the judgment of Congress, entitled it to be admitted as a State of the Union.

4. During the time it remains a Territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States, and may establish a Territorial Government, and the form of the local Government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States in respect to the rights of persons or rights of property.

IV

1. The territory thus acquired is acquired by the people of the United States for their common and equal benefit through their agent and trustee, the Federal Government. Congress can exercise no power over the rights of persons or property of a citizen in the Territory which is prohibited by the Constitution. The Government and the citizen, whenever the Territory is open to settlement, both enter it with their respective rights defined and limited by the Constitution.

2. Congress have no right to prohibit the citizens of any particular State or States from taking up their home there while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit, and if open to any, it must be open to all upon equal and the same terms.

3. Every citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognises as property.

4. The Constitution of the United States recognises slaves as property, and pledges the Federal Government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind.

5. The act of Congress, therefore, prohibiting a citizen of the United States from [60 U.S. 396] taking with him his slaves when he removes to the Territory in question to reside is an exercise of authority over private property which is not warranted by the Constitution, and the removal of the plaintiff by his owner to that Territory gave him no title to freedom.

V

1. The plaintiff himself acquired no title to freedom by being taken by his owner to Rock Island, in Illinois, and brought back to Missouri. This court has heretofore decided that the *status* or condition of a person of African descent depended on the laws of the State in which he resided.

2. It has been settled by the decisions of the highest court in Missouri that, by the laws of that State, a slave does not become entitled to his freedom where the owner takes him to reside in a State where slavery is not permitted and afterwards brings him back to Missouri.

Conclusion. It follows that it is apparent upon the record that the court below erred in its judgment on the plea in abatement, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States. And the Circuit Court had no jurisdiction, either in the cases stated in the plea in abatement or in the one stated in the exception, its judgment in favor of the defendant is erroneous, and must be reversed.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county (State court), where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Sandford appeared, and filed the following plea:

DRED SCOTT)
v.) Plea to the Jurisdiction of the Court.
JOHN F. A. SANDFORD)

APRIL TERM, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action and each and every of them (if any such have accrued to the said Dred Scott) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because [60 U.S. 397] he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN F. A. SANDFORD

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave judgment that the demurrer should be sustained.

In May, 1854, the defendant, in pursuance of an agreement between counsel, and with the leave of the court, pleaded in bar of the action:

1. Not guilty.

2. That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do.

3. That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner and in virtue of the same legal right.

In the first of these pleas, the plaintiff joined issue, and to the second and third filed replications alleging that the defendant, of his own wrong and without the cause in his second and third pleas alleged, committed the trespasses, &c.

The counsel then filed the following agreed statement of facts, *viz:*

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. I n that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the

State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. [60 U.S. 398] In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey,* north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that, on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

In May, 1854, the cause went before a jury, who found the following verdict, *viz:*

> As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find that before and at the time when, &c., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant; and as to the issue thirdly above joined, we, the jury, find that before and at the time when, &c., in the second and third counts mentioned, the said Harriet, wife of [60 U.S. 399] said Dred Scott, and Eliza and Lizzie, the daughters of the said Dred Scott, were negro slaves, the lawful property of the defendant.

Whereupon, the court gave judgment for the defendant.

After an ineffectual motion for a new trial, the plaintiff filed the following bill of exceptions.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury the following agreed statement of facts, (*see* agreement above.) No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give to the jury the following instruction, *viz:*

"That, upon the facts agreed to by the parties, they ought to find for the plaintiff. The court refused to give such instruction to the jury, and the plaintiff, to such refusal, then and there duly excepted."

The court then gave the following instruction to the jury, on motion of the defendant:

> The jury are instructed, that upon the facts in this case, the law is with the defendant.

The plaintiff excepted to this instruction.

Upon these exceptions, the case came up to this court.

TANEY, J., lead opinion

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court, and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case and direct a re-argument on some of the points in order that we might have an opportunity of giving to the whole subject a more deliberate [60 U.S. 400] consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us, and that, as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error, and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court. [60 U.S. 401]

But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not

been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

In these last-mentioned courts, where their character and rank are analogous to that of a Circuit Court of the United States -- in other words, where they are what the law terms courts of general jurisdiction -- they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now it is not necessary to inquire whether, in courts of that description, a party who pleads over in bar when a plea to the jurisdiction has been ruled against him does or does not waive his plea, nor whether, upon a judgment in his favor on the pleas in bar and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts in questions of jurisdiction stand on different principles, and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it, and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined, and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should [60 U.S. 402] show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common law English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show affirmatively that the inferior court had authority under the Constitution to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States, and he cannot maintain his suit without showing that fact in the pleadings.

This point was decided in the case of *Bingham v. Cabot,* in 3 Dall. 382, and ever since adhered to by the court. And in *Jackson v. Ashton,* 8 Pet. 148, it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of *Capron v. Van Noorden,* in 2 Cr. 126, and *Montalet v. Murray,* 4 Cr. 46, are sufficient to show the rule of which we have spoken. The case of *Capron v. Van Noorden* strikingly illustrates the difference between a common law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is whether the facts stated in the plea are

sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. [60 U.S. 403]

We think they are before us. The plea in abatement and the judgment of the court upon it are a part of the judicial proceedings in the Circuit Court and are there recorded as such, and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of the *United States v. Smith*, 11 Wheat. 172, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration, and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate [60 U.S. 404] right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments as much so as if an ocean had separated the red man from the white, and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States, and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members

of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate [60 U.S. 405] and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the [60 U.S. 406] rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And, for the same reason, it cannot introduce any person or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons who were, at the time of the adoption of the Constitution, recognised as citizens in the several States became also citizens of this new political body, but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges

guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State [60 U.S. 407] which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State whose rights and liberties had been outraged by the English Government, and who declared their independence and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more [60 U.S. 408] uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them, one being still a large slaveholding State and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, ch. 13, s. 5, passed a law declaring

> that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court where such marriage so happens shall think fit, to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid.

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled "An act for the better preventing of a spurious and mixed issue," &c., and it provides, that

> if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at [60 U.S. 409] the discretion of the justices before whom the offender shall be convicted.

And

> that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information.

We give both of these laws in the words used by the respective legislative bodies because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma of the deepest degradation was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States as to the rights of man and the rights of the people was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that,

> [w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to [60 U.S. 410] assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation.

It then proceeds to say:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the

language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men -- high in literary acquirements, high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others, and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares [60 U.S. 411] that it is formed by the people of the United States -- that is to say, by those who were members of the different political communities in the several States -- and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show conclusively that neither the description of persons therein referred to nor their descendants were embraced in any of the other provisions of the Constitution, for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not [60 U.S. 412] even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true that, in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence, and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race, but because it was discovered from experience that slave labor was unsuited to the climate and productions of these States, for some of the States where it had ceased or nearly ceased to exist were actively engaged in the slave trade, procuring cargoes on the coast of Africa and transporting them for sale to those parts of the Union where their labor was found to be profitable and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form -- that is, in the seizure and transportation -- the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer in support of this proposition to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted and some since the Government went into operation.

We need not refer on this point particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure. [60 U.S. 413] And as long ago as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States, and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meigs's Tenn.Reports, 331.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The law of 1786, like the law of 1705, forbids the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon anyone who shall join them in marriage, and declares all such marriage absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their revised code published in 1836. This code forbids any person from joining in marriage any white person with any Indian, negro, or mulatto, and subjects the party who shall offend in this respect to imprisonment not exceeding six months in the common jail or to hard labor, and to a fine of not less than fifty nor more than two hundred dollars, and, like the law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the code upon the person who shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. The law last mentioned was passed in October, 1788, about nine months after the State had ratified and adopted the present Constitution of the United States, and, by that law, it prohibited its own citizens, under severe penalties, from engaging in the trade, and declared all policies of insurance on the vessel or cargo made in the State to be null and void. But up to the time of the adoption of the Constitution, there is nothing in the legislation of the State indicating any change of opinion as to the relative rights and position of the white and black races in this country, or indicating that it meant to place the latter, when free, upon a level with its citizens. And certainly nothing which would have led the slaveholding States to suppose that Connecticut designed to claim for them, under [60 U.S. 414] the new Constitution, the equal rights and privileges and rank of citizens in every other State.

The first step taken by Connecticut upon this subject was as early as 1774, wen it passed an act forbidding the

further importation of slaves into the State. But the section containing the prohibition is introduced by the following preamble:

> And whereas the increase of slaves in this State is injurious to the poor, and inconvenient.

This recital would appear to have been carefully introduced in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon the interest and convenience of the white population -- excluding the inference that it might have been intended in any degree for the benefit of the other.

And in the act of 1784, by which the issue of slaves born after the time therein mentioned were to be free at a certain age, the section is again introduced by a preamble assigning a similar motive for the act. It is in these words:

> Whereas sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare

-- showing that the right of property in the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience to the whites of a slave population in the State.

And still further pursuing its legislation, we find that, in the same statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian, or mulatto servant who was found wandering out of the town or place to which he belonged without a written pass such as is therein described was made liable to be seized by anyone, and taken before the next authority to be examined and delivered up to his master -- who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides that if any free negro shall travel without such pass, and shall be stopped, seized, or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that, up to that time, free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State.

And again, in 1833, Connecticut passed another law which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or [60 U.S. 415] institution, or board or harbor for that purpose, any such person without the previous consent in writing of the civil authority of the town in which such school or institution might be.

And it appears by the case of *Crandall v. The State,* reported in 10 Conn. Rep. 340, that upon an information filed against Prudence Crandall for a violation of this law, one of the points raised in the defence was that the law was a violation of the Constitution of the United States, and that the persons instructed, although of the African race, were citizens of other States, and therefore entitled to the rights and privileges of citizens in the State of Connecticut. But Chief Justice Dagget, before whom the case was tried, held that persons of that description were not citizens of a State, within the meaning of the word citizen in the Constitution of the United States, and were not therefore entitled to the privileges and immunities of citizens in other States.

The case was carried up to the Supreme Court of Errors of the State, and the question fully argued there. But the case went off upon another point, and no opinion was expressed on this question.

We have made this particular examination into the legislative and judicial action of Connecticut because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union, and if we find that, at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.

A brief notice of the laws of two other States, and we shall pass on to other considerations.

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State but free white citizens, and the same provision is found in a subsequent collection of the laws made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it. [60 U.S. 416]

Again, in 1822, Rhode Island, in its revised code, passed a law forbidding persons who were authorized to join persons in marriage from joining in marriage any white person with any negro, Indian, or mulatto, under the penalty of two hundred dollars, and declaring all such marriages absolutely null and void, and the same law was again reenacted in its revised code of 1844. So that, down to the last-mentioned period, the strongest mark of inferiority and degradation was fastened upon the African race in that State.

It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court the various laws, marking the condition of this race which were passed from time to time after the Revolution and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries (published in 1848, 2 vol., 258, note b) that in no part of the country except Maine did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows in a manner not to be mistaken the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards, throughout the thirteen States by which that instrument was framed, and it is hardly consistent with the respect due to these States to suppose that they regarded at that time as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized, whom, as we are bound out of respect to the State sovereignties to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation, or, that, when they met in convention to form the Constitution, they looked upon them as a portion of their constituents or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights and privileges and rank, in the new political body throughout the Union which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police [60 U.S. 417] regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand

equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen anyone born in the United States who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much [60 U.S. 418] more important power -- that is, the power of transforming into citizens a numerous class of persons who, in that character, would be much more dangerous to the peace and safety of a large portion of the Union than the few foreigners one of the States might improperly naturalize. The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States anyone, no matter where he was born or what might be his character or condition, and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause similar to the one in the Constitution in relation to the rights and immunities of citizens of one State in the other States was contained in the Articles of Confederation. But there is a difference of language which is worthy of note. The provision in the Articles of Confederation was

> that the *free inhabitants* of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States.

It will be observed that, under this Confederation, each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another State. The term *free inhabitant,* in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And, notwithstanding the generality of the words "free inhabitants," it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not, for the fifth section of the ninth article provides that Congress should have the power

> to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of *white* inhabitants in such State, which requisition should be binding.

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject -- the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed that a class of [60 U.S. 419] persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words "free inhabitants," in the preceding article, to whom privileges and immunities were so carefully secured in every State.

But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word *inhabitant,* which might be construed to include an emancipated slave, is omitted, and the privilege is confined to *citizens* of the State. And this alteration in words would hardly have been made unless a different meaning was intended to be conveyed or a possible doubt removed. The just and fair inference is that as this privilege was about to be placed under the protection of the General Government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given -- and the word *citizen* was on that account substituted for the words *free inhabitant.* The word citizen excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted, and also every description of persons who were not fully recognised as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of

the Constitution that we have given. Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words "people of the United States" and "citizen" in that well-considered instrument.

The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons.*"

Now the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another Government. But the language of the law above quoted shows that citizenship [60 U.S. 420] at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might, as we before said, have authorized the naturalization of Indians because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery and governed at their own pleasure.

Another of the early laws of which we have spoken is the first militia law, which was passed in 1792 at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners, the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free, but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, 2 Stat. 809, and it provides:

> That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States. [60 U.S. 421]

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

And even as late as 1820, chap. 104, sec. 8, in the charter to the city of Washington, the corporation is authorized "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," thus associating them together in its legislation, and, after prescribing the punishment that may be inflicted on the slaves, proceeds in the following words:

> And to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offence; and in case of the inability of any

> such free negro or mulatto, to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time not exceeding six calendar months.

And in a subsequent part of the same section, the act authorizes the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city."

This law, like the laws of the States, shows that this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens. And after such an uniform course of legislation as we have stated, by the colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized "citizens" of the United States, "fellow citizens," a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution, and that free persons of color were not citizens within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to [60 U.S. 422] that character, although he does not possess all the rights which may belong to other citizens -- as, for example, the right to vote, or to hold particular offices -- and that yet, when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote, and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union, foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race, and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, will all the privileges and immunities which belong to citizens of the [60 U.S. 423] State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and

immunities in every State, and the State could not restrict them, for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation, and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of *Legrand v. Darnall,* 2 Peters 664, has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States, but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the meantime, had taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the Circuit Court for the district of Maryland.

The whole proceeding, as appears by the report, was an amicable one, Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties and confided in by both of them, and whose only [60 U.S. 424] object was to have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the court in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filed his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not therefore take the land devised to him, nor make Legrand a good title, and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing, the Circuit Court was of opinion that Darnall was a free man and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now it is difficult to imagine how any question about the citizenship of Darnall, or his right to sue in that character, can be supposed to have arisen or been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in that way with the judgment of a Circuit Court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties, and had not only the right, but it was its duty -- no matter who were the parties in the judgment -- to prevent them from proceeding to enforce it by execution if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon

his title to freedom. And if he was free, he could hold and [60 U.S. 425] convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was therefore the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process as a court of common law to compel the payment of the purchase money when it was evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land and refuse the payment of the money upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of Legrand and Darnall has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for to a State. It would. in effect. give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognised him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States, and the State officers and tribunals would be compelled by the paramount authority of the Constitution to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them treat them as property and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government [60 U.S. 426] of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and

the word "people."

And, upon a full and careful consideration of the subject, [60 U.S. 427] the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial, for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and, upon their return to Missouri, became citizens of that State.

Now if the removal of which he speaks did not give them their freedom, then, by his own admission, he is still a slave, and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law is too well settled to be disputed that a court can give no judgment for either party where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it, and it has been said that, as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception, and that anything it may say upon that part of the case will be extrajudicial, and mere *obiter dicta.*

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, [60 U.S. 428] whether it be the error of giving judgment in a case over which it had no jurisdiction or any other material error, and this too whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a State court with writs of error to a Circuit Court of the United States. Undoubtedly, upon a writ of error to a State court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in *this court.* And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a State court and to a Circuit Court of the United States are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision, and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us that the Circuit Court committed an error in deciding that it had jurisdiction upon the facts in the case admitted by the pleadings. I t is the duty of the appellate tribunal to correct this error, but that could not be done by dismissing the case for want of jurisdiction here -- for that would leave the erroneous judgment in full force,

and the injured party without remedy. And the appellate court therefore exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the Circuit Court, as they appear upon the record brought up by the writ of error.

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law nor any practice nor any decision of a [60 U.S. 429] court which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case, and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy and the point has been relied on by either side and argued before the court.

In the case before us, we have already decided that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant where, upon the facts admitted in the exception, it had no jurisdiction.

We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court has not judicial authority to correct the last-mentioned error because they had before corrected the former, or by what process of reasoning it can be made out that the error of an inferior court in actually pronouncing judgment for one of the parties in a case in which it had no jurisdiction cannot be looked into or corrected by this court because we have decided a similar question presented in the pleadings. The last point is distinctly presented by the facts contained in the plaintiff's own bill of exceptions, which he himself brings here by this writ of error. It was the point which chiefly occupied the attention of the counsel on both sides in the argument -- and the judgment which this court must render upon both errors is precisely the same. It must, in each of them, exercise jurisdiction over the judgment, and reverse it for the errors committed by the court below; and issue a mandate to the Circuit Court to conform its judgment to the opinion pronounced by this court, by dismissing the case for want of jurisdiction in the Circuit Court. This is the constant and invariable practice of this court where it reverses a judgment for want of jurisdiction in the Circuit Court.

It can scarcely be necessary to pursue such a question further. The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So also where it appears that a court of admiralty has exercised jurisdiction in a case belonging exclusively [60 U.S. 430] to a court of common law. In these cases, there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.

The cases of *Jackson v. Ashton* and of *Capron v. Van Noorden,* to which we have referred in a previous part of this opinion, are directly in point. In the last-mentioned case, Capron brought an action against Van Noorden in a Circuit Court of the United States without showing, by the usual averments of citizenship, that the court had jurisdiction. There was no plea in abatement put in, and the parties went to trial upon the merits. The court gave judgment in favor of the defendant with costs. The plaintiff thereupon brought his writ of error, and this court reversed the judgment given in favor of the defendant and remanded the case with directions to dismiss it because it did not appear by the transcript that the Circuit Court had jurisdiction.

The case before us still more strongly imposes upon this court the duty of examining whether the court below has not committed an error in taking jurisdiction and giving a judgment for costs in favor of the defendant, for in *Capron v. Van Noorden,* the judgment was reversed, because it did *not appear* that the parties were citizens of different States. They might or might not be . But in this case it *does appear* that the plaintiff was born a slave, and if the facts upon which he relies have not made him free, then it appears affirmatively on the record that he is not a citizen, and

consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. [60 U.S. 431]

The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey,* north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore [60 U.S. 432] mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress upon which the plaintiff relies declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon anyone who is held as a slave under the have of anyone of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed will show the correctness of this proposition.

It will be remembered that, from the commencement of the Revolutionary war, serious difficulties existed between the States in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. And some of the other States, and more especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several States to pay the expenses of the war, and ought not to be appropriated to the use of the State in whose chartered limits they might happen [60 U.S. 433] to lie, to the exclusion of the other States, by whose combined efforts and common expense the territory was defended and preserved against the claim of the British Government.

These difficulties caused much uneasiness during the war, while the issue was in some degree doubtful, and the future boundaries of the United States yet to be defined by treaty, if we achieved our independence.

The majority of the Congress of the Confederation obviously concurred in opinion with the State of Maryland, and desired to obtain from the States which claimed it a cession of this territory, in order that Congress might raise money on this security to carry on the war. This appears by the resolution passed on the 6th of September, 1780, strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit; and this was followed by the resolution of October 10th, 1780, by which Congress pledged itself that if the lands were ceded, as recommended by the resolution above mentioned, they should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty and freedom and independence as other States.

But these difficulties became much more serious after peace took place, and the boundaries of the United States were established. Every State, at that time, felt severely the pressure of its war debt; but in Virginia and some other States, there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience, while other States which had no such resource saw before them many years of heavy and burdensome taxation, and the latter insisted, for the reasons before stated, that these unsettled lands should be treated as the common property of the States, and the proceeds applied to their common benefit.

The letters from the statesmen of that day will show how much this controversy occupied their thoughts, and the dangers that were apprehended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the river Ohio, and which was within the acknowledged limits of the State. The only object of the State in making [60 U.S. 434] this cession was to put an end to the threatening and exciting controversy, and to enable the Congress of that time to dispose of the lands and appropriate the proceeds as a common fund for the common benefit of the States. It was not ceded because it was inconvenient to the State to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States.

The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the

Constitution, all of the States, similarly situated had ceded their unappropriated lands, except North Carolina and Georgia. The main object for which these cessions were desired and made was on account of their money value, and to put an end to a dangerous controversy as to who was justly entitled to the proceeds when the lands should be sold. It is necessary to bring this part of the history of these cessions thus distinctly into view because it will enable us the better to comprehend the phraseology of the article in the Constitution so often referred to in the argument.

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential in order to make it effectual and to accomplish its objects. But it must be remembered that, at that time, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States were thirteen separate, sovereign, independent States which had entered into a league or confederation for their mutual protection and advantage, and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting together, as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. But this Confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear that as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession. There was, as we have said, no Government of the United States then in existence [60 U.S. 435] with special enumerated and limited powers. The territory belonged to sovereignties who, subject to the limitations above mentioned, had a right to establish any form of government they pleased by compact or treaty among themselves, and to regulate rights of person and rights of property in the territory as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties and acting under their authority and command (but not from any authority derived from the Articles of Confederation), that the instrument usually called the Ordinance of 1787 was adopted, regulating in much detail the principles and the laws by which this territory should be governed; and, among other provisions, slavery is prohibited in it. We do not question the power of the States, by agreement among themselves, to pass this ordinance, nor its obligatory force in the territory while the confederation or league of the States in their separate sovereign character continued to exist.

This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence in order to prepare it for admission as States according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new Government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this Government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution or necessarily to be implied from the language of the instrument and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new Government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a Government and system of jurisprudence should be maintained in it to protect the citizens of the United States who should migrate to the territory, in their rights of person and of property. It was also necessary that the new Government, about to be [60 U.S. 436] adopted should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded but the cession of which was confidently anticipated upon some terms that would be arranged between the General Government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new Government nor anyone else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new Government, and to clothe it with the necessary powers,

that the clause was inserted in the Constitution which give Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new Government the property then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States -- that is, to a territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of the lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the article. It then gives the power which was necessarily associated with the disposition and sale of the lands -- that is, the power of making needful rules and regulations respecting the territory. And whatever construction may now be given to these words, everyone, we think, [60 U.S. 437] must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new Government might afterwards itself obtain by cession from a State, either for its seat of Government or for forts, magazines, arsenals, dockyards, and other needful buildings.

And the same power of making needful rules respecting the territory is, in precisely the same language, applied to the other property belonging to the United States -- associating the power over the territory in this respect with the power over movable or personal property -- that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said that this power, in relation to the last-mentioned objects, was deemed necessary to be thus specially given to the new Government in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service.

No one, it is believed, would think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution. Nor can it, upon any fair construction, be applied to any property but that which the new Government was about the receive from the confederated States. And if this be true as to this property, it must be equally true and limited as to the territory, which is so carefully and precisely coupled with it -- and like it referred to as property in the power granted. The concluding words of the clause appear to render this construction irresistible, for, after the provisions we have mentioned, it proceeds to say, "that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

Now, as we have before said, all of the States except North Carolina and Georgia had made the cession before the Constitution was adopted, according to the resolution of Congress of October 10, 1780. The claims of other States that the unappropriated lands in these two States should be applied to the common benefit in like manner was still insisted on, but refused by the States. And this member of the clause in question evidently applies to them, and can apply to nothing else. It was to exclude the conclusion that either party, by adopting the Constitution, would surrender what they deemed their rights. And when the latter provision relates so obviously to the unappropriated lands not yet ceded by the States, and the first clause makes provision for those then actually ceded, it is [60 U.S. 438] impossible, by any just rule of construction, to make the first provision general, and extend to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory; which was a part of the same controversy, and involved in the same dispute, and depended upon the same principles. The union of the two provisions in the same clause shows that they were kindred subjects, and that the whole clause is local, and relates only to lands within the limits of the United States which had been or then were claimed by a State, and that no other territory was in the mind of the framers of the Constitution or intended to be embraced in it. Upon any other

construction, it would be impossible to account for the insertion of the last provision in the place where it is found, or to comprehend why or for what object it was associated with the previous provision.

This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence. It must be borne in mind that the same States that formed the Confederation also formed and adopted the new Government, to which so large a portion of their former sovereign powers were surrendered. It must also be borne in mind that all of these same States which had then ratified the new Constitution were represented in the Congress which passed the first law for the government of this territory, and many of the members of that legislative body had been deputies from the States under the Confederation -- had united in adopting the Ordinance of 1787 and assisted in forming the new Government under which they were then acting, and whose powers they were then exercising. And it is obvious from the law they passed to carry into effect the principles and provisions of the ordinance that they regarded it as the act of the States done in the exercise of their legitimate powers at the time. The new Government took the territory as it found it, and in the condition in which it was transferred, and did not attempt to undo anything that had been done. And among the earliest laws passed under the new Government is one reviving the Ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new Government, into whose hands the power had fallen. It appears, therefore, that this Congress regarded the purposes [60 U.S. 439] to which the land in this Territory was to be applied and the form of government and principles of jurisprudence which were to prevail there, while it remained in the Territorial state, as already determined on by the States when they had full power and right to make the decision, and that the new Government, having received it in this condition, ought to carry substantially into effect the plans and principles which had been previously adopted by the States, and which no doubt the States anticipated when they surrendered their power to the new Government. And if we regard this clause of the Constitution as pointing to this Territory, with a Territorial Government already established in it, which had been ceded to the States for the purposes hereinbefore mentioned -- every word in it is perfectly appropriate and easily understood, and the provisions it contains are in perfect harmony with the objects for which it was ceded, and with the condition of its government as a Territory at the time. We can, then, easily account for the manner in which the first Congress legislated on the subject -- and can also understand why this power over the territory was associated in the same clause with the other property of the United States, and subjected to the like power of making needful rules and regulations. But if the clause is construed in the expanded sense contended for, so as to embrace any territory acquired from a foreign nation by the present Government and to give it in such territory a despotic and unlimited power over persons and property such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used when compared with other grants of power -- and also for its association with the other provisions in the same clause.

The Constitution has always been remarkable for the felicity of its arrangement of different subjects and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present Government from a foreign nation, outside of the limits of any charter from the British Government to a colony, it would be difficult to say why it was deemed necessary to give the Government the power to sell any vacant lands belonging to the sovereignty which might be found within it, and, if this was necessary, why the grant of this power should precede the power to legislate over it and establish a Government there, and still more difficult to say why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words *other property* necessarily, by every known rule of interpretation, must mean [60 U.S. 440] property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State," or to say how any particular State could have claims in or to a territory ceded by a foreign Government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection.

The words "needful rules and regulations" would seem also to have been cautiously used for some definite object. They are not the words usually employed by statesmen when they mean to give the powers of sovereignty, or to establish a Government, or to authorize its establishment. Thus, in the law to renew and keep alive the Ordinance of

1787 and to reestablish the Government, the title of the law is: "An act to provide for the government of the territory northwest of the river Ohio." And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of Government independently of a State, it does not say Congress shall have power "to make all needful rules and regulations respecting the territory," but it declares that

> Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.

The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the Government, and not, as we have seen, when granting general powers of legislation. As, for example, in the particular power to Congress "to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform *rule* of naturalization;" "to coin money and *regulate* the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the Government might afterwards acquire is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular Territory, in which a Government and laws had already been established but which would require some alterations to adapt it to the new Government, the words are peculiarly applicable and appropriate for that purpose. [60 U.S. 441]

The necessity of this special provision in relation to property and the rights or property held in common by the confederated States is illustrated by the first clause of the sixth article. This clause provides that

> all debts, contracts, and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Government as under the Confederation.

This provision, like the one under consideration, was indispensable if the new Constitution was adopted. The new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new Government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution. And as the several States would cease to exist in their former confederated character upon the adoption of the Constitution, and could not, in that character, again assemble together, special provisions were indispensable to transfer to the new Government the property and rights which at that time they held in common, and at the same time to authorize it to lay taxes and appropriate money to pay the common debt which they had contracted; and this power could only be given to it by special provisions in the Constitution. The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted provided for the other. They have no connection with the general powers and rights of sovereignty delegated to the new Government, and can neither enlarge nor diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a Government.

Indeed, a similar provision was deemed necessary in relation to treaties made by the Confederation; and when, in the clause next succeeding the one of which we have last spoken, it is declared that treaties shall be the supreme law of the land, care is taken to include, by express words, the treaties made by the confederated States. The language is: "and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear that it applies only to the particular [60 U.S. 442] territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this Territory, while it remained under a Territorial Government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power

which the General Government exercised over slavery in this Territory, as altogether inapplicable to the case before us.

But the case of the *American and Ocean Insurance Companies v. Canter,* 1 Pet. 511, has been quoted as establishing a different construction of this clause of the Constitution. There is, however, not the slightest conflict between the opinion now given and the one referred to, and it is only by taking a single sentence out of the latter and separating it from the context that even an appearance of conflict can be shown. We need not comment on such a mode of expounding an opinion of the court. Indeed, it most commonly misrepresents instead of expounding it. And this is fully exemplified in the case referred to, where, if one sentence is taken by itself, the opinion would appear to be in direct conflict with that now given, but the words which immediately follow that sentence show that the court did not mean to decide the point, but merely affirmed the power of Congress to establish a Government in the Territory, leaving it an open question whether that power was derived from this clause in the Constitution, or was to be necessarily inferred from a power to acquire territory by cession from a foreign Government. The opinion on this part of the case is short, and we give the whole of it to show how well the selection of a single sentence is calculated to mislead.

The passage referred to is in page 542, in which the court, in speaking of the power of Congress to establish a Territorial Government in Florida until it should become a State, uses the following language:

> In the meantime, Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government may result necessarily from the facts that it is not within the jurisdiction of any particular [60 U.S. 443] State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. *Whichever may be the source from which the power is derived, the possession of it is unquestionable.*

It is thus clear from the whole opinion on this point that the court did not mean to decide whether the power was derived from the clause in the Constitution or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, and in this we entirely concur, and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court -- that is, as "*the inevitable consequence of the right to acquire territory.*"

And what still more clearly demonstrates that the court did not mean to decide the question, but leave it open for future consideration, is the fact that the case was decided in the Circuit Court by Mr. Justice Johnson, and his decision was affirmed by the Supreme Court. His opinion at the circuit is given in full in a note to the case, and in that opinion he states, in explicit terms, that the clause of the Constitution applies only to the territory then within the limits of the United States, and not to Florida, which had been acquired by cession from Spain. This part of his opinion will be found in the note in page 517 of the report. But he does not dissent from the opinion of the Supreme Court, thereby showing that, in his judgment as well as that of the court, the case before them did not call for a decision on that particular point, and the court abstained from deciding it. And in a part of its opinion subsequent to the passage we have quoted, where the court speak of the legislative power of Congress in Florida, they still speak with the same reserve. And in page 546, speaking of the power of Congress to authorize the Territorial Legislature to establish courts there, the court say:

> They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

It has been said that the construction given to this clause is new, and now for the first time brought forward. The case of which we are speaking, and which has been so much discussed, shows that the fact is otherwise. It shows that precisely the same question came before Mr. Justice Johnson, at his circuit, thirty years ago -- was fully considered by him, and the same construction given to the clause in the Constitution which is now given by this court. And that upon an appeal [60 U.S. 444] from his decision the same question was brought before this court, but was not decided because a decision upon it was not required by the case before the court.

There is another sentence in the opinion which has been commented on, which even in a still more striking manner shows how one may mislead or be misled by taking out a single sentence from the opinion of a court, and leaving out

of view what precedes and follows. It is in page 546, near the close of the opinion, in which the court say: "In legislating for them," (the territories of the United States) "Congress exercises the combined powers of the General and of a State Government." And it is said that, as a State may unquestionably prohibit slavery within its territory, this sentence decides in effect that Congress may do the same in a Territory of the United States, exercising there the powers of a State as well as the power of the General Government.

The examination of this passage in the case referred to would be more appropriate when we come to consider in another part of this opinion what power Congress can constitutionally exercise in a Territory, over the rights of person or rights of property of a citizen. But, as it is in the same case with the passage we have before commented on, we dispose of it now, as it will save the court from the necessity of referring again to the case. And it will be seen upon reading the page in which this sentence is found that it has no reference whatever to the power of Congress over rights of person or rights of property, but relates altogether to the power of establishing judicial tribunals to administer the laws constitutionally passed, and defining the jurisdiction they may exercise.

The law of Congress establishing a Territorial Government in Florida provided that the Legislature of the Territory should have legislative powers over "all rightful objects of legislation, but no law should be valid which was inconsistent with the laws and Constitution of the United States."

Under the power thus conferred, the Legislature of Florida passed an act erecting a tribunal at Key West to decide cases of salvage. And in the case of which we are speaking, the question arose whether the Territorial Legislature could be authorized by Congress to establish such a tribunal, with such powers, and one of the parties, among other objections, insisted that Congress could not under the Constitution authorize the Legislature of the Territory to establish such a tribunal with such powers, but that it must be established by Congress itself, and that a sale of cargo made under its order to pay salvors was void as made without legal authority, and passed no property to the purchaser. [60 U.S. 445]

It is in disposing of this objection that the sentence relied on occurs, and the court begin that part of the opinion by stating with great precision the point which they are about to decide.

They say:

> It has been contended that by the Constitution of the United States, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of the judicial power must be vested "in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish." Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature.

And after thus clearly stating the point before them and which they were about to decide, they proceed to show that these Territorial tribunals were not constitutional courts, but merely legislative, and that Congress might therefore delegate the power to the Territorial Government to establish the court in question, and they conclude that part of the opinion in the following words:

> Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and State Governments.

Thus it will be seen by these quotations from the opinion that the court, after stating the question it was about to decide in a manner too plain to be misunderstood, proceeded to decide it, and announced, as the opinion of the tribunal, that in organizing the judicial department of the Government in a Territory of the United States, Congress does not act under, and is not restricted by, the third article in the Constitution, and is not bound, in a Territory, to ordain and establish courts in which the judges hold their offices during good behaviour, but may exercise the discretionary power which a State exercises in establishing its judicial department and regulating the jurisdiction of its courts, and may authorize the Territorial Government to establish, or may itself establish, courts in which the judges hold their offices for a term of years only, and may vest in them judicial power upon subjects confided to the judiciary of the United States. And in doing this, Congress undoubtedly exercises the combined power of the General and a State Government. It exercises the discretionary power of a State Government in authorizing the establishment of a court in which the judges hold their appointments for a term of years only, and not during good behaviour, and it exercises the power of

the General Government in investing that [60 U.S. 446] court with admiralty jurisdiction, over which the General Government had exclusive jurisdiction in the Territory.

No one, we presume, will question the correctness of that opinion; nor is there anything in conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the third article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a Territory in organizing the judicial department of the Government. The case before us depends upon other and different provisions of the Constitution altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a Territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different -- are regulated by different and separate articles of the Constitution, and stand upon different principles. And we are satisfied that no one who reads attentively the page in Peters' Reports to which we have referred can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held into a Territory of the United States.

This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States while it remains a Territory and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a Government there, according to its own unlimited discretion, was viewed with great jealousy by the [60 U.S. 447] leading statesmen of the day. And in the Federalist No. 38, written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia, and the establishment of a Government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given, and, in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority, and, as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government, and not the judicial, and whatever the political department of the Government shall recognise as within the limits of the United States, the judicial department is also bound to recognise and to administer in it the laws of the United States so far as they apply, and to maintain in the Territory the authority and rights of the Government and also the personal rights and rights of property of individual citizens as secured by the Constitution. All we mean to say on this point is that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution and its distribution of powers for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a Territory

belonging to the people of the United States cannot be ruled as mere colonists, dependent upon the will of the General Government and to be governed by any laws it may think proper to impose. The principle upon which our Governments rest and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in [60 U.S. 448] their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it throughout the dominion of the United States. A power, therefore, in the General Government to obtain and hold colonies and dependent territories over which they might legislate without restriction would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State, and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit, for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But, until that time arrives, it is undoubtedly necessary that some Government should be established in order to organize society and to protect the inhabitants in their persons and property, and as the people of the United States could act in this matter only through the Government which represented them and the through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty, to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established [60 U.S. 449] necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory as to the number and character of its inhabitants and their situation in the Territory. In some cases, a Government consisting of persons appointed by the Federal Government would best subserve the interests of the Territory when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society and prepare it to become a State, and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose. It was acquired by the exercise of this discretion, and it must be held and governed in like manner until it is fitted to be a State.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it, and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution.

The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government [60 U.S. 450] can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.

These powers, and others in relation to rights of person which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government, and the rights of private property have been guarded with equal care. Thus, the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted, nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are [60 U.S. 451] concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt under the plea of implied or incidental powers. And if Congress itself cannot do this -- if it is beyond the powers conferred on the Federal Government -- it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government established by its authority to violate the provisions of the Constitution.

It seems, however, to be supposed that there is a difference between property in a slave and other property and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it have been dwelt upon in the argument.

But, in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees

which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect [60 U.S. 452] it in all future time if the slave escapes from his owner. This is done in plain words -- too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States, and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief, for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham,* reported in 10th Howard 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition as free or slave depended upon the laws of Kentucky when they were brought back into that State, and not of Ohio, and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status as free or slave depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument that, by the laws of Missouri, he was free on his return, and that this case [60 U.S. 453] therefore cannot be governed by the case of *Strader et al. v. Graham,* where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may at one time have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant, and that the Circuit Court of the United States had no jurisdiction when, by the laws of the State, the plaintiff was a slave and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State, was fully argued there, and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant, and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for

argument that the writ must have been dismissed for want of jurisdiction in this court. The case of *Strader and others v. Graham* is directly in point, and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a State court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us, and by the printed report of the case.

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the [60 U.S. 454] State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had, in open violation of law, entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

WAYNE, J., concurring

Mr. Justice WAYNE.

Concurring as I do entirely in the opinion of the court as it has been written and read by the Chief Justice -- without any qualification of its reasoning or its conclusions -- I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record or which was not necessary for the judicial disposition of it in the way that it has been done, by more than a majority of the court.

In doing this, the court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be and as the States of the Union and the people of those States intended it should be when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance about which there had [60 U.S. 455] become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject of regret that the conclusions of the court have not been assented to by all of its members if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment and if our decision in this case had not been made by as large

a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case with which I concur, assuming that the Circuit Court had jurisdiction, but he abstains altogether from expressing any opinion upon the eighth section of the act of 1820, known commonly as the Missouri Compromise law, and six of us declare that it was unconstitutional.

But it has been assumed that this court has acted extrajudicially in giving an opinion upon the eighth section of the act of 1820 because, as it has decided that the Circuit Court had no jurisdiction of the case, this court had no jurisdiction to examine the case upon its merits.

But the error of such an assertion has arisen in part from a misapprehension of what has been heretofore decided by the Supreme Court in cases of a like kind with that before us, in part from a misapplication to the Circuit Courts of the United States of the rules of pleading concerning pleas to the jurisdiction which prevail in common law courts, and from its having been forgotten that this case was not brought to this court by appeal or writ of error from a State court, but by a writ of error to the Circuit Court of the United States.

The cases cited by the Chief Justice to show that this court has now only done what it has repeatedly done before in other cases, without any question of its correctness, speak for themselves. The differences between the rules concerning pleas to the jurisdiction in the courts of the United States and common law courts have been stated and sustained by reasoning and adjudged cases, and it has been shown that writs of error to a State court and to the Circuit Courts of the United States are to be determined by different laws and principles. In the first, it is our duty to ascertain if this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the case from the State court, and if it shall be found that it has not, the case is at end so far as this court is concerned, for our power [60 U.S. 456] to review the case upon its merits has been made, by the twenty-fifth section, to depend upon its having jurisdiction, when it has not, this court cannot criticise, controvert, or give any opinion upon the merits of a case from a State court.

But in a case brought to this court, by appeal or by writ of error from *a Circuit Court of the United States,* we begin a review of it not by inquiring if this court has jurisdiction, but if that court has it. If the case has been decided by that court upon its merits, but the record shows it to be deficient in those averments which by the law of the United States must be made by the plaintiff in the action to give the court jurisdiction of his case, we send it back to the court from which it was brought with directions to be dismissed though it has been decided there upon its merits.

So, in a case containing the averments by the plaintiff which are necessary to give the Circuit Court jurisdiction, if the defendant shall file his plea in abatement denying the truth of them, and the plaintiff shall demur to it, and the court should *erroneously sustain the plaintiff's demurrer, or declare the plea to be insufficient, and by doing so require the defendant to answer over by a plea to the merits, and shall decide the case upon such pleading,* this court has the same authority to inquire into the jurisdiction of that court to do so, and to correct its error in that regard, that it had in the other case to correct its error, in trying a case in which the plaintiff had not made those averments which were necessary to give the court jurisdiction. In both cases, the record is resorted to to determine the point of jurisdiction, but, as the power of review of cases from a Federal court by this court is not limited by the law to a part of the case, this court may correct an error upon the merits, and there is the same reason for correcting an erroneous judgment of the Circuit Court where the want of jurisdiction appears from any part of the record that there is for declaring a want of jurisdiction for a want of necessary averments. Any attempt to control the court from doing so by the technical common law rules of pleading in cases of jurisdiction, when a defendant has been denied his plea to it, would tend to enlarge the jurisdiction of the Circuit Court by limiting this court's review of its judgments in that particular. But I will not argue a point already so fully discussed. I have every confidence in the opinion of the court upon the point of jurisdiction, and do not allow myself to doubt that the error of a contrary conclusion will be fully understood by all who shall read the argument of the Chief Justice.

I have already said that the opinion of the court has my unqualified assent. [60 U.S. 457]

NELSON, J., separate opinion

Mr. Justice NELSON.

I shall proceed to state the grounds upon which I have arrived at the conclusion that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff for the purpose of asserting his freedom and that of Harriet, his wife, and two children.

The defendant plead in abatement to the suit that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then plead over in bar of the action:

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented upon which the trial proceeded and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That, in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the army of the United States, and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory of Upper Louisiana, and north of the latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery at Fort Snelling from the last-mentioned date until the year 1838.

That, in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the army of the United States, and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery at Fort Snelling until the year 1838. That, in the year 1836, the plaintiff and Harriet [60 U.S. 458] were married at Fort Snelling with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat *Gipsey*, north of the State of Missouri, and upon the Mississippi river, the other, about seven years of age, was born in the State of Missouri at the military post called Jefferson Barracks.

In 1838, Dr. Emerson removed the plaintiff Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided. And that, before the commencement of this suit, they were sold by the Doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor, but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony in the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff, when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff and his competency to bring a

suit in the Federal courts, the common law rule of pleading is that, upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with his master from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and [60 U.S. 459] return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect, but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is that the laws of Illinois forbidding slavery within her territory had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman, and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and, of consequence, he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice, and hence, in respect to the case before us, to the State of Missouri -- a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of the Union, sovereign not merely as respects the Federal Government -- except as they have consented to its limitation -- but sovereign as respects each other. Whether, therefore, the State of Missouri will recognise or give effect to the laws of Illinois within her territories on the subject of slavery is a question for her to determine. Nor is there any constitutional power in this Government that can rightfully control her. [60 U.S. 460]

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory, and her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state of all persons therein, and also the remedy and modes of administering justice. And it is equally true that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State therefore can enact laws to operate beyond its own dominions, and if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extraterritorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now it follows from these principles that whatever force or effect the laws of one State or nation may have in the territories of another must depend solely upon the laws and municipal regulations of the latter, upon its own

jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes in his Conflict of Laws, p. 24,

> that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories. . . . And that, when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed.

Nations, from convenience and comity and from mutual interest and a sort of moral necessity to do justice, recognise and administer the laws of other countries. But of the nature, extent, and utility of them respecting property or the state and condition of persons within her territories, each nation judges for itself, and is never bound, even upon the ground of comity, to recognise them if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes, p. 398,

> that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests.

And he adds,

> in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own Government unless they are repugnant to its policy or prejudicial to its interests.

See also 2 Kent Com., p. 457, 13 Peters 519, 589.

These principles fully establish that it belongs to the sovereign [60 U.S. 461] State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution, and further that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extraterritorial operation within the jurisdiction of another except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extraterritorially, and the State of Illinois refused to recognise its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws and contrary to her policy. But how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognise and enforce the law of Illinois? For unless she is the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extraterritorially except what may be voluntarily conceded to them.

It has been supposed by the counsel for the plaintiff that a rule laid down by Huberus had some bearing upon this question. Huberus observes that

> personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his [60 U.S. 462] class elsewhere enjoy or are subject to.

De Confl.Leg., lib. 1, tit. 3, sec. 12, 4 Dallas, 375 n., 1 Story Con.Laws, pp. 59, 60.

The application sought to be given to the rule was this: that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri, he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities to which Huberus refers are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and, during his residence there, he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is that the rule, in any aspect in which it may be viewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author, for he admits that foreign Governments give effect to these laws of the domicil no further than they are consistent with their own laws and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign Government. We should add also that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story Con., sec. 91, 96, 103, 104; 2 Kent. Com., p. 457, 458; 1 Burge Con.Laws, pp. 12, 127.

We come now to the decision of this court in the case of *Strader et al. v. Graham,* 10 How. 2. The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio with their master's consent and had returned to Kentucky into his service, had thereby [60 U.S. 463] become entitled to their freedom. The Court of Appeals held that they had not. The case was brought to this court under the twenty-fifth section of the Judiciary Act. This court held that it had no jurisdiction, for the reason the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that

> every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except insofar as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery after their return depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for herself whether their employment in another State should or should not make them free on their return.

It has been supposed, in the argument on the part of the plaintiff that the eighth section of the act of Congress passed March 6, 1820, 3 St. at Large, p. 544, which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extraterritorially and within the State of Missouri, beyond that of the laws of Illinois or those of Ohio in the case of *Strader et al. v. Graham.* A similar ground was taken and urged upon the court in the case just mentioned, under the Ordinance of 1787, which was enacted during the time of the Confederation and reenacted by Congress after the adoption of the Constitution with some amendments adapting it to the new Government. 1 St. at Large p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed:

> The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the States since formed within the territory and admitted into the Union. If this proposition could be maintained, it would not alter the question, for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them. [60 U.S. 464]

> The ordinance in question, he observes, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and

could not influence the decision upon the rights of the master or the slaves in that State.

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extraterritorial effect of a State law and the act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States, and that, if this act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result that effect may be given to such legislation, for it is only by giving the act of Congress operation within the State of Missouri that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain upon any consistent reasoning that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State, and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one Government have no force within the limits of another or extraterritorially except from the consent of the latter.

It is perhaps not unfit to notice in this connection that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State -- an effect, as insisted, that displaces the laws of the State and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power under the Constitution to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject, and then, upon the process of reasoning which seeks to extend its influence beyond the Territory and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do [60 U.S. 465] not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is that even conceding, for the purposes of the argument that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits or within the jurisdiction of a State. It can neither displace its laws nor change the status or condition of its inhabitants.

Our conclusion therefore is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State and trying the case before us was bound to follow it.

The remaining question for consideration is what is the law of the State of Missouri on this subject? And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case were it not due to that tribunal to state somewhat at large the course of decision and the principles involved on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below and remanded the cause to the circuit for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant that court following the decision of the Supreme Court of the State. The judgment of the Supreme Court is reported in the 15 Misso.R. p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and Territory to which they removed, and their return to the slave State, and upon the principles of international law that foreign laws have no extraterritorial force except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the same judgment given, 15 Misso.R. 595, 17 *Ib.* 434. It must be admitted, therefore, as the settled law of the State, [60 U.S. 466] and, according to the decision in the case of Strader et al. v. Graham, is conclusive of the case in this court.

It is said, however that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly it must be unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be that the courts of a State are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence -- in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his Government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free -- in Kentucky, 2 Marsh. 476, 5 B. Munroe 176, 9 *ib.* 565 -- in Virginia, 1 Rand. 15, 1 Leigh 172, 10 Grattan 495 -- in Maryland, 4 Harris and McHenry 295, 322, 325. In conformity also with the law of England on this subject, *Ex parte Grace,* 2 Hagg.Adm.R. 94, and with the opinions of the [60 U.S. 467] most eminent jurists of the country. Story's Confl. 396a, 2 Kent Com. 258 n., 18 Pick. 193, Chief Justice Shaw. *See* Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.

Lord Stowell, in communicating his opinion in the case of the slave Grace to Judge Story, states, in his letter, what the question was before him, namely:

> Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return.

He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the *Case of Somersett,* but the practice, he observed, "has regularly been that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes:

> I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result.

Again he observes:

> In my native State (Massachusetts), the state of slavery is not recognised as legal, and yet, if a slave should come hither and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be redintegrated.

We may remark in this connection that the case before the Maryland court, already referred to, and which was

decided in 1799, presented the same question as that before Lord Stowell, and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that

> however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State (then the province of Maryland), the relation of master and slave continued in its extent, as authorized by the laws of this State.

And Luther Martin, one of the counsel in that case, stated, on the argument that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in [60 U.S. 468] holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law by an act of her Legislature in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England over which the Imperial Government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the original condition of the slave attached. The question presented in cases arising here is as to the effect and operation to be given to the laws of a foreign State on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority both in England and in this country is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his Government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of the *Attorney General v. Napier,* 6 Welsh, Hurtst. and Gordon Exch. Rep. 217, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely, the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it. [60 U.S. 469]

Our conclusion is that the judgment of the court below should be affirmed.

GRIER, J., separate opinion

Mr. Justice GRIER.

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice that the act of Congress of 6th March, 1820, is unconstitutional and void and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a

citizen of Missouri in the courts of the United States. But that the record shows a *prima facie* case of jurisdiction, requiring the court to decide all the questions properly arising in it, and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance, for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

DANIEL, J., separate opinion

Mr. Justice DANIEL.

It may with truth be affirmed that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise and to control not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their internal and domestic authority and interests and the relations they sustain to their confederates.

To my mind it is evident that nothing less than the ambitious and far-reaching pretension to compass these objects of vital concern is either directly essayed or necessarily implied in the positions attempted in the argument for the plaintiff in error.

How far these positions have any foundation in the nature of the rights and relations of separate, equal, and independent Governments, or in the provisions of our own Federal compact, or the laws enacted under and in pursuance of the authority of that compact will be presently investigated.

In order correctly to comprehend the tendency and force of those positions, it is proper here succinctly to advert to the [60 U.S. 470] facts upon which the questions of law propounded in the argument have arisen.

This was an action of trespass *vi et armis* instituted in the Circuit Court of the United States for the district of Missouri, in the name of the plaintiff in error, a negro held as a slave, for the recovery of freedom for himself, his wife, and two children, also negroes.

To the declaration in this case the defendant below, who is also the defendant in error, pleaded in abatement that the court could not take cognizance of the cause because the plaintiff was not a citizen of the State of Missouri, as averred in the declaration, but was a negro of African descent, and that his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and hence it followed, from the second section of the third article of the Constitution, which creates the judicial power of the United States with respect to controversies between citizens of different States that the Circuit Court could not take cognizance of the action.

To this plea in abatement, a demurrer having been interposed on behalf of the plaintiff, it was sustained by the court. After the decision sustaining the demurrer, the defendant, in pursuance of a previous agreement between counsel, and with the leave of the court, pleaded in bar of the action: 1st, not guilty, 2dly that the plaintiff was a negro slave, the lawful property of the defendant, and as such the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do, 3dly that with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.

Issues having been joined upon the above pleas in bar, the following statement, comprising all the evidence in the cause, was agreed upon and signed by the counsel of the respective parties, *viz:*

In the year 1834, the plaintiff was a negro slave belonging to Doctor Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held

him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six [60 U.S. 471] degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson, hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at a military post called Jefferson barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

R. M. FIELD, *for Plaintiff*

H. A. GARLAND, *for Defendant.*

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county that there was a verdict and judgment in his favor that on a writ of error to the Supreme Court, the judgment below was reversed, and the [60 U.S. 472] cause remanded to the Circuit Court, where it has been continued to await the decision of this case.

FIELD, *for Plaintiff*

GARLAND, *for Defendant*

Upon the aforegoing agreed facts, the plaintiff prayed the court to instruct the jury that they ought to find for the plaintiff, and upon the refusal of the instruction thus prayed for, the plaintiff excepted to the court's opinion. The court then, upon the prayer of the defendant, instructed the jury that upon the facts of this case agreed as above, the law was with the defendant. To this opinion also the plaintiff's counsel excepted, as he did to the opinion of the court denying to the plaintiff a new trial after the verdict of the jury in favor of the defendant.

The question first in order presented by the record in this cause is that which arises upon the plea in abatement, and the demurrer to that plea, and upon this question, it is my opinion that the demurrer should have been overruled, and the plea sustained.

On behalf of the plaintiff, it has been urged that by the pleas interposed in bar of a recovery in the court below (which pleas both in fact and in law are essentially the same with the objections averred in abatement), the defence in abatement has been displaced or waived that it could therefore no longer be relied on in the Circuit Court, and cannot claim the consideration of this court in reviewing this cause. This position is regarded as wholly untenable. On the contrary, it would seem to follow conclusively from the peculiar character of the courts of the United States, as organized under the Constitution and the statutes, and as defined by numerous and unvarying adjudications from this bench, that there is not one of those courts whose jurisdiction and powers can be deduced from mere custom or tradition, not one whose jurisdiction and powers must not be traced palpably to, and invested exclusively by, the Constitution and statutes of the United States, not one that is not bound, therefore, at all times, and at all stages of its

proceedings, to look to and to regard the special and declared extent and bounds of its commission and authority. There is no such tribunal of the United States as a court of general jurisdiction, in the sense in which that phrase is applied to the superior courts under the common law, and even with respect to the courts existing under that system, it is a well settled principle that *consent* can never give jurisdiction.

The principles above stated, and the consequences regularly deducible from them, have, as already remarked, been repeatedly [60 U.S. 473] and unvaryingly propounded from this bench. Beginning with the earliest decisions of this court, we have the cases of *Bingham v. Cabot et al.,* 3 Dallas 382, *Turner v. Eurille,* 4 Dallas 7, *Abercrombie v. Dupuis et al.,* 1 Cranch 343, *Wood v. Wagnon,* 2 Cranch 9, *The United States v. The brig Union et al.,* 4 Cranch 216, *Sullivan v. The Fulton Steamboat Company,* 6 Wheaton 450, *Mollan et al. v. Torrence,* 9 Wheaton 537, *Brown v. Keene,* 8 Peters 112, and *Jackson v. Ashton,* 8 Peters 148, ruling, in uniform and unbroken current, the doctrine that it is essential to the jurisdiction of the courts of the United States that the facts upon which it is founded should appear upon the record. Nay, to such an extent and so inflexibly has this requisite to the jurisdiction been enforced that in the case of *Capron v. Van Noorden,* 2 Cranch 126, it is declared that the plaintiff in this court may assign for error his own omission in the pleadings in the court below where they go to the jurisdiction. This doctrine has been, if possible, more strikingly illustrated in a later decision, the case of *The State of Rhode Island v. The State of Massachusetts,* in the 12th of Peters.

In this case, on page 718 of the volume, this court, with reference to a motion to dismiss the cause for want of jurisdiction, have said:

> *However late this objection has been made, or may be made, in any cause in an inferior or appellate court of the United States,* it must be considered and decided before any court can move one farther step in the cause, as any movement is necessarily to exercise the jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit, to adjudicate or exercise any judicial power over them. The question is whether on the case before the court their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. A motion to dismiss a cause pending in the courts of the United States is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm and all causes of action between them. It depends on the subject matter, whether the jurisdiction shall be exercised by a court of law or equity, but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing to the [60 U.S. 474] contrary appears; hence has arisen the rule that the party claiming an exemption from its process must set out the reason by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must proceed in virtue of its general jurisdiction. A motion to dismiss therefore cannot be entertained, as it does not disclose a case of exception, and, if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery that the subject matter is cognizable only by the King in Council, or that the parties defendant cannot be brought before any municipal court on account of their sovereign character or the nature of the controversy, or to the very common cases which present the question, whether the cause belong to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court. The objection goes to a denial of any jurisdiction of a municipal court in the one class of cases, and to the jurisdiction of any court of equity or of law in the other, on which last the court decides according to its discretion.
>
> An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue, but when the objection goes to the power of the court over the parties or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ. Where an inferior court can have no jurisdiction of a case of law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, *or at the trial or hearing.* As a denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. *But as this court is one of limited and special original jurisdiction,* its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice,* and its action a nullity. And whether the want or excess of power is objected by a party or is apparent [60 U.S. 475] to the court, it must surcease its action or proceed extrajudicially.

In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know -- nay, are bound to know and to be governed by.

If, on the other hand, there exist facts or circumstances by which a particular case would be withdrawn or exempted from the influence of public law or necessary historical knowledge, such facts and circumstances form an exception to the general principle, and these must be specially set forth and *established* by those who would avail themselves of

such exception.

Now the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know -- that the African negro race never have been acknowledged as belonging to the family of nations; that, as amongst them, there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase, as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.

In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied, and the causes which show the absence of that character or capacity are set forth by averment. The verity of those causes, according to the settled rules of pleading, being admitted by the demurrer, it only remained for the Circuit Court to decide upon their legal sufficiency to abate the plaintiff's action. And it now becomes the province of this court to determine whether the plaintiff below (and in error here), admitted to be a *negro* of African descent, whose ancestors were of pure African blood and were brought into this country and sold as negro slaves -- such being his status, and such the circumstances surrounding his position -- whether he can, by correct legal induction from that status and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri?

It may be assumed as a postulate that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly *property,* to be used in subserviency to the interests, the convenience, [60 U.S. 476] or the will, of his owner, and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy as his own that which another has a paramount right and power to withhold. Hence it follows necessarily that a slave, the *peculium* or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a CITIZEN. For who, it may be asked, is a citizen? What do the character and status of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. Upon a principle of etymology alone, the term *citizen,* as derived from *civitas,* conveys the ideas of connection or identification with the State or Government, and a participation of its functions. But beyond this, there is not, it is believed, to be found in the theories of writers on Government or in any actual experiment heretofore tried, an exposition of the term *citizen* which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

Thus Vattel, in the preliminary chapter to his Treatise on the Law of Nations, says:

> Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their mutual strength. Such a society has her affairs and her interests, she deliberates and takes resolutions *in common,* thus becoming a moral person who possesses an understanding and a will peculiar to herself.

Again, in the first chapter of the first book of the Treatise just quoted, the same writer, after repeating his definition of a State, proceeds to remark that,

> from the very design that induces a number of men to form a society which has its common interests and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the *sovereignty.*

Again, this writer remarks: "The authority of *all* over each member essentially belongs to the body politic, or the State."

By this same writer it is also said:

> The citizens are the members of the civil society, bound to this society by certain duties, and subject to its authority; they *equally* participate in its advantages. The natives or natural-born citizens are those born in the country of parents who are citizens. As society [60 U.S. 477] cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights.

Again:

> I say, to be *of the country,* it is necessary to be born of a person who is a *citizen,* for if he be born there of a foreigner, it will be only the place of his *birth,* and not his *country.* The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country.

Vattel, Book 1, cap. 19, p. 101.

From the views here expressed, and they seem to be unexceptionable, it must follow that, with the *slave,* with one devoid of rights or capacities, *civil or political,* there could be no pact that one thus situated could be no party to or actor in, the association of those possessing free will, power, discretion. He could form no part of the design, no constituent ingredient or portion of a society based upon *common,* that is, upon *equal* interests and powers. He could not at the same time be the sovereign and the slave.

But it has been insisted in argument that the emancipation of a slave, effected either by the direct act and assent of the master or by causes operating in contravention of his will, produces a change in the status or capacities of the slave such as will transform him from a mere subject of property into a being possessing a social, civil, and political equality with a citizen. In other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to conceive by what magic the mere *surcease* or renunciation of an interest in a subject of *property,* by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, though voluntarily or designedly performed, yet without the co-operation or warrant of the Government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked how such a result could be accomplished by means wholly extraneous and entirely foreign to the Government of the State? The argument thus urged must lead to these extraordinary conclusions. It is regarded at once as wholly untenable, and as unsustained by the direct authority or by the analogies of history.

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the [60 U.S. 478] mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of *villanage,* as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans or from slavery at any period within the United States.

But with regard to slavery amoungst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.

The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the republic, and until a late period of the eastern empire, and at last was in *effect* destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abasement incident to absolute and simple despotism.

By the learned and elegant historian of the Decline and Fall of the Roman Empire, we are told that,

> In the decline of the Roman empire, the proud distinctions of the republic were gradually abolished, and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates, and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But, in the eye of the law, all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was *degraded* to an obsolete and empty name. T he voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master, and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which the citizen alone had been once entitled to assume over the conquests of his fathers. The first Caesars had scrupulously guarded the distinction of *ingenuous* and *servile* birth, which was decided by the condition of the mother. The slaves who were

> liberated by a generous master immediately entered into the middle class of *libertini,* or freedmen, but they could never be enfranchised from the duties of obedience and gratitude, whatever were the fruits of [60 U.S. 479] their industry, their patron and his family inherited the third part, or even the whole, of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave obtained without reserve or delay the station of a citizen, and at length the dignity of an ingenuous birth *was created* or *supposed* by the omnipotence of the emperor.{1}

The above account of slavery and its modifications will be found in strictest conformity with the Institutes of Justinian. Thus, in book 1st, title 3d, it is said: "The first general division of persons in respect to their rights is into freemen and slaves." The same title, sec. 4th: "Slaves are born such, or become so. They are born such of bondwomen; they become so either by the *law of nations,* as by capture, or by the civil law." Section 5th: "In the condition of slaves there is no diversity, but among free persons there are many. Thus some are *ingenui* or freemen, others *libertini* or freedmen."

Tit. 4th. DE INGENUIS. "A freeman is one who is born free by being born in matrimony, of parents who both are free, or both freed, or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."

Tit. 5th. DE LIBERTINIS. "Freedmen are those who have been manumitted from just servitude."

Section third of the same title states that "freedmen were formerly distinguished by a threefold division." But the emperor proceeds to say:

> Our *piety* leading us to reduce all things into a better state, we have amended our laws, and reestablished the ancient usage, for anciently liberty was simple and undivided – that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference that the person manumitted became only a *freed man,* although his manumittor was a *free* man.

And he further declares:

> We have made all freed men in general become citizens of Rome, regarding neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which *slaves* may become Roman citizens.

By the references above given, it is shown, from the nature and objects of civil and political associations and upon the direct authority of history, that citizenship was not conferred [60 U.S. 480] by the simple fact of emancipation, but that such a result was deduced therefrom in violation of the fundamental principles of free political association, by the exertion of despotic will to establish, under a false and misapplied denomination, one equal and universal slavery, and to effect this result required the exertions of absolute power -- of a power both in theory and practice, being in its most plenary acceptation the SOVEREIGNTY, THE STATE ITSELF -- it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a slave. The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not perhaps a community in which slavery is recognised in which the power of emancipation and the modes of its exercise are not regulated by law -- that is, by the sovereign authority, and none can fail to comprehend the necessity for such regulation for the preservation of order and even of political and social existence.

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions that to change or to abolish a fundamental principle of the society must be the act of the society itself -- of the *sovereignty,* and that none other can admit to a participation of that high attribute. It may further expose the character of the argument urged for the plaintiff to point out some of the revolting consequences which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or *quasi* citizen, or a resident foreigner of anyone of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such State, but also materially to interfere with the organization of the Federal Government and with the authority of the separate and independent States. He may emancipate his negro slave, by

which process he first transforms that slave into a citizen of his own State; he may next, under color of article fourth, section second, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: this manumitted slave [60 U.S. 481] may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that Government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the Federal compact, have restricted that boon to *free white aliens alone.* If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive -- that it has *in effect* no existence, but is repealed or abrogated.

But it has been strangely contended that the jurisdiction of the Circuit Court might be maintained upon the ground that the plaintiff was a *resident* of Missouri, and that, for the purpose of vesting the court with jurisdiction over the parties, residence within the State was sufficient.

The first, and to my mind a conclusive, reply to this singular argument is presented in the fact that the language of the Constitution restricts the jurisdiction of the courts to cases in which the parties shall be *citizens,* and is entirely silent with respect to residence. A second answer to this strange and latitudinous notion is that it so far stultifies the sages by whom the Constitution was framed as to impute to them ignorance of the material distinction existing between *citizenship* and mere *residence* or *domicil,* and of the well known facts that a person confessedly an *alien* may be permitted to reside in a country in which he can possess no civil or political rights, or of which he is neither a citizen nor subject, and that, for certain purposes, a man may have a *domicil* in different countries, in no one of which he is an actual personal resident.

The correct conclusions upon the question here considered would seem to be these:

That, in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as *property* merely, and as such was not and could not be a party or an actor, much less a *peer* in any compact or form of government established by the States or the United States. That if, since the adoption of the State Governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty -- the State -- exerted [60 U.S. 482] to that end, either in the form of legislation or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That, so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognised either by the language or purposes of the former, and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization,* these laws, as has already been remarked, being restricted to *free white aliens* exclusively.

But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of State power would be incompetent to bestow a character or status created by the Constitution or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the Federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

The States, in the exercise of their political power, might, with reference to their peculiar Government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make the objects of their bounty, but they could not reclaim or exert the powers which they had vested exclusively in the Government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect

proceeding.

According to the view taken of the law as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by as requiring neither a particular examination nor an adjudication directly upon them. upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest. [60 U.S. 483]

The questions then to be considered upon the several pleas in bar, and upon the agreed statement of facts between the counsel, are: 1st. Whether the admitted master and owner of the plaintiff, holding him as his slave in the State of Missouri, and in conformity with his rights guarantied to him by the laws of Missouri then and still in force, by carrying with him for his own benefit and accommodation, and as his own slave, the person of the plaintiff into the State of Illinois, within which State slavery had been prohibited by the Constitution thereof, and by retaining the plaintiff during the commorancy of the master within the State of Illinois, had, upon his return with his slave into the State of Missouri, forfeited his rights as master by reason of any supposed operation of the prohibitory provision in the Constitution of Illinois, beyond the proper territorial jurisdiction of the latter State? 2d. Whether a similar removal of the plaintiff by his master from the State of Missouri, and his retention in service at a point included within no State, but situated north of thirty-six degrees thirty minutes of north latitude, worked a forfeiture of the right of property of the master, and the manumission of the plaintiff?

In considering the first of these questions, the acts or declarations of the master, as expressive of his purpose to emancipate, may be thrown out of view, since none will deny the right of the owner to relinquish his interest in any subject of property at any time or in any place. The inquiry here bears no relation to acts or declarations of the owner as expressive of his intent or purpose to make such a relinquishment; it is simply a question whether, irrespective of such purpose and in opposition thereto, that relinquishment can be enforced against the owner of property within his own country, in defiance of every guaranty promised by its laws, and this through the instrumentality of a claim to power entirely foreign and extraneous with reference to himself, to the origin and foundation of his title, and to the independent authority of his country. A conclusive negative answer to such an inquiry is at once supplied by announcing a few familiar and settled principles and doctrines of public law.

Vattel, in his chapter the the general principles of the laws of nations, section 15th, tells us that

> nations, being free and independent of each other in the same manner that men are naturally free and independent, the second general law of their society is that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature.

"The natural society of nations," says this writer, "cannot subsist unless the natural rights of each be respected." In [60 U.S. 484] section 16th he says,

> as a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes for her – of what it is proper or improper for her to do, and of course it rests solely with her to examine and determine whether she can perform any office for another nation without neglecting the duty she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations.

Again, in section 18th of the same chapter,

> nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom.

So, in section 20:

> A nation, then, is mistress of her own actions, so long as they do not affect the proper and *perfect rights* of any other nation – so long as she is only *internally* bound, and does not lie under any *external* and *perfect* obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty, but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are *free, independent,*

> and *equal,* and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, a perfect equality of rights between nations in the administration of their affairs and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment.

Chancellor Kent, in the 1st volume of his Commentaries, lecture 2d, after collating the opinions of Grotius, Heineccius, Vattel, and Rutherford, enunciates the following positions as sanctioned by these and other learned publicists, *viz:* that

> nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal [60 U.S. 485] policy, to another. This writer gives some instances of the violation of this great national immunity, and amongst them the constant interference by the ancient Romans, under the pretext of settling disputes between their neighbors, but with the real purpose of reducing those neighbors to bondage, the interference of Russia, Prussia, and Austria for the dismemberment of Poland, the more recent invasion of Naples by Austria in 1821, and of Spain by the French Government in 1823, under the excuse of suppressing a dangerous spirit of internal revolution and reform.

With reference to this right of self-government in independent sovereign States, an opinion has been expressed which, whilst it concedes this right as inseparable from and as a necessary attribute of sovereignty and independence, asserts nevertheless some implied and paramount authority of a supposed international law, to which this right of self-government must be regarded and exerted as subordinate, and from which independent and sovereign States can be exempted only by a protest, or by some public and formal rejection of that authority. With all respect for those by whom this opinion has been professed, I am constrained to regard it as utterly untenable, as palpably inconsistent, and as presenting in argument a complete *felo de se.*

Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. Again, could such claims from extraneous sources be regarded as legitimate, the effort to resist or evade them, by protest or denial, would be as irregular and unmeaning as it would be futile. It could in no wise affect the question of superior right. For the position here combatted, no respectable authority has been, and none it is thought can be, adduced. It is certainly irreconcilable with the doctrines already cited from the writers upon public law.

Neither the *Case of Lewis Somersett,* Howell's State Trials, vol. 20, so often vaunted as the proud evidence of devotion to freedom under a Government which has done as much perhaps to extend the reign of slavery as all the world besides, nor does any decision founded upon the authority of *Somersett's Case,* when correctly expounded, assail or impair the principle of national equality enunciated by each and all of the publicists already referred to. In the case of *Somersett,* although the applicant for the habeas corpus and the individual claiming property in that applicant were both subjects and residents [60 U.S. 486] within the British empire, yet the decision cannot be correctly understood as ruling absolutely and under all circumstances against the right of property in the claimant. That decision goes no farther than to determine that, *within the realm of England,* there was no authority to justify the detention of an individual in private bondage. If the decision in *Somersett's Case* had gone beyond this point, it would have presented the anomaly of a repeal by laws enacted for and limited in their operation to the realm alone, of other laws and institutions established for places and subjects without the limits of the realm of England, laws and institutions at that very time, and long subsequently, sanctioned and maintained under the authority of the British Government, and which the full and combined action of the King and Parliament was required to abrogate.

But could the decision in *Somersett's Case* be correctly interpreted as ruling the doctrine which it has been attempted to deduce from it, still that doctrine must be considered as having been overruled by the lucid and able opinion of Lord Stowell in the more recent case of the slave Grace, reported in the second volume of Haggard, p. 94, in which opinion, whilst it is conceded by the learned judge that there existed no power to coerce the slave whilst in England that yet, upon her return to the island of Antigua, her status as a slave was revived, or, rather, that the title of the owner to the slave as property had never been extinguished, but had always existed in that island. If the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it

apply as between nations or Governments entirely separate, and absolutely independent of each other? For in this precise attitude the States of this Union stand with reference to this subject, and with reference to the tenure of every description of property vested under their laws and held within their territorial jurisdiction.

A strong illustration of the principle ruled by Lord Stowell, and of the effect of that principle even in a case of express contract, is seen in the case of *Lewis v. Fullerton,* decided by the Supreme Court of Virginia and reported in the first volume of Randolph, p. 15. The case was this: a female slave, the property of a citizen of Virginia, whilst with her master in the State of Ohio, was taken from his possession under a writ of habeas corpus, and set at liberty. Soon, or immediately after, by agreement between this slave and her master, a deed was executed in Ohio by the latter containing a stipulation that this slave should return to Virginia, and after a service of two years in that State, should there be free. The law of Virginia [60 U.S. 487] regulating emancipation required that deeds of emancipation should, within a given time from their date, be recorded in the court of the county in which the grantor resided, and declared that deeds with regard to which this requisite was not complied with should be void. Lewis, an infant son of this female, under the rules prescribed in such cases, brought an action *in forma pauperis* in one of the courts of Virginia for the recovery of his freedom, claimed in virtue of the transactions above mentioned. Upon an appeal to the Supreme Court from a judgment against the plaintiff, Roane, Justice, in delivering the opinion of the court, after disposing of other questions discussed in that case, remarks:

> As to the deed of emancipation contained in the record that deed, taken in connection with the evidence offered in support of it, shows that it had a reference to the State of Virginia, and the testimony shows that it formed a part of this contract, whereby the slave Milly was to be brought back (as she was brought back) into the State of Virginia. Her object was therefore to secure her freedom by the deed within the State of Virginia after the time should have expired for which she had indented herself and when she should be found abiding within the State of Virginia.
>
> If, then, this contract had an eye to the State of Virginia for its operation and effect, the *lex loci* ceases to operate. In that case, it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for what of a due recording in the county court, as was decided in the case of *Givens v. Mann* in this court. It is also ineffectual within the Commonwealth of Virginia for another reason. The *lex loci* is also to be taken subject to the exception that it is not to be enforced in another country when it violates some moral duty or the policy of that country or is not consistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case, we are told, "*magis jus nostrum, quam jus alienum servemus.*" Huberus, tom. 2, lib. 1, tit. 3, 2 Fontblanque, p. 444.
>
> That third party in this instance is the Commonwealth of Virginia, and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance.

The second or last-mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon the provision of the act of Congress of March 6, 1820, prohibiting slavery in Upper Louisiana north of thirty-six degrees thirty minutes north latitude, popularly called the *Missouri Compromise,* that assumption renews the question, formerly so [60 U.S. 488] zealously debated, as to the validity of the provision in the act of Congress, and upon the constitutional competency of Congress to establish it.

Before proceeding, however, to examine the validity of the prohibitory provision of the law, it may, so far as the rights involved in this cause are concerned, be remarked that conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits comprised within its terms, much less could there be inferred from it a power to destroy or in any degree to control rights, either of person or property, entirely within the bounds of a distinct and independent sovereignty -- rights invested and fortified by the guaranty of that sovereignty. These surely would remain in all their integrity, whatever effect might be ascribed to the prohibition within the limits defined by its language.

But, beyond and in defiance of this conclusion, inevitable and undeniable as it appears, upon every principle of justice or sound induction, it has been attempted to convert this prohibitory provision of the act of 1820 not only into a weapon with which to assail the inherent -- the necessarily inherent -- powers of independent sovereign Governments, but into a mean of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt, there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all -- the power, in fine, of confiscation, in retribution for no offence, or, if for an offence, for that of accidental locality only.

It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the impotence of such a pretension; still, the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquillity, and fraternal feeling which are the surest, nay, the only, means of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this Government.

The power of Congress to impose the prohibition in the eighth section of the act of 1820 has been advocated upon an attempted construction of the second clause of the third section [60 U.S. 489] of the fourth article of the Constitution, which declares that

> Congress shall have power to dispose of and to make all needful rules and regulations respecting the *territory* and *other property belonging* to the United States.

In the discussions in both houses of Congress at the time of adopting this eighth section of the act of 1820, great weight was given to the peculiar language of this clause, *viz: territory* and *other property belonging* to the United States, as going to show that the power of disposing of and regulating thereby vested in Congress was restricted to a *proprietary interest in the territory or land* comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, "*territory or other property,*" identified *territory* with *property,* and inasmuch as *citizens* or *persons* could not be property, and especially were not property *belonging* to the United States. And upon every principle of reason or necessity, this power to dispose of and to regulate the *territory* of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, *viz.,* the nation. Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes by degrading them from the position they previously occupied.

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the Territories; on the contrary, there is an absolute incongruity between them.

But whatever the power vested in Congress, and whatever the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the *United States,* and one to be disposed of and regulated for the benefit and under the authority of the *United States.* Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals, but every citizen would, if any *one* [60 U.S. 490] could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument which imparts to Congress its very existence and its every function guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation, and farther that the only private property which the Constitution has *specifically recognised,* and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce,* is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow citizens, and of the formal

and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were *uno flatu,* to another to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.

A conclusion in favor of the prohibitory power in Congress, as asserted in the eighth section of the act of 1820, has been attempted, as deducible from the precedent of the ordinance of the convention of 1787, concerning the cession by Virginia of the territory northwest of the Ohio, the provision in which ordinance, relative to slavery, it has been attempted to impose upon other and subsequently acquired territory.

The first circumstance which, in the consideration of this provision, impresses itself upon my mind is its utter futility and want of authority. This court has, in repeated instances, ruled that whatever may have been the force accorded to this Ordinance of 1787 at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of *Pollard's Lessee v. Hagan,* 3 How. 212, *Parmoli v. The First Municipality of* [60 U.S. 491] *New Orleans,* 3 How. 589, *Strader v. Graham,* 16 How. 82. But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention either to require or to accept a condition or restriction upon the cession like that insisted on, a condition inconsistent with, and destructive of, the object of the grant. The cession was, as recommended by the old Congress in 1780, made originally and completed *in terms to the United States,* and for the benefit of the United States, *i.e.,* for *the people, all the people,* of the United States. The condition subsequently sought to be annexed in 1787 (declared, too, to be perpetual and immutable), being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, *the people of the United States,* vested, must necessarily so far have been *ab initio void.* With respect to the power of the convention to impose this inhibition, it seems to be pertinent in this place to recur to the opinion of one contemporary with the establishment of the Government, and whose distinguished services in the formation and adoption of our national charter point him out as the *artifex maximus* of our Federal system. James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of article fourth of the Constitution

> that it cannot be well extended beyond a power over the territory *as property,* and the power to make provisions really needful or necessary for the government of settlers, until ripe for admission into the Union.

Again, he says,

> with respect to what has taken place in the Northwest territory, it may be observed that the ordinance giving it is distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised, and it remains to be decided how far the States formed within that territory, and admitted into the Union, are on a different footing from its other members as to their legislative sovereignty. As to the power of admitting new States into the Federal compact, the questions offering themselves are whether Congress can attach conditions, or the new States concur in conditions, which after admission would *abridge* or *enlarge* the constitutional rights of legislation common to other States; whether Congress can, by a compact [60 U.S. 492] with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident.{2}

In support of the Ordinance of 1787, there may be adduced the semblance at least of obligation deductible from *compact,* the *form* of assent or agreement between the grantor and grantee, but this form or similitude, as is justly remarked by Mr. Madison, is rendered null by the absence of power or authority in the contracting parties and by the more intrinsic and essential defect of incompatibility with the rights and avowed purposes of those parties, and with their relative duties and obligations to others. If, then, with the attendant *formalities* of assent or compact, the restrictive power claimed was void as to the immediate subject of the ordinance, how much more unfounded must be the pretension to such a power as derived from that source (*viz.,* the Ordinance of 1787) with respect to territory acquired by purchase or conquest under the supreme authority of the Constitution -- territory not the subject of *mere donation,* but obtained *in the name of all, by the combined efforts and resources of all,* and with no condition annexed or

pretended.

In conclusion, my opinion is that the decision of the Circuit Court upon the law arising upon the several pleas in bar is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that, for this error, the decision of the Circuit Court should be reversed, and the cause remanded to that court with instructions to abate the action for the reason set forth and pleaded in the plea in abatement.

In the aforegoing examination of this cause, the circumstance that the questions involved therein had been previously adjudged between these parties by the court of the State of Missouri has not been adverted to, for although it has been ruled by this court that in instances of concurrent jurisdiction, the court first obtaining possession or cognizance of the controversy should retain and decide it, yet, as in this case there had [60 U.S. 493] been no plea, either of a former judgment or of *autre action pendent,* it was thought that the fact of a prior decision, however conclusive it might have been if regularly pleaded, could not be incidentally taken into view.

CAMPBELL, J., concurring

Mr. Justice CAMPBELL.

I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion.

The case shows that the plaintiff, in the year 1834, was a negro slave in Missouri, the property of Dr. Emerson, a surgeon in the army of the United States. In 1834, his master took him to the military station at Rock Island, on the border of Illinois, and in 1836 to Fort Snelling, in the present Minnesota, then Wisconsin, Territory. While at Fort Snelling, the plaintiff married a slave who was there with her master, and two children have been born of this connection, one during the journey of the family in returning to Missouri, and the other after their return to that State.

Since 1838, the plaintiff and the members of his family have been in Missouri in the condition of slaves. The object of this suit is to establish their freedom. The defendant, who claims the plaintiff and his family, under the title of Dr. Emerson, denied the jurisdiction of the Circuit Court by the plea that the plaintiff was a negro of African blood, the descendant of Africans who had been imported and sold in this country as slaves, and thus he had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, a trial was then had upon the general issue, and special pleas to the effect that the plaintiff and his family were slaves belonging to the defendant.

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass complained of was committed upon one claiming to be a freeman and a citizen, in that State, and who had been living for years under the dominion of its laws. And the rule is that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried. 20 How.St.Tri., 234, Cowp.S.C. 161.

The Constitution of Missouri recognises slavery as a legal condition, extends guaranties to the masters of slaves, and invites [60 U.S. 494] immigrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.

The Federal Constitution and the acts of Congress provide for the return of escaping slaves within the limits of the Union. No removal of the slave beyond the limits of the State, against the consent of the master, nor residence there in another condition, would be regarded as an effective manumission by the courts of Missouri, upon his return to the State. "*Sicut liberis captis status restituitur sic servus domino.*" Nor can the master emancipate the slave within the State except through the agency of a public authority. The inquiry arises whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a

case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case? Similar inquiries have arisen in a great number of suits, and the discussions in the State courts have relieved the subject of much of its difficulty. 12 B.M.Ky.R. 545, *Foster v. Foster,* 10 Gratt.Va.R. 485, 4 Har. and McH.Md.R. 295, *Scott v. Emerson,* 15 Misso. 576, 4 Rich.S.C.R., 186, 17 Misso. 434, 15 Misso. 596, 5 B.M. 173, 8 B.M. 540, 633, 9 B.M. 565, 5 Leigh 614, 1 Raud. 15, 18 Pick. 193.

The result of these discussions is that, in general, the status or civil and political capacity of a person is determined in the first instance by the law of the domicil where he is born; that the legal effect on persons arising from the operation of the law of that domicil is not indelible, but that a new capacity or status may be acquired by a change of domicil. That questions of status are closely connected with considerations arising out of the social and political organization of the State where they originate, and each sovereign power must determine them within its own territories.

A large class of cases has been decided upon the second of the propositions above stated in the Southern and Western courts -- cases in which the law of the actual domicil was adjudged to have altered the native condition and status of the slave although he had never actually possessed the status of freedom in that domicil. *Rankin v. Lydia,* 2 A.K.M., *Herny v. Decker,* Walk. 36, 4 Mart. 385, 1 Misso. 472, *Hunter v. Fulcher,* 1 Leigh.

I do not impugn the authority of these cases. No evidence is found in the record to establish the existence of a domicil [60 U.S. 495] acquired by the master and slave either in Illinois or Minnesota. The master is described as an officer of the army who was transferred from one station to another along the Western frontier in the line of his duty and who, after performing the usual tours of service, returned to Missouri; these slaves returned to Missouri with him, and had been there for near fifteen years in that condition when this suit was instituted. But absence in the performance of military duty, without more, is a fact of no importance in determining a question of a change of domicil. Questions of that kind depend upon acts and intentions, and are ascertained from motives, pursuits, the condition of the family and fortune of the party, and no change will be inferred unless evidence shows that one domicil was abandoned and there was an intention to acquire another. 11 L. and Eq. 6, 6 Exch. 217, 6 M. and W. 511, 2 Curt.Ecc.R. 368.

The cases first cited deny the authority of a foreign law to dissolve relations which have been legally contracted in the State where the parties are and have their actual domicil -- relations which were never questioned during their absence from that State -- relations which are consistent with the native capacity and condition of the respective parties, and with the policy of the State where they reside, but which relations were inconsistent with the policy or laws of the State or Territory within which they had been for a time, and from which they had returned, with these relations undisturbed. It is upon the assumption that the law of Illinois or Minnesota was indelibly impressed upon the slave and its consequences carried into Missouri that the claim of the plaintiff depends. The importance of the case entitles the doctrine on which it rests to a careful examination.

It will be conceded that, in countries where no law or regulation prevails opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State would not be liberated by the accident of their introgression. The relation of domestic slavery is recognised in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause, is a violation of that law. Wheat. Law of Na., 724, 5 Stats. at Large 601, Calh.Sp., 378, Reports of the Com. U.S. and G.B. 187, 238, 241.

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne abolishes the rule of prescription. He directs,

> that wheresoever, within the bounds of Italy, either the runaway slave of the king, or of [60 U.S. 496] the church, or of any other man shall be found by his master, he shall be restored without any bar or prescription of years, yet upon the provision that the master be a Frank or German, or of any other nation (foreign,) but if he be a Lombard or a Roman, he shall acquire or receive his slaves by that law which has been established from ancient times among them.

Without referring for precedents abroad or to the colonial history for similar instances, the history of the Confederation

and Union affords evidence to attest the existence of this ancient law. In 1783, Congress directed General Washington to continue his remonstrances to the commander of the British forces respecting the permitting negroes belonging to the citizens of these States to leave New York, and to insist upon the discontinuance of that measure. In 1788, the resident minister of the United States at Madrid was instructed to obtain from the Spanish Crown orders to its Governors in Louisiana and Florida

> to permit and facilitate the apprehension of fugitive slaves from the States, promising that the States would observe the like conduct respecting fugitives from Spanish subjects.

The committee that made the report of this resolution consisted of Hamilton, Madison, and Sedgwick, 2 Hamilton's Works, 473, and the clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. The diminution of the power of a master to reclaim his escaping bondsman in Europe commenced in the enactment of laws of prescription in favor of privileged communes. Bremen, Spire, Worms, Vienna, and Ratisbon, in Germany, Carcassonne, Beziers, Toulouse, and Paris, in France, acquired privileges on this subject at an early period. The ordinance of William the Conqueror that a residence of any of the servile population of England, for a year and a day, without being claimed, in any city, burgh, walled town, or castle of the King, should entitle them to perpetual liberty is a specimen of these laws.

The earliest publicist who has discussed this subject is Bodin, a jurist of the sixteenth century whose work was quoted in the early discussions of the courts in France and England on this subject. He says:

> In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy anyone of others, insomuch as the slaves of strangers, so soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France.

He states another case, which arose in the city of Toulouse, of a Genoese merchant, who had [60 U.S. 497] carried a slave into that city on his voyage from Spain, and when the matter was brought before the magistrates, the

> procureur of the city, out of the records, showed certain ancient privileges given unto them of Tholouse, wherein it was granted that slaves, so soon as they should come into Tholouse, should be free.

These cases were cited with much approbation in the discussion of the claims of the West India slaves of Verdelin for freedom, in 1738, before the judges in admiralty, 15 Causes Celebres p. 1, 2 Masse Droit Com., sec. 58, and were reproduced before Lord Mansfield, in the cause of Somersett, in 1772. Of the cases cited by Bodin, it is to be observed that Charles V of France exempted all the inhabitants of Paris from serfdom or other feudal incapacities in 1371, and this was confirmed by several of his successors, 3 Dulaire Hist. de Par. 546, Broud. Court. de Par. 21, and the ordinance of Toulouse is preserved as follows:

> *Civitas Tholosana fuit et erit sine fine libera, adeo ut servi et ancillae, sclavi et sclavae, dominos sive dominas habentes, cum rebus vel sine rebus suis, ad Tholosam vel infra terminos extra urbem terminatos accedentes acquirant libertatem.*

Hist. de Langue, tome 3, p. 69; *ibid.* 6, p. 8, Loysel Inst. b. 1, sec. 6.

The decisions were made upon special ordinances, or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege, and the history of Paris furnishes but little support for the boast that she was a "*sacro sancta civitas,*" where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates in the case of Verdelin, which amused the grave lawyers who argued the case of Somersett. The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master.

The *Case of Somersett* was that of a Virginia slave carried to England by his master in 1770, and who remained there two years. For some cause, he was confined on a vessel destined to Jamaica, where he was to be sold. Lord Mansfield, upon a return to a habeas corpus, states the question involved. "Here, the person of the slave himself," he says, "is the immediate subject of inquiry, can any dominion, authority, or coercion be exercised in this country, according to the American laws?" He answers:

> The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England.

Again, he says:

> The return states that the slave departed, and refused to serve, whereupon he was kept to be sold abroad. . . . So high [60 U.S. 498] an act of dominion must be recognised by the law of the country where it is used. The power of the master over his slave has been extremely different in different countries. . . . The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created are erased from the memory. It is so odious that nothing can be suffered to support it but positive law.

That there is a difference in the systems of States which recognise and which do not recognise the institution of slavery cannot be disguised. Constitutional law, punitive law, police, domestic economy, industrial pursuits, and amusements, the modes of thinking and of belief of the population of the respective communities all show the profound influence exerted upon society by this single arrangement. This influence was discovered in the Federal Convention, in the deliberations on the plan of the Constitution. Mr. Madison observed

> that the States were divided into different interests not by their difference of size, but by other different interests, not by their difference of size, but by other circumstances, the most material of which resulted from climate, but principally from the effects of their having or not having slaves. These two causes concur in forming the great division of interests in the United States.

The question to be raised with the opinion of Lord Mansfield, therefore, is not in respect to the incongruity of the two systems, but whether slavery was absolutely contrary to the law of England, for if it was so, clearly, the American laws could not operate there. Historical research ascertains that, at the date of the Conquest, the rural population of England were generally in a servile condition, and under various names denoting noting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament in the time of Richard II, and also of Henry VIII, refused to adopt a general law of emancipation. Acts of emancipation by the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries when the case of Somersett was heard, and no motion for its suppression had ever been submitted to Parliament, while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been introduced under the counsel of the most illustrious jurists of the realm, and such slaves had been publicly [60 U.S. 499] sold for near a century in the markets of London. In the northern part of the kingdom of Great Britain, there existed a class of from 30,000 to 40,000 persons, of whom the Parliament said, in 1775, 15 George III, chap. 28,

> many colliers, coal-heavers, and salters are in a state of slavery or bondage, bound to the collieries and salt works where they work for life, transferable with the collieries and salt works when their original masters have no use for them, and whereas the emancipating or setting free the colliers, coal-heavers, and salters in Scotland, who are now in a state of servitude, gradually and upon reasonable conditions, would be the means of increasing the number of colliers, coal-heavers, and salters, to the great benefit of the public, without doing any injury to the present masters, and would remove the reproach of allowing such a state of servitude to exist in a free country,

&c., and again, in 1799, "they declare that many colliers and coal-heavers still continue in a state of bondage" No statute, from the Conquest till the 15 George III, had been passed upon the subject of personal slavery. These facts have led the most eminent civilian of England to question the accuracy of this judgment, and to insinuate that, in this judgment, the offence of *ampliare jurisdictionem* by private authority was committed by the eminent magistrate who pronounced it.

This sentence is distinguishable from those cited from the French courts in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law, whereas here the consequences of slavery merely -- that is the public policy -- were found to be contrary to the law of slavery. The case of the slave Grace, 2 Hagg., with four others, came before Lord Stowell in 1827, by appeals from the West India vice admiralty courts. They were cases of slaves who had returned to those islands, after a residence in Great Britain, and where the claim to freedom was first presented in the colonial forum. The learned judge in that case said:

> This suit fails in its foundation. She (Grace) was not a free person, no injury is done her by her continuance in slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of a family. If she depends upon such freedom conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased, and she was imported into Antigua.

The decision of Lord Mansfield was, "that so high an act of dominion" as the master exercises over his slave, in sending him abroad for sale, could not be exercised in England [60 U.S. 500] under the American laws, and contrary to the spirit of their own.

The decision of Lord Stowell is that the authority of the English laws terminated when the slave departed from England. That the laws of England were not imported into Antigua with the slave upon her return, and that the colonial forum had no warrant for applying a foreign code to dissolve relations which had existed between persons belonging to that island, and which were legal according to its own system. There is no distinguishable difference between the case before us and that determined in the admiralty of Great Britain.

The complaint here, in my opinion, amounts to this: that the judicial tribunals of Missouri have not denounced as odious the Constitution and laws under which they are organized, and have not superseded them on their own private authority for the purpose of applying the laws of Illinois, or those passed by Congress for Minnesota, in their stead. The eighth section of the act of Congress of the 6th of March, 1820, 3 Statutes at Large 545, entitled, "An act to authorize the people of Missouri to form a State Government," &c., is referred to as affording the authority to this court to pronounce the sentence which the Supreme Court of Missouri felt themselves constrained to refuse. That section of the act prohibits slavery in the district of country west of the Mississippi, north of thirty-six degrees thirty minutes north latitude, which belonged to the ancient province of Louisiana, not included in Missouri.

It is a settled doctrine of this court that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States. Nor can that Government affect the duration of slavery within the States, other than by a legislation over the foreign slave trade. The power of Congress to adopt the section of the act above cited must therefore depend upon some condition of the Territories which distinguishes them from States, and subjects them to a control more extended. The third section of the fourth article of the Constitution is referred to as the only and all-sufficient grant to support this claim. It is that

> new States may be admitted by the Congress to this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of State, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property [60 U.S. 501] belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

It is conceded in the decisions of this court that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize Territorial Governments, with powers of legislation. 3 How. 212, 12 How. 1, 1 Pet. 511, 13 P. 436, 16 H. 164.

But the recognition of a plenary power in Congress to dispose of the public domain or to organize a Government over it does not imply a corresponding authority to determine the internal polity or to adjust the domestic relations or the persons who may lawfully inhabit the territory in which it is situated. A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the territorial limits where it lies, are distinguished by broad lines of demarcation in American history. This court has assisted us to define them. In *Johnson v. McIntosh,* 8 Wheat. 595-543, they say:

> According to the theory of the British Constitution, all vacant lands are vested in the Crown, and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative.
>
> All the lands we hold were originally granted by the Crown, and the establishment of a royal Government has never been considered as impairing its right to grant lands within the chartered limits of such colony.

And the British Parliament did claim a supremacy of legislation coextensive with the absoluteness of the dominion of the sovereign over the Crown lands. The American doctrine, to the contrary, is embodied in two brief resolutions of the people of Pennsylvania in 1774: 1st.

> That the inhabitants of these colonies are entitled to the same rights and liberties, within the colonies that the subjects born in England are entitled within the realm.

2d.

> That the power assumed by Parliament to bind the people of these colonies by statutes, in all cases whatever, is unconstitutional, and therefore the source of these unhappy difficulties.

The Congress of 1774, in their statement of rights and grievances, affirm "a free and exclusive power of legislation" in their several Provincial Legislatures,

> in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.

1 Jour.Cong. 32.

The unanimous consent of the people of the colonies, then, [60 U.S. 502] to the power of their sovereign, "to dispose of and make all needful rules and regulations respecting the territory" of the Crown, in 1774, was deemed by them as entirely consistent with opposition, remonstrance, the renunciation of allegiance, and proclamation of civil war, in preference to submission to his claim of supreme power in the territories.

I pass now to the evidence afforded during the Revolution and Confederation. The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent colonies became thirteen independent States. "The Declaration of Independence was not," says Justice Chase,

> a declaration that the United Colonies jointly, in a collective capacity, were independent States, &c., but that each of them was a sovereign and independent State – that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth.

3 Dall. 199, 4 Cr. 212.

These sovereign and independent States, being united as a Confederation, by various public acts of cession became jointly interested in territory and concerned to dispose of and make all needful rules and regulations respecting it. It is a conclusion not open to discussion in this court

> that there was no territory within the (original) United States that was claimed by them in any other right than that of some of the confederate States.

Harcourt v. Gaillord, 12 Wh. 523. "The question whether the vacant lands within the United States," says Chief Justice Marshall,

> became joint property or belonged to the separate States was a momentous question which threatened to shake the American Confederacy to its foundations. This important and dangerous question has been compromised, and the compromise is not now to be contested.

6 C.R. 87.

The cessions of the States to the Confederation were made on the condition that the territory ceded should be laid out and formed into distinct republican States, which should be admitted as members to the Federal Union having the same rights of sovereignty, freedom, and independence as the other States. The first effort to fulfil this trust was made in 1785 by the offer of a charter or compact to the inhabitants who might come to occupy the land.

Those inhabitants were to form for themselves temporary State Governments, founded on the Constitutions of any of the States but to be alterable at the will of their Legislature, and [60 U.S. 503] permanent Governments were to succeed these whenever the population became sufficiently numerous to authorize the State to enter the Confederacy, and Congress assumed to obtain powers from the States to facilitate this object. Neither in the deeds of cession of the States nor in this compact was a sovereign power for Congress to govern the Territories asserted. Congress retained power, by this act, "to dispose of and to make rules and regulations respecting the public domain," but submitted to the people to organize a Government harmonious with those of the confederate States.

The next stage in the progress of colonial government was the adoption of the Ordinance of 1787 by eight States, in which the plan of a Territorial Government, established by act of Congress, is first seen. This was adopted while the Federal Convention to form the Constitution was sitting. The plan placed the Government in that hands of a Governor, Secretary, and Judges, appointed by Congress, and conferred power on them to select suitable laws from the codes of the States until the population should equal 5,000. A Legislative Council, elected by the people, was then to be admitted to a share of the legislative authority, under the supervision of Congress, and States were to be formed whenever the number of the population should authorize the measure.

This ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their Constitution and laws. These conditions were designed to fulfill the trust in the agreements of cession that the States to be formed of the ceded Territories should be "distinct republican States." This ordinance was submitted to Virginia in 1788, and the 5th article, embodying as it does a summary of the entire act, was specifically ratified and confirmed by that State. This was an incorporation of the ordinance into her act of cession. It was conceded in the argument that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. To a part of the engagements, the assent of nine States was required, and for another portion no provision had been made in those articles. Mr. Madison said, in a writing nearly contemporary, but before the confirmatory act of Virginia,

> Congress have proceeded to form new States, to erect temporary Governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority.

Federalist No. 38. Richard Henry Lee, one of the committee who reported the ordinance to Congress, [60 U.S. 504] transmitted it to General Washington (15th July, 1787), saying,

> It seemed necessary, for the security of property among uninformed and perhaps licentious people, as the greater part of those who go there are, that a strong-toned Government should exist, and the rights of property be clearly defined.

The consent of all the States represented in Congress, the consent of the Legislature of Virginia, the consent of the inhabitants of the Territory, all concur to support the authority of this enactment. It is apparent in the frame of the Constitution that the Convention recognised its validity, and adjusted parts of their work with reference to it. The authority to admit new States into the Union, the omission to provide distinctly for Territorial Governments, and the clause limiting the foreign slave trade to States then existing, which might not prohibit it, show that they regarded this Territory as provided with Government and organized permanently with a restriction on the subject of slavery. Justice Chase, in the opinion already cited, says of the Government before, and it is in some measure true during the Confederation that

> the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs,

and there is only one rule of construction, in regard to the acts done, which will fully support them, *viz.,* that the powers actually exercised were rightfully exercised wherever they were supported by the implied sanction of the State Legislatures and by the ratifications of the people.

The clauses in the 3d section of the 4th article of the Constitution, relative to the admission of new States and the disposal and regulation of the territory of the United States, were adopted without debate in the Convention.

There was a warm discussion on the clauses that relate to the subdivision of the States, and the reservation of the claims of the United States and each of the States from any prejudice. The Maryland members revived the controversy in regard to the Crown lands of the Southwest. There was nothing to indicate any reference to a government of Territories not included within the limits of the Union, and the whole discussion demonstrates that the Convention was consciously dealing with a Territory whose condition, as to government, had been arranged by a fundamental and unalterable compact.

An examination of this clause of the Constitution, by the light of the circumstances in which the Convention was placed, will aid us to determine its significance. The first clause is "that new States may be admitted by the Congress to this [60 U.S. 505] Union." The condition of Kentucky, Vermont, Rhode Island, and the new States to be formed in the Northwest suggested this as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of States and the parties to consent to such an alteration, was required by the plans on foot for changes in Massachusetts, New York, Pennsylvania, North Carolina, and Georgia. The clause which enables Congress to dispose of and make regulations respecting the public domain was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands, and the last clause that nothing in the Constitution should prejudice the claims of the United States or a particular State was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain among the discussions of the time for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive previsions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry, and in respect to dangers from power vested in a central Government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them to warn their countrymen that here was a power to threaten the landmarks of this federative Union, and, with them, the safeguards of popular and constitutional liberty, or that, under this article, there might be introduced, on our soil, a single Government over a vast extent of country -- a Government foreign to the persons over whom it might be exercised and capable of binding those not represented, by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents -- expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal Government, which this Constitution was not designed to supersede, but merely to modify as to its conditions.

The compacts of cession by North Carolina and Georgia are subsequent to the Constitution. They adopt the Ordinance of 1787, except the clause respecting slavery. But the precautionary repudiation of that article forms an argument quite as satisfactory to the advocates for Federal power, as its introduction [60 U.S. 506] would have done. The refusal of a power to Congress to legislate in one place seems to justify the seizure of the same power when another place for its exercise is found.

This proceeds from a radical error which lies at the foundation of much of this discussion. It is that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is that the powers of the Federal Government are limited to the grants of the Constitution.

Before the cession of Georgia was made, Congress asserted rights, in respect to a part of her territory, which require a passing notice. In 1798 and 1800, acts for the settlement of limits with Georgia, and to establish a Government in the Mississippi Territory, were adopted. A Territorial Government was organized between the Chattahoochee and Mississippi rivers. This was within the limits of Georgia. These acts dismembered Georgia. They established a separate Government upon her soil, while they rather derisively professed

> that the establishment of that Government shall in no respects impair the rights of the State of Georgia, either to the jurisdiction or soil of the Territory.

The Constitution provided that the importation of such persons as any of the existing States shall think proper to admit

shall not be prohibited by Congress before 1808. By these enactments, a prohibition was placed upon the importation of salves into Georgia, although her Legislature had made none.

This court have repeatedly affirmed the paramount claim of Georgia to this Territory. They have denied the existence of any title in the United States. 6 C.R. 87, 12 Wh. 523, 3 How. 212, 13 How. 381. Yet these acts were cited in the argument as precedents to show the power of Congress in the Territories. These statutes were the occasion of earnest expostulation and bitter remonstrance on the part of the authorities of the State, and the memory of their injustice and wrong remained long after the legal settlement of the controversy by the compact of 1802. A reference to these acts terminates what I have to say upon the Constitutions of the Territory within the original limits of the United States. These Constitutions were framed by the concurrence of the States making the cessions and Congress, and were tendered to immigrants who might be attracted to the vacant territory. The legislative powers of the officers of this Government were limited to the selection of laws from the States, and provision was made for the introduction of popular institutions, and their emancipation [60 U.S. 507] from Federal control whenever a suitable opportunity occurred. The limited reservation of legislative power to the officers of the Federal Government was excused on the plea of *necessity*, and the probability is that the clauses respecting slavery embody some compromise among the statesmen of that time; beyond these, the distinguishing features of the system which the patriots of the Revolution had claimed as their birthright from Great Britain predominated in them.

The acquisition of Louisiana in 1803 introduced another system into the United States. This vast province was ceded or Spain. To establish a Government constituted on similar principles, and with like conditions, was not an unnatural proceeding.

But there was great difficulty in finding constitutional authority for the measure. The third section of the fourth article of the Constitution was introduced into the Constitution on the motion of Mr. Gouverneur Morris. In 1803, he was appealed to for information in regard to its meaning. He answers:

> I am very certain I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. . . . I knew then as well as I do now that all North America must at length be annexed to us. Happy indeed, if the lust of dominion stop here. It would therefore have been perfectly utopian to oppose a paper restriction to the violence of popular sentiment in a popular Government.

3 Mor.Writ. 185. A few days later, he makes another reply to his correspondent. "I perceive," he says,

> I mistook the drift of your inquiry, which substantially is whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to GOVERN THEM AS PROVINCES, AND ALLOW THEM NO VOICE *in our councils. In wording the third SECTION OF THE fourth article, I went as far as circumstances would permit to establish the exclusion.* CANDOR OBLIGES ME TO ADD MY BELIEF THAT HAD IT BEEN MORE POINTEDLY EXPRESSED, A STRONG OPPOSITION WOULD HAVE BEEN MADE.

3 Mor.Writ. 192. The first Territorial Government of Louisiana was an Imperial one, founded upon a French or Spanish model. For a time, the Governor, Judges, Legislative Council, Marshal, Secretary, and officers of the militia were appointed by the President.{1} [60 U.S. 508]

Besides these anomalous arrangements, the acquisition gave rise to jealous inquiries as to the influence it would exert in determining the men and States that were to be "the arbiters and rulers" of the destinies of the Union, and unconstitutional opinions, having for their aim to promote sectional divisions, were announced and developed. "Something," said an eminent statesman,

> something has suggested to the members of Congress the policy of acquiring geographical majorities. This is a very direct step towards disunion, for it must foster the geographical enmities by which alone it can be effected. This something must be a contemplation of particular advantages to be derived from such majorities, and is it not notorious that they consist of nothing else but usurpations over persons and property, by which they can regulate the internal *wealth and prosperity of States and individuals?*

The most dangerous of the efforts to employ a geographical political power to perpetuate a geographical preponderance in the Union is to be found in the deliberations upon the act of the 6th of March, 1820, before cited. The attempt consisted of a proposal to exclude Missouri from a place in the Union unless her people would adopt a Constitution containing a prohibition upon the subject of slavery according to a prescription of Congress. The

sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the legislative department. In *Groves v. Slaughter,* 15 Pet., the Chief Justice said:

> The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits.

Justice McLean said:

> The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State.

In *Pollard's Lessee v. Hagan,* 3 How. 212, the court said:

> The United States have no constitutional capacity to exercise municipal [60 U.S. 509] jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact.

This is a necessary consequence resulting from the nature of the Federal Constitution, which is a federal compact among the States establishing a limited Government, with powers delegated by the people of distinct and independent communities, who reserved to their State Governments, and to themselves, the powers they did not grant. This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people, to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by Congress, as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy and aroused such animosities among the people that patriots whose confidence had not failed during the Revolution began to despair for the Constitution.{2} Amid the utmost violence of this extraordinary contest, the expedient contained in the eighth section of this act was proposed to moderate it, and to avert the catastrophe it menaced. It was not seriously debated, nor were its constitutional aspects severely scrutinized by Congress. For the first time in the history of the country has its operation been embodied in a case at law and been presented to this court for their judgment. The inquiry is whether there are conditions in the Constitutions of the Territories which subject the capacity and status of persons within their limits to the direct action of Congress. Can Congress determine the condition and status of persons who inhabit the Territories?

The Constitution permits Congress to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. This power applies as well to territory belonging to the United States within the States as beyond them. It comprehends all the public domain, wherever it may be. The argument is that [60 U.S. 510] the power to make "ALL needful rules and regulations" "is a power of legislation," "a full legislative power," "that it includes all subjects of legislation in the territory," and is without any limitations, except the positive prohibitions which affect all the powers of Congress. Congress may then regulate or prohibit slavery upon the public domain within the new States, and such a prohibition would permanently affect the capacity of a slave whose master might carry him to it. And why not? Because no power has been conferred on Congress. This is a conclusion universally admitted. But the power to "make rules and regulations respecting the territory" is not restrained by State lines, nor are there any constitutional prohibitions upon its exercise in the domain of the United States within the States, and whatever rules and regulations respecting territory Congress may constitutionally make are supreme, and are not dependent on the situs of "the territory."

The author of the Farmer's Letters, so famous in the ante-revolutionary history, thus states the argument made by the American loyalists in favor of the claim of the British Parliament to legislate in all cases whatever over the colonies: "It has been urged with great vehemence against us," he says,

> and it seems to be thought their FORT by our adversaries that a power of regulation is a power of legislation, and a power of legislation, if constitutional, must be universal and supreme, in the utmost sense of the word. It is therefore concluded that the colonies, by acknowledging

> the power of regulation, acknowledged every other power.

This sophism imposed upon a portion of the patriots of that day. Chief Justice Marshall, in his life of Washington, says

> that many of the best-informed men in Massachusetts had perhaps adopted the opinion of the parliamentary right of internal government over the colonies; . . . that the English statute book furnishes many instances of its exercise; . . . that in no case recollected was their authority openly controverted;

and "that the General Court of Massachusetts, on a late occasion, openly recognised the principle." Marsh.Wash., v. 2, p. 75, 76.

But the more eminent men of Massachusetts rejected it, and another patriot of the time employs the instance to warn us of "the stealth with which oppression approaches," and "the enormities towards which precedents travel." And the people of the United States, as we have seen, appealed to the last argument, rather than acquiesce in their authority. Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive [60 U.S. 511] words, such as "rules," "regulations," "territory," to reestablish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings and sacrifices of seven years of war? Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores -- in a word, as George III would have understood them -- or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson, to the sage Franklin, or to Hamilton, who, from his early manhood, was engaged in combating British constructions of such words? We know that the resolution of Congress of 1780 contemplated that the new States to be formed under their recommendation were to have the same rights of sovereignty, freedom, and independence, as the old. That every resolution, cession, compact, and ordinance of the States observed the same liberal principle. That the Union of the Constitution is a union formed of equal States, and that new States, when admitted, were to enter "this Union." Had another union been proposed in "any pointed manner," it would have encountered not only "strong," but successful, opposition. The disunion between Great Britain and her colonies originated in the antipathy of the latter to "rules and regulations" made by a remote power respecting their internal policy. In forming the Constitution, this fact was ever present in the minds of its authors. The people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and

> that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority than the general authority is subject to them within its own sphere.

Still this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the Ninth and Tenth Amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? When [60 U.S. 512] the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote:

> I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution.

The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution with some insight and confidence.

I have endeavored, with the assistance of these, to find a solution for the grave and difficult question involved in this inquiry. My opinion is that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting territory," is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution. The Ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acquiescence of the people who recognised the validity of that plea of necessity which supported so many of the acts of the Governments of that time, and the Federal Government accepted the ordinance as a recognised and valid engagement of the Confederation.

In referring to the precedents of 1798 and 1800, I find the Constitution was plainly violated by the invasion of the rights of a sovereign State, both of soil and jurisdiction, and in reference to that of 1804, the wisest statesmen protested against it, and the President more than doubted its policy and the power of the Government.

Mr. John Quincy Adams, at a later period, says of the last act

> that the President found Congress mounted to the pitch of passing those acts without inquiring where they acquired the authority, and he conquered his own scruples as they had done theirs.

But this court cannot undertake for themselves the same conquest. They acknowledge that our peculiar security [60 U.S. 513] is in the possession of a written Constitution, and they cannot make it blank paper by construction.

They look to its delineation of the operations of the Federal Government, and they must not exceed the limits it marks out, in their administration. The court have said

> that Congress cannot exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, beyond what has been delegated.

We are then to find the authority for supreme power in the Territories in the Constitution. What are the limits upon the operations of a Government invested with legislative, executive, and judiciary powers, and charged with the power to dispose of and to make all needful rules and regulations respecting a vast public domain? The feudal system would have recognised the claim made on behalf of the Federal Government for supreme power over persons and things in the Territories as an incident to this title -- that is the title to dispose of and make rules and regulations respecting it.

The Norman lawyers of William the Conqueror would have yielded an implicit assent to the doctrine that a supreme sovereignty is an inseparable incident to a grant to dispose of and to make all needful rules and regulations respecting the public domain. But an American patriot, in contrasting the European and American systems, may affirm

> that European sovereigns give lands to their colonists, but reserve to themselves a power to control their property, liberty, and privileges, but the American Government sells the lands belonging to the people of the several States (*i.e.,* United States) to their citizens, who are already in the possession of personal and political rights which the Government did not give and cannot take away.

And the advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of of the several departments of the Federal Government. Nor are the States or people restrained by any enumeration or definition of their rights or liberties.

To impair or diminish either, the department must produce an authority from the people themselves, in their Constitution, and, as we have seen, a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. But as this is "thought their fort" by our adversaries, I propose a more definite examination of it. We have seen, Congress does not [60 U.S. 514] dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States.

These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in

common, and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory "belonging to the United States."

Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain and its preparation for sale or disposition. The system of land surveys, the reservations for schools, internal improvements, military sites, and public buildings, the preemption claims of settlers, the establishment of land offices and boards of inquiry to determine the validity of land titles, the modes of entry and sale, and of conferring titles, the protection of the lands from trespass and waste, the partition of the public domain into municipal subdivisions, having reference to the erection of Territorial Governments and States, and perhaps the selection, under their authority, of suitable laws for the protection of the settlers until there may be a sufficient number of them to form a self-sustaining municipal Government -- these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of Government which belong to them as the Legislature of the United States, of which these Territories make a part. *Loughborough v. Blake,* 5 Wheat. 317. Thus, the laws of taxation, for the regulation of foreign, Federal, and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and in a great measure is beyond the cognizance of the judiciary department of that Government. How much municipal power may be exercised by the people of the Territory before their admission to the Union, the courts of justice cannot decide. This must depend, for [60 U.S. 515] the most part, on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the 8th section of the act of 6th March, 1820, I have cited, insofar as it concerns the capacity and status of persons in the condition and circumstances of the plaintiff and his family.

These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of municipal law, which, though derived from a common source and recognising in the main similar principles, yet in some respects had become unlike, and, on a particular subject, promised to be antagonistic.

Their systems provided protection for life, liberty, and property among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value, to regulate foreign and Federal commerce, to secure, for a limited period, to authors and inventors a property in their writings and discoveries, and to make rules concerning captures in war, and, within the limits of these powers, it has exercised, rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

But the great powers of war and negotiation, finance, postal communication, and commerce, in general, when employed in respect to the property of a citizen, refer to and depend upon the municipal laws of the States to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognise to be property.

And this principle follows from the structure of the respective Governments, State and Federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose acts, within the scope of their respective jurisdictions, are mutually obligatory. They are, respectively, the depositories of such powers of legislation as the people were willing to surrender, and their duty is to cooperate within their several jurisdictions to maintain the rights of the same citizens under both Governments unimpaired. [60 U.S. 516] A proscription, therefore, of the Constitution and laws of one or more States, determining

property, on the part of the Federal Government, by which the stability of its social system may be endangered is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all of these powers are sometimes required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the rights which were not surrendered to the Federal Government. The provident care of the statesmen who projected the Constitution was signalized by such a distribution of the powers of Government as to exclude many of the motives and opportunities for promoting provocations and spreading discord among the States, and for guarding against those partial combinations, so destructive of the community of interest, sentiment, and feeling, which are so essential to the support of the Union. The distinguishing features of their system consist in the exclusion of the Federal Government from the local and internal concerns of, and in the establishment of an independent internal Government within, the States. And it is a significant fact in the history of the United States that those controversies which have been productive of the greatest animosity, and have occasioned most peril to the peace of the Union, have had their origin in the well sustained opinion of a minority among the people that the Federal Government had overstepped its constitutional limits to grant some exclusive privilege, or to disturb the legitimate distribution of property or power among the States or individuals. Nor can a more signal instance of this be found than is furnished by the act before us. No candid or rational man can hesitate to believe that if the subject of the eighth section of the act of March, 1820, had never been introduced into Congress and made the basis of legislation, no interest common to the Union would have been seriously affected. And certainly the creation within this Union of large confederacies of unfriendly and frowning States, which has been the tendency and, to an alarming extent, the result produced by the agitation arising from it does not commend it to the patriot or statesman. This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him without any impediment from or fear of Congressional [60 U.S. 517] legislation or interference. The question then arises whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognise and respect the rights and relations that validly exist under the Constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations, within the Territories.

And the citation of State statutes prohibiting the immigration of slaves, and of the decisions of State courts enforcing the forfeiture of the master's title in accordance with their rule, only darkens the discussion. For the question is have Congress the municipal sovereignty in the Territories which the State Legislatures have derived from the authority of the people, and exercise in the States?

And this depends upon the construction of the article in the Constitution before referred to.

And, in my opinion that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States.

The eighth section of the act of Congress of the 6th of March, 1820, did not, in my opinion, operate to determine the domestic condition and status of the plaintiff and his family during their sojourn in Minnesota Territory, or after their return to Missouri.

The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition when this suit was brought. Nor does it appear that he at any time possessed another state or condition *de facto.* His claim to freedom depends upon his temporary relocation, from the domicil of his origin, in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case as it was submitted upon uncontested evidence, upon appropriate issues to the jury, and upon the instructions given and refused by the court upon that evidence. My opinion is that the opinion of the Circuit Court was correct upon all the claims involved in those issues, and that the verdict of the jury was justified by the evidence and instructions.

The jury have returned that the plaintiff and his family are slaves.

Upon this record, it is apparent that this is not a controversy between citizens of different States, and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had a capacity to maintain a suit in the courts [60 U.S. 518] of the United States. And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family in any of the conditions or circumstances of their lives as presented in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed, on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded that the suit may be dismissed.

CATRON, J., separate opinion

Mr. Justice CATRON.

The defendant pleaded to the jurisdiction of the Circuit Court that the plaintiff was a negro of African blood, the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of the general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial, a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ.

The judgment was given for him conformably to the prayer of his demurrer. He cannot assign an error in such a judgment. Tidd's Pr. 1163, 2 Williams's Saund. 46a, 2 Iredell N.C. 87, 2 W. and S. 391. Nor does the fact that the judgment was given on a plea to the jurisdiction avoid the application of this rule. *Capron v. Van Noorden,* 2 Cr. 126, 6 Wend. 465, 7 Met. 598, 5 Pike 1005.

The declaration discloses a case within the jurisdiction of the court -- a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by a writ [60 U.S. 519] of error. The authorities are very conclusive on this point. *Shepherd v. Graves,* 14 How. 505, *Bailey v. Dozier,* 6 How. 23, 1 Stewart (Alabama) 46, 10 Ben. Monroe (Kentucky) 555, 2 Stewart (Alabama) 370, 443, 2 Scammon (Illinois) 78. Nor can the court assume as admitted facts the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea. *Tompkins v. Ashley,* 1 Moody and Mackin 32, 33 Maine 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom, and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson, with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff that his freedom (and that of his wife and eldest child) was obtained by force of the act of Congress of 1820, usually known as the Missouri Compromise Act, which declares:

> That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, *forever prohibited.*

From this prohibition, the territory now constituting the State of Missouri was excepted, which exception to the stipulation gave it the designation of a compromise.

The first question presented on this act is whether Congress had power to make such compromise. For if power was wanting, then no freedom could be acquired by the defendant under the act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that, by force of the power to govern, laws could be enacted prohibiting slavery in any portion of the Louisiana Territory, and, of course, to abolish slavery *in all* parts of it whilst it was or is governed as a Territory.

My opinion is that Congress is vested with power to govern [60 U.S. 520] the Territories of the United States by force of the third section of the fourth article of the Constitution. And I will state my reasons for this opinion.

Almost every provision in that instrument has a history that must be understood before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That "new States may be admitted by the Congress into this Union." 2d.

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State.

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection, and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783. The colonial charters of Virginia, North Carolina, and Georgia included it. Other States set up pretensions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. 5 Wheat. 375.

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it insisted that the country belonged to the States united, and that the lands should be disposed of for the benefit of the whole, and to which end the western territory should be ceded to the States united. The contest was stringent and angry long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783, and, in 1784, the deed of cession was executed by her delegates in the Congress of the Confederation conveying to the United States in Congress assembled, for the benefit of said States,

> all right, title, and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia [60 U.S. 521] charter, situate, lying, and being to the northwest of the river Ohio.

In 1787 (July 13), the ordinance was passed by the old Congress to govern the Territory.

Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country from the British Canada line to Florida and from the head of the Mississippi almost to its mouth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the Territory north of the Ohio, still it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And, thirdly, to give power to govern the different Territories as incipient States not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these powers were necessary. As early as the third day of its session (May 29th), Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the tenth of which is as follows:

> Resolved, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

> To dispose of the unappropriated lands of the United States. . . . To institute temporary Governments for new States arising therein.

3 Madison Papers 1353. [60 U.S. 522]

These, with the resolution that a district for the location of the seat of Government should be provided, and some others, were referred, without a dissent, to the committee of detail to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States, and secondly, to dispose of the public lands and to govern the Territories in the meantime, between the cessions of the States and the admission into the Union of new States arising in the ceded territory. 3 Madison Papers 1456 to 1466.

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper that the King of England had to grant the Virginia colonial charter of 1609, or to grant the charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old

Congress, had the same right to govern that Virginia had before the cession. Baldwin's Constitutional Views 90. And the sixth article of the Constitution adopted all engagements entered into by the Congress of the Confederation as valid against the United States, and that the laws made in pursuance of the new Constitution to carry out this engagement should be the supreme law of the land, and the judges bound thereby. To give the compact and the ordinance which was part of it full effect under the new Government, the Act of August 7th, 1789, was passed, which declares,

> Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the Territory northwest of the river Ohio, may have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States.

It is then provided that the Governor and other officers should be appointed by the President, with the consent of the Senate, and be subject to removal, &c., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern given by the Constitution, those amendments to the ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia further than to adapt it to the new Constitution.

It is due to myself to say that it is asking much of a judge [60 U.S. 523] who has for nearly twenty years been exercising jurisdiction from the western Missouri line to the Rocky Mountains and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories by its legislation directly or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions, which it cannot do, as I think. It was held in the case of *Cross v. Harrison,* 16 How. 193-194, that the sovereignty of California was in the United States in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction to hold and govern it, by force of the instrument under whose authority the country was acquired, and the foregoing was the conclusion of this court on the proposition. What was there announced was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there, and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the Ordinance of 1787 for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European Government had. And, having excluded slavery, the new Government was bound by that engagement by article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the Territorial form, for, when a new State came in, it might do so with or without slavery.

My opinion is that Congress had no power, in face of the compact between Virginia and the twelve other States, to force slavery into the Northwest Territory, because there it was bound to that "engagement," and could not break it. [60 U.S. 524]

In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enjoy all the privileges and advantages of the ordinance for governing the territory north of the Ohio river, and that Congress should assume the government, and accept the cession, under the express conditions contained in the ordinance: *Provided,* "That no regulation made, or to be made, by Congress, shall tend to emancipate slaves."

In 1802, Georgia ceded her western territory to the United States, with the provision that the Ordinance of 1787

should in all its parts extend to the territory ceded, "that article only excepted which forbids slavery." Congress had no more power to legislate slavery out from the North Carolina and Georgia cessions than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected whilst they were governed by Congress, in like manner that they were protected before the cession was made, and when they were, respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi river? The country there was acquired from France by treaty in 1803. It declares that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the colony or province of Louisiana, with all the rights and appurtenances of the said territory. And, by article third, that

> the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States, and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony of a proper size for a State of the Union had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfil the treaty, additional population was indispensable, and obviously desired with anxiety by both sides so that the whole country should, as soon as possible, become States of the Union. And for this [60 U.S. 525] contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected "*in the meantime,*" that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it and carry his liberty, property, and religion with him, and in which he was to be maintained and protected until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty.

The settled doctrine in the State courts of Louisiana is that a French subject coming to the Orleans Territory, after the treaty of 1803 was made and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission.

That this is the true construction I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree -- that is due west from the city of New Orleans -- and to declare that, north of that line, slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery; who doubts what the decision of this court would have been on such an act of Congress, yet the difference between the supposed line and that on thirty-six degrees thirty minutes north is only in the degree of grossness presented by the lower line.

The Missouri Compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean, stretching over thirty-two degrees of longitude and twelve and a half degrees of latitude on its eastern side, sweeping over four-fifths, to say no more, of the original province of Louisiana.

That the United States Government stipulated in favor of [60 U.S. 526] the inhabitants to the extent here contended for has not been seriously denied, as far as I know, but the argument is that Congress had authority to *repeal* the third article of the treaty of 1803, insofar as it secured the right to hold slave property in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were treaties also, and stood on the same footing of the Louisiana treaty, on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory now the State of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise; the instrument looked to no theories of Government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts and the condition and necessities of the country gave rise to almost every provision; and among those facts, it was prominently true that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution and then engaged in war with the great confederacy of Indians extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the treaty? How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States for the protection of slave property. The Federal Constitution was relied on to secure the rights of Georgia and her citizens during the Territorial condition of the country. She relied on the indisputable truths that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States united, and held in trust for [60 U.S. 527] them. The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State by virtue of that great fundamental condition of the Union -- the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked, nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him, and the precise question here is whether Congress had the power to annul that title. It is idle to say that, if Congress could not defeat the title *directly,* that it might be done [60 U.S. 528] indirectly, by drawing a narrow circle around the slave population of Upper Louisiana and declaring that, if the slave went beyond it, he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle to contend that, because Congress has express power to regulate commerce among the Indian tribes and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. Am.State Papers, vol. 1, p. 734. We *must* meet the question whether Congress had the power to declare that a citizen of a State, carrying with him his equal rights secured to him through his State, could be stripped of his goods and slaves and be deprived of any participation in the common property? If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious indirect evasions of the Constitution have been attempted and defeated heretofore. In the *Passenger Cases,* 7 How.R., the attempt was made to impose a tax on the masters, crews, and passengers of vessels, the Constitution having prohibited a tax on the vessel itself, but this Court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio by her charter of cession, and that the territory was taken by the United States with this condition imposed. I also admit that France could, by the treaty of 1803, have prohibited slavery in any part of the ceded territory, and imposed it on the United States as a fundamental condition of the cession, in the meantime, till new States were admitted in the Union.

I concur with Judge Baldwin that Federal power is exercised over all the territory within the United States, pursuant to the Constitution *and* the conditions of the cession, whether it was a part of the original territory of a State of the Union or of a foreign State, ceded by deed or treaty, the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the Territory as its inhabitants into the Union. Baldwin's Constitutional Views 84.

My opinion is that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly that the Act of 1820, known as the Missouri [60 U.S. 529] Compromise, violates the most leading feature of the Constitution -- a feature on which the Union depends and which secures to the respective States and their citizens and entire EQUALITY of rights, privileges, and immunities.

On these grounds, I hold the compromise act to have been void, and consequently that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff Scott is a slave, and was so when this suit was brought.

Mr. Justice McLEAN and Mr. Justice CURTIS dissented.

MCLEAN, J., dissenting

Mr. Justice McLEAN dissenting.

This case is before us on a writ of error from the Circuit Court for the district of Missouri.

An action of trespass was brought which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott, his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part and against law.

The defendant filed a plea in abatement,

> that said causes of action, and each and every of them, if any such accrued to the said Dred Scott, accrued out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit, said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify, wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid.

To this a demurrer was filed which, on argument, was sustained by the court, the plea in abatement being held insufficient; the defendant was ruled to plead over. Under this rule, he pleaded: 1. Not guilty, 2. That Dred Scott was a negro slave, the property of the defendant, and 3. That Harriet, the wife, and Eliza and Lizzie, the daughters of the plaintiff, were the lawful slaves of the defendant.

Issue was joined on the first plea, and replications of *de injuria* were filed to the other pleas.

The parties agreed to the following facts: In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to [60 U.S. 530] the post of Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, Dr. Emerson removed the plaintiff from Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the territory Known as Upper Louisiana, acquired by the United States of France, and situate north of latitude thirty-six degrees thirty minutes north, and north of the State of Missouri. Dr. Emerson held the plaintiff in slavery, at Fort Snelling from the last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, Major Taliaferro took Harriet to Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at Fort Snelling, unto Dr. Emerson, who held her in slavery at that place until the year 1838.

In the year 1836, the plaintiff and Harriet were married at Fort Snelling, with the consent of Dr. Emerson, who claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey,* north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri at the military post called Jefferson Barracks.

In the year 1838, Dr. Emerson removed the plaintiff and said Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of the suit, Dr. Emerson sold and conveyed the plaintiff, Harriet, Eliza, and Lizzie, to the defendant as slaves, and he has ever since claimed to hold them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be the owner, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than he might lawfully do if they were of right his slaves at such times.

In the first place, the plea to the jurisdiction is not before us on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff, and, as the plaintiff prosecutes this writ of error, he does

not complain of the decision on the demurrer. The defendant [60 U.S. 531] might have complained of this decision, as against him, and have prosecuted a writ of error to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case precisely in point is recollected in our reports. The pleadings do not show a want of jurisdiction. This want of jurisdiction can only be ascertained by a judgment on the demurrer to the special plea. No such case, it is believed, can be cited. But if this rule of practice is to be applied in this case, and the plaintiff in error is required to answer and maintain as well the points ruled in his favor, as to show the error of those ruled against him, he has more than an ordinary duty to perform. Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this:

> That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country and sold as negro slaves.

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

It has often been held that the jurisdiction, as regards parties, can only be exercised between citizens of different States, [60 U.S. 532] and that a mere residence is not sufficient, but this has been said to distinguish a temporary from a permanent residence.

To constitute a good plea to the jurisdiction, it must negative those qualities and rights which enable an individual to sue in the Federal courts. This has not been done, and on this ground the plea was defective, and the demurrer was properly sustained. No implication can aid a plea in abatement or in bar; it must be complete in itself; the facts stated, if true, must abate or bar the right of the plaintiff to sue. This is not the character of the above plea. The facts stated, if admitted, are not inconsistent with other facts which may be presumed and which bring the plaintiff within the act of Congress.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause, but I am yet to learn that it is sanctioned by any known rule of pleading.

The defendant's counsel complain that, if the court take jurisdiction on the ground that the plaintiff is free, the assumption is against the right of the master. This argument is easily answered. In the first place, the plea does not show him to be a slave; it does not follow that a man is not free whose ancestors were slaves. The reports of the Supreme Court of Missouri show that this assumption has many exceptions, and there is no averment in the plea that the plaintiff is not within them.

By all the rules of pleading, this is a fatal defect in the plea. If there be doubt, what rule of construction has been

established in the slave States? In *Jacob v. Sharp,* Meigs's Rep., Tennessee 114, the court held, when there was doubt as to the construction of a will which emancipated a slave, "it must be construed to be subordinate to the higher and more important right of freedom."

No injustice can result to the master from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him on the ground that he is a slave, it is decisive of his fate.

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that Federal jurisdiction "may be exercised between citizens of different States," and the same is provided [60 U.S. 533] in the act of 1789. The above argument is properly met by saying that the Constitution was intended to be a practical instrument, and where its language is too plain to be misunderstood, the argument ends.

In *Chirae v. Chirae,* 2 Wheat. 261, 4 Curtis 99, this court says: "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted." No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress. Congress has power "to establish a uniform rule of naturalization."

It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the acts of Congress on the subject of naturalization, and subversive of the Federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and, in this view, have recognised them as citizens, and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.

There are several important principles involved in this case which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish Territorial Governments and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the control of his [60 U.S. 534] master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri on the questions before us binding on this court within the rule adopted.

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an

exception, is that slavery can exist only within the territory where it is established, and that, if a slave escapes or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation. Grotius, lib. 2, chap. 15, 5, 1, lib. 10, chap. 10, 2, 1, Wicqueposts Ambassador, lib. 1, p. 418, 4 Martin 385, Case of the Creole in the House of Lords, 1842, 1 Phillimore on International Law 316, 335.

There is no nation in Europe which considers itself bound to return to his master a fugitive slave under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did now allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane; by the King's Bench, they were held to be free. 2 Barn. and Cres. 440.

In the great and leading case of *Prigg v. The State of Pennsylvania,* 16 Pet. 539, 14 Curtis 421, this court said that, by the general law of nations, no nation is bound to recognise the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somersett's Case,* Lafft's Rep. 1, 20 Howell's State Trials, 79, which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in *Prigg's Case,* but there was none in regard to the great principle that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of *Somersett.* The judgment pronounced [60 U.S. 535] by Lord Mansfield was the judgment of the Court of King's Bench. The cause was argued at great length, and with great ability, by Hargrave and others, who stood among the most eminent counsel in England. It was held under advisement from term to term, and a due sense of its importance was felt and expressed by the Bench.

In giving the opinion of the court, Lord Mansfield said:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law.

He referred to the contrary opinion of Lord Hardwicke, in October, 1749, as Chancellor: "That he and Lord Talbot, when Attorney and Solicitor General, were of opinion that no such claim as here presented, for freedom, was valid."

The weight of this decision is sought to be impaired from the terms in which it was described by the exuberant imagination of Curran. The words of Lord Mansfield, in giving the opinion of the court, were such as were fit to be used by a great judge in a most important case. It is a sufficient answer to all objections to that judgment that it was pronounced before the Revolution, and that it was considered by this court as the highest authority. For near a century, the decision in *Somersett's Case* has remained the law of England. The *Case of the Slave Grace,* decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, "No dominion, authority, or coercion, can be exercised over him." Under another head, I shall have occasion to examine the opinion in the *Case of Grace.*

To the position that slavery can only exist except under the authority of law, it is objected that in few if in any instances has it been established by statutory enactment. This is no answer to the doctrine laid down by the court. Almost all the principles of the common law had their foundation in usage. Slavery was introduced into the colonies of this country by Great Britain at an early period of their history, and it was protected and cherished until it became incorporated into the colonial policy. It is immaterial whether a system of slavery was introduced by express law or otherwise, if it have the authority of law. There is no slave State where the institution is not recognised and protected by statutory enactments and judicial decisions. Slaves are made property by the laws of the slave States, and as such are liable to the claims of creditors; [60 U.S. 536] they descend to heirs, are taxed, and, in the South, they are a subject of

commerce.

In the case of *Rankin v. Lydia,* 2 A. K. Marshall's Rep., Judge Mills, speaking for the Court of Appeals of Kentucky, says:

> In deciding the question [of slavery], we disclaim the influence of the general principles of liberty which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten and common law.

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a State institution. In the ninth section of the first article of the Constitution, it is provided

> that the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried -- New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia, voting in the affirmative, and New Jersey, Pennsylvania, and Virginia, in the negative. In opposition to the motion, Mr. Madison said:

> Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves, so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution.

Madison Papers.

The provision in regard to the slave trade shows clearly that Congress considered slavery a State institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years not as a general measure, but for the "benefit of such States as shall think proper to encourage it."

In the case of *Groves v. Slaughter,* 15 Peters 499, 14 Curtis 137, Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States, but the court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among [60 U.S. 537] them. If this trade were subject to the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union.

The only connection which the Federal Government holds with slaves in a State arises from that provision of the Constitution which declares that

> No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union, and so far as the rendition of fugitives from labor has become a subject of judicial action, the Federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a

historical fact that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay as a means of construing the Constitution in all its bearings, rather than to look behind that period into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom, and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or [60 U.S. 538] shortly afterward, took measures to abolish slavery within their respective jurisdictions, and it is a well known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

After the cession of western territory by Virginia and other States to the United States, the public attention was directed to the best mode of disposing of it for the general benefit. While in attendance on the Federal Convention, Mr. Madison, in a letter to Edmund Randolph dated the 22d April, 1787, says:

> Congress are deliberating on the plan most eligible for disposing of the western territory not yet surveyed. Some alteration will probably be made in the ordinance on that subject.

And in the same letter he says:

> The inhabitants of the Illinois complain of the land jobbers, &c., who are purchasing titles among them. Those of St. Vincent's complain of the defective criminal and civil justice among them, as well as of military protection.

And on the next day, he writes to Mr. Jefferson:

> The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself, and rendered more so by our ignorance of the many circumstances on which a right judgment depends. The inhabitants at those places claim protection against the savages, and some provision for both civil and criminal justice.

In May, 1787, Mr. Edmund Randolph submitted to the Federal Convention certain propositions as the basis of a Federal Government, among which was the following:

> *Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

Afterward, Mr. Madison submitted to the Convention, in order to be referred to the committee of detail, the following powers, as proper to be added to those of general legislation: [60 U.S. 539]

> To dispose of the unappropriated lands of the United States. To institute temporary Governments for new States arising therein. To regulate affairs with the Indians, as well within as without the limits of the United States.

Other propositions were made in reference to the same subjects, which it would be tedious to enumerate. Mr.

Gouverneur Morris proposed the following:

> The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State.

This was adopted as a part of the Constitution, with two verbal alterations -- Congress was substituted for Legislature, and the word either was stricken out.

In the organization of the new Government, but little revenue for a series of years was expected from commerce. The public lands were considered as the principal resource of the country for the payment of the Revolutionary debt. Direct taxation was the means relied on to pay the current expenses of the Government. The short period that occurred between the cession of western lands to the Federal Government by Virginia and other States, and the adoption of the Constitution, was sufficient to show the necessity of a proper land system and a temporary Government. This was clearly seen by propositions and remarks in the Federal Convention, some of which are above cited, by the passage of the Ordinance of 1787, and the adoption of that instrument by Congress, under the Constitution, which gave to it validity.

It will be recollected that the deed of cession of western territory was made to the United States by Virginia in 1784, and that it required the territory ceded to be laid out into States that the land should be disposed of for the common benefit of the States, and that all right, title, and claim, as well of soil as of jurisdiction, were ceded, and this was the form of cession from other States.

On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the river Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three nor more than five States, designating their boundaries. It passed while the Federal Convention was in session, about two months before the Constitution was adopted by the Convention. The members of the Convention must therefore have been well acquainted with the provisions of the [60 U.S. 540] Ordinance. It provided for a temporary Government, as initiatory to the formation of State Governments. Slavery was prohibited in the territory.

Can anyone suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country in the organization of temporary Governments for the vast territory northwest of the river Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary Government of the territory. Without a temporary Government, new States could not have been formed, nor could the public lands have been sold.

If the third section were before us now for consideration for the first time, under the facts stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make "rules and regulations," except by legislation. But it is argued that the word "territory" is used as synonymous with the word "land," and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that, in the first line of the section, "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

In the discussion of the power of Congress to govern a Territory, in the case of the *Atlantic Insurance Company v. Canter,* 1 Peters 511, 7 Curtis 685, Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida,

> they do not, however, participate in political power, they do not share in the Government till Florida shall become a State; in the meantime, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

And he adds,

> perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result [60 U.S. 541] necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory, whichever may be the source whence the power is derived, the possession of it is unquestioned.

And, in the close of the opinion, the court says, "in legislating for them [the Territories], Congress exercises the combined powers of the General and State Governments."

Some consider the opinion to be loose and inconclusive, others that it is *obiter dicta*, and the last sentence is objected to as recognising absolute power in Congress over Territories. The learned and eloquent Wirt, who, in the argument of a cause before the court, had occasion to cite a few sentences from an opinion of the Chief Justice, observed, "no one can mistake the style, the words so completely match the thought."

I can see no want of precision in the language of the Chief Justice; his meaning cannot be mistaken. He states, first, the third section as giving power to Congress to govern the Territories, and two other grounds from which the power may also be implied. The objection seems to be that the Chief Justice did not say which of the grounds stated he considered the source of the power. He did not specifically state this, but he did say, "whichever may be the source whence the power is derived, the possession of it is unquestioned." No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticise the opinion consider it without authority because the Chief Justice did not designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised.

The opinion clearly was not *obiter dicta.* The turning point in the case was whether Congress had power to authorize the Territorial Legislature of Florida to pass the law under which the Territorial court was established, whose decree was brought before this court for revision. The power of Congress, therefore, was the point in issue.

The word "territory," according to Worcester, "means land, country, a district of country under a temporary Government." The words "territory or other property," as used, do imply, from the use of the pronoun "other" that territory was used as descriptive of land, but does it follow that it was not used also as descriptive of a district of country? In both of these senses, it belonged to the United States -- as land for the purpose of sale, as territory for the purpose of government. [60 U.S. 542]

But if it be admitted that the word territory, as used, means land, and nothing but land, the power of Congress to organize a temporary Government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those "needful regulations" depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. If a temporary Government be deemed needful, necessary, requisite, or is wanted, Congress has power to establish it. This court says, in *McCulloch v. The State of Maryland,* 4 Wheat. 316,

> If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The power to establish post offices and post roads gives power to Congress to make contracts for the transportation of the mail, and to punish all who commit depredations upon it in its transit or at its places of distribution. Congress has power to regulate commerce, and, in the exercise of its discretion, to lay an embargo, which suspends commerce; so, under the same power, harbors, lighthouses, breakwaters, &c., are constructed.

Did Chief Justice Marshall, in saying that Congress governed a Territory by exercising the combined powers of the Federal and State Governments, refer to unlimited discretion? A Government which can make white men slaves? Surely such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be

exercised which are prohibited by the Constitution or which are contrary to its spirit, so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers.

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the Government of a Territory, to some extent the combined powers of the Federal and State Governments are necessarily exercised. [60 U.S. 543]

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States, and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a Territorial Government is established in a slave Territory, it has uniformly remained in that condition until the people form a State Constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of country where there is no organized Government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri on individuals, for murders committed beyond the limit of any organized Territory or State, and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory. [60 U.S. 544] This power has been exercised, without doubt of its constitutionality, over territory acquired by conquest and purchase.

And when there is a large district of country within the United States, and not within any State Government, if it be necessary to establish a temporary Government to carry out a power expressly vested in Congress -- as the disposition of the public lands -- may not such Government be instituted by Congress? How do we read the Constitution? Is it not a practical instrument?

In such cases, no implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction. As my opinion rests on the third section, these remarks are made as an intimation that the power to establish a temporary Government may arise, also, on the other two grounds stated in the opinion of the court in the insurance case, without weakening the third section.

I would here simply remark that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law. When we consider the men who laid the foundation of our Government and carried it into operation, the men who occupied the bench, who filled the halls of legislation and the Chief Magistracy, it would seem, if any question could be settled clear of all doubt, it was the power of Congress to establish Territorial Governments. Slavery was prohibited in the entire Northwestern Territory, with the approbation of

leading men, South and North, but this prohibition was not retained when this ordinance was adopted for the government of Southern Territories, where slavery existed. In a late republication of a letter of Mr. Madison, dated November 27, 1819, speaking of this power of Congress to prohibit slavery in a Territory, he infers there is no such power from the fact that it has not been exercised. This is not a very satisfactory argument against any power, as there are but few, if any, subjects on which the constitutional powers of Congress are exhausted. It is true, as Mr. Madison states that Congress, in the act to establish a Government in the Mississippi Territory, prohibited the importation of slaves into it from foreign parts, but it is equally true that, in the act erecting Louisiana into two Territories, Congress declared,

> it shall not be lawful for any person to bring into Orleans Territory, from any port or place within the limits of the United States, any slave which shall have been imported since 1798, or which may hereafter be imported, except by a citizen of the United States who settles in the Territory, under the penalty of the freedom of such slave.

The inference of Mr. Madison, therefore, against the power of [60 U.S. 545] Congress, is of no force, as it was founded on a fact supposed, which did not exist.

It is refreshing to turn to the early incidents of our history and learn wisdom from the acts of the great men who have gone to their account. I refer to a report in the House of Representatives, by John Randolph, of Roanoke, as chairman of a committee, in March, 1803 -- fifty-four years ago. From the Convention held at Vincennes, in Indiana, by their President, and from the people of the Territory, a petition was presented to Congress praying the suspension of the provision which prohibited slavery in that Territory. The report stated

> that the rapid population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known to that quarter of the United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration.

1 vol. State Papers, Public Lands 160.

The judicial mind of this country, State and Federal, has agreed on no subject within its legitimate action with equal unanimity as on the power of Congress to establish Territorial Governments. No court, State or Federal, no judge or statesman, is known to have had any doubts on this question for nearly sixty years after the power was exercised. Such Governments have been established from the sources of the Ohio to the Gulf of Mexico, extending to the Lakes on the north and the Pacific Ocean on the west, and from the lines of Georgia to Texas.

Great interests have grown up under the Territorial laws over a country more than five times greater in extent than the original thirteen States, and these interests, corporate or otherwise, have been cherished and consolidated by a benign policy without anyone supposing the law-making power had united with the Judiciary, under the universal sanction of the whole country, to usurp a jurisdiction which did not belong to them. Such a discovery at this late date is more extraordinary than anything which has occurred in the judicial history of this or any other country. Texas, under a previous organization, [60 U.S. 546] was admitted as a State, but no State can be admitted into the Union which has not been organized under some form of government. Without temporary Governments, our public lands could not have been sold, nor our wildernesses reduced to cultivation and the population protected, nor could our flourishing States, West and South, have been formed.

What do the lessons of wisdom and experience teach under such circumstances if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous, which has secured to the country an advancement and prosperity beyond the power of computation.

An act of James Madison, when President, forcibly illustrates this policy. He had made up his opinion that Congress had no power under the Constitution to establish a National Bank. In 1815, Congress passed a bill to establish a bank. He vetoed the bill on objections other than constitutional. In his message, he speaks as a wise statesman and

Chief Magistrate, as follows:

> Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.

Has this impressive lesson of practical wisdom become lost to the present generation?

If the great and fundamental principles of our Government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement.

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the act admitting that State into the Union, was passed by a vote of 134 in the House of Representatives to 42. Before Mr. Monroe signed the act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular if, in 1804, Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power, embodied in the Missouri Compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of [60 U.S. 547] Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the Ordinance of 1787 and the Missouri Compromise line. In what does the distinction consist? The ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution, and that, in the cession of territory, authority was given to establish a Territorial Government.

It is clear that the ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed in the opinion of the Court that the articles of cession placed it on a different footing from territories subsequently acquired. I am unable to perceive the force of this distinction. That the ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to Southern Territories, with modifications, by acts of Congress, and to some Northern Territories. But the ordinance was made valid by the act of Congress, and, without such act, could have been of no force. It rested for its validity on the act of Congress, the same, in my opinion, as the Missouri Compromise line.

If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery, in doing which it followed the Ordinance of 1787.

I will now consider the fourth head, which is: "The effect of taking slaves into a State or Territory, and so holding them where slavery is prohibited."

If the principle laid down in the case of *Prigg v. The State of Pennsylvania* is to be maintained, and it is certainly to be maintained until overruled, as the law of this Court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. And the court further says:

> It is manifest from this consideration that, if the Constitution had not contained the clause requiring the rendition of fugitives from labor, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves [60 U.S. 548] coming within its limits, and to have given them entire immunity and protection against the claims of their masters.

Now if a slave abscond, he may be reclaimed, but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or

Territory not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Lord Mansfield held that a slave brought into England was free. Lord Stowell agreed with Lord Mansfield in this respect, and that the slave could not be coerced in England, but on her voluntary return to Antigua, the place of her slave domicil, her former status attached. The law of England did not prohibit slavery, but did not authorize it. The jurisdiction which prohibits slavery is much stronger in behalf of the slave within it than where it only does not authorize it.

By virtue of what law is it that a master may take his slave into free territory and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory?, and does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be [60 U.S. 549] denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty which every person carries with him from his late domicil? One thing is certain -- that its origin has been very recent, and it is unknown to the laws of any civilized country.

A slave is brought to England from one of its islands, where slavery was introduced and maintained by the mother country. Although there is no law prohibiting slavery in England, yet there is no law authorizing it, and for near a century, its courts have declared that the slave there is free from the coercion of the master. Lords Mansfield and Stowell agree upon this point, and there is no dissenting authority.

There is no other description of property which was not protected in England, brought from one of its slave islands. Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, "it is a mere municipal regulation, founded upon and limited to the range of the territorial laws?" This decision is not a mere argument, but it is the end of the law, in regard to the extent of slavery. Until it shall be overturned, it is not a point for argument, it is obligatory on myself and my brethren, and on all judicial tribunals over which this court exercises an appellate power.

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court says a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England, would that authorize him to take his slaves with him to England? The Constitution, in express terms, recognises the status of slavery as founded on the municipal law: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall," &c. Now unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States the same as a horse, or any other kind of property. It is true this was said by the court, as also many other things which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered as [60 U.S. 550] authority. I shall certainly not regard it as such. The

question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man, and he is destined to an endless existence.

Under this head I shall chiefly rely on the decisions of the Supreme Courts of the Southern States, and especially of the State of Missouri.

In the first and second sections of the sixth article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted, and in the second section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as I suppose, belongs exclusively to the State.

The Supreme Court of Illinois, in the case of *Jarrot v. Jarrot,* 2 Gilmer 7, said:

> After the conquest of this Territory by Virginia, she ceded it to the United States and stipulated that the titles and possessions, rights and liberties of the French settlers should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it, or, in other words, that the ordinance and Constitution should not be so interpreted and understood as applying to such slaves when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illinois, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the ordinance and Constitution.

The first slave case decided by the Supreme Court of Missouri contained in the reports was *Winny v. Whitesides,* 1 Missouri Rep. 473, at October term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave, after which, they removed to Missouri, taking her with them.

The court held that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State. [60 U.S. 551]

That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of *Lagrange v. Chouteau,* 2 Missouri Rep. 20, at May Term, 1828, it was decided that the Ordinance of 1787 was intended as a fundamental law for those who may choose to live under it, rather than as a penal statute.

That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance, and thereby introduce slavery *de facto,* would entitle such slave to freedom.

In *Julia v. McKinney,* 3 Missouri Rep. 279, it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the second section of the sixth article of the Constitution of Illinois.

Rachel v. Walker, 4 Missouri Rep. 350, June Term, 1836, is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom, and it appeared that she had been bought as a slave in Missouri by Stockton, an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year, and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her three years, and then he took her to the State of Missouri, and sold her as a slave.

> Fort Snelling was admitted to be on the west side of the Mississippi river, and north of the State of Missouri, in the territory of the United States. That Prairie du Chien was in the Michigan Territory, on the east side of the Mississippi river. Walker, the defendant, held Rachel under Stockton.

The court said, in this case:

> The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slaveholding country and procured her; this was his voluntary act, done without any other reason than that of his convenience, and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom.

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the Government compelled him to keep the plaintiff there as a slave.

> Shall it be said that, because an officer of the army owns [60 U.S. 552] slaves in Virginia, that when, as officer and soldier, he is required to take the command of a fort in the non-slaveholding States or Territories, he thereby has a right to take with him as many slaves as will suit his interests or convenience? It surely cannot be law. If this be true, the court say, then it is also true that the convenience or supposed convenience of the officer repeals, as to him and others who have the same character, the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibition of the several laws and Constitutions of the non-slaveholding States.

In *Wilson v. Melvin,* 4 Missouri R. 592, it appeared the defendant left Tennessee with an intention of residing in Illinois, taking his negroes with him. After a month's stay in Illinois, he took his negroes to St. Louis, and hired them, then returned to Illinois. On these facts, the inferior court instructed the jury that the defendant was a sojourner in Illinois. This the Supreme Court held was error, and the judgment was reversed.

The case of *Dred Scott v. Emerson,* 15 Missouri R. 682, March Term, 1852, will now be stated. This case involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. It cannot be improper to state the grounds of the opinion of the court and of the dissent.

The court say:

> Cases of this kind are not strangers in our court. Persons have been frequently here adjudged to be entitled to their freedom on the ground that their masters held them in slavery in Territories or States in which that institution is prohibited. From the first case decided in our court, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to "exact the forfeiture of emancipation," as they term it, on the ground, it would seem, that it was the duty of the courts of this State to carry into effect the Constitution and laws of other States and Territories, regardless of the rights, the policy, or the institutions, of the people of this State.

And the court say that the States of the Union, in their municipal concerns, are regarded as foreign to each other; that the courts of one State do not take notice of the laws of other States, unless proved as facts; and that every State has the right to determine how far its comity to other States shall extend; and it is laid down that when there is no act of manumission decreed to the free State, the courts of the slave States [60 U.S. 553] cannot be called to give effect to the law of the free State. Comity, it alleges, between States depends upon the discretion of both, which may be varied by circumstances. And it is declared by the court "that times are not as they were when the former decisions on this subject were made." Since then, not only individuals but States have been possession with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our Government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

Chief Justice Gamble dissented from the other two judges. He says:

> In every slaveholding State in the Union, the subject of emancipation is regulated by statute, and the forms are prescribed in which it shall be effected. Whenever the forms required by the laws of the State in which the master and slave are resident are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which the slave and his former master resided, and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by law in which the court sits.
>
> In all such cases, courts continually administer the law of the country where the right was acquired, and when that law becomes known to

> the court, it is just as much a matter of course to decide the rights of the parties according to its requirements as it is to settle the title of real estate situated in our State by its own laws.

This appears to me a most satisfactory answer to the argument of the court. Chief Justice continues:

> The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the General Government, it is left to be adopted or rejected by the several States, as they think best, nor can any one State, or number of States, claim the right to interfere with any other State upon the question of admitting or excluding this institution.
>
> A citizen of Missouri who removes with his slave to Illinois [60 U.S. 554] has no right to complain that the fundamental law of that State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act as if he had executed a deed of emancipation. No one can pretend ignorance of this constitutional provision, and,

he says,

> the decisions which have heretofore been made in this State and in many other slaveholding States give effect to this and other similar provisions on the ground that the master, by making the free State the residence of his slave, has submitted his right to the operation of the law of such State, and this,

he says, "is the same in law as a regular deed of emancipation."

He adds:

> I regard the question as conclusively settled by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them than I would any other series of decisions by which the law of any other question was settled. There is with me,

he says,

> nothing in the law relating to slavery which distinguishes it from the law on any other subject or allows any more accommodation to the temporary public excitements which are gathered around it.

"In this State," he says,

> it has been recognised from the beginning of the Government as a correct position in law that a master who takes his slave to reside in a State or Territory where slavery is prohibited thereby emancipates his slave.

These decisions, which come down to the year 1837, seemed to have so fully settled the question that, since that time, there has been no case bringing it before the court for any reconsideration until the present. In the case of *Winny v. Whitesides,* the question was made in the argument "whether one nation would execute the penal laws of another," and the court replied in this language, Huberus, quoted in 4 Dallas, which says,

> personal rights or disabilities obtained or communicated by the laws of any particular place are of a nature which accompany the person wherever he goes,

and the Chief Justice observed, in the case of *Rachel v. Walker,* the act of Congress called the Missouri Compromise was held as operative as the Ordinance of 1787.

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri in 1838, they were free, as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. Prior to this, for nearly thirty years, as Chief Justice Gamble declares, the residence of a master with his slave in the State of Illinois, or in the Territory north of Missouri, where slavery was prohibited [60 U.S. 555] by the act called the Missouri Compromise, would manumit the slave as effectually as if he had executed a deed of emancipation, and that an officer of the army who takes his slave into that State or Territory and holds him there as a slave liberates him the same as any other citizen -- and, down to the above time, it was settled by numerous and uniform decisions; and that, on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of

Missouri until the decision of *Scott and Emerson.*

In the case of *Sylvia v. Kirby,* 17 Misso.Rep. 434, the court followed the above decision, observing it was similar in all respects to the case of *Scott and Emerson.*

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority, but we follow the settled construction of the statutes not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretence that the case of *Dred Scott v. Emerson* turned upon the construction of a Missouri statute, nor was there any established rule of property which could have rightfully influenced the decision. On the contrary, the decision overruled the settled law for near thirty years.

This is said by my brethren to be a Missouri question, but there is nothing which gives it this character except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by the Supreme Court of that State. It involves a right claimed under an act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case that it will not regard either of those laws, without which there was no case before it, and Dred Scott, having been a slave, remains a slave. In this respect, it is admitted this is a Missouri question -- a case which has but one side if the act of Congress and the Constitution of Illinois are not recognised.

And does such a case constitute a rule of decision for this court -- a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years [60 U.S. 556] ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

The courts of Louisiana having held for a series of years that, where a master took his slave to France, or any free State, he was entitled to freedom, and that, on bringing him back, the status of slavery did not attach, the Legislature of Louisiana declared by an act that the slave should not be made free under such circumstances. This regulated the rights of the master from the time the act took effect. But the decision of the Missouri court, reversing a former decision, affects all previous decisions, technically, made on the same principles, unless such decisions are protected by the lapse of time or the statute of limitations. Dred Scott and his family, beyond all controversy, were free under the decisions made for twenty-eight years, before the case of *Scott v. Emerson.* This was the undoubted law of Missouri for fourteen years after Scott and his family were brought back to that State. And the grave question arises whether this law may be so disregarded as to enslave free persons. I am strongly inclined to think that a rule of decision so well settled as not to be questioned cannot be annulled by a single decision of the court. Such rights may be inoperative under the decision in future, but I cannot well perceive how it can have the same effect in prior cases.

It is admitted that, when a former decision is reversed, the technical effect of the judgment is to make all previous adjudications on the same question erroneous. But the case before us was not that the law had been erroneously construed, but that, under the circumstances which then existed, that law would not be recognised, and the reason for this is declared to be the excitement against the institution of slavery in the free States. While I lament this excitement as much as anyone, I cannot assent that it shall be made a basis of judicial action.

In 1816, the common law, by statute, was made a part of the law of Missouri, and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require the same exercise of power to abolish the common law as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is, in fact, an international morality, adapted to the best interests of nations. And in regard to the States [60 U.S. 557] of this Union, on

the subject of slavery, it is eminently fitted for a rule of action subject to the Federal Constitution. "The laws of nations are but the natural rights of man applied to nations." Vattel.

If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning to his former domicil in a slave State. It is unnecessary to say what legislative power might do by a general act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done not only in the absence of special legislation, but in a State where the common law is in force.

It is supposed by some that the third article in the treaty of cession of Louisiana to this country by France in 1803 may have some bearing on this question. The article referred to provides

> that the inhabitants of the ceded territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.

As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.

The answer to this is, in the first place, that such a subject does not belong to the treaty-making power, and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri, and Arkansas embraced every slave in Louisiana at the time of the cession. This removes every ground of objection under the treaty. There is therefore no pretence growing out of the treaty that any part of the territory of Louisiana, as ceded, beyond the organized States, is slave territory.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife on their return to Missouri.

This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and, up to 1852, the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illinois, or the law of Congress [60 U.S. 558] called the Missouri Compromise. This was the effect of the decision, though its terms were that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognised the principle that a slave, being taken to a free State, became free. *Commonwealth v. Pleasants,* 10 Leigh Rep. 697. In *Betty v. Horton,* the Court of Appeals held that the freedom of the slave was acquired by the action of the laws of Massachusetts by the said slave's being taken there. 5 Leigh Rep. 615.

The slave States have generally adopted the rule that, where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law where a contract is made and is to be executed governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery; the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say that I have never found a jury in the four States which constitute my circuit which have not sustained this law where the evidence required them to sustain it. And it is proper that I should also say that more cases have arisen in my circuit, by reason of its extent and locality, than in all [60 U.S. 559] other parts of the Union. This has been done to vindicate the sovereign rights of the Southern States and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it with a view of becoming a resident shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri Compromise Act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and, in the action before us, they are not only claimed as slaves, but a majority of my brethren have held that, on their being returned to Missouri, the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience, and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case:

> In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided.

This is the agreed case, and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was "removed," which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's decision; he must have acted voluntarily. It would be a [60 U.S. 560] mockery of law and an outrage on his rights to coerce his return and then claim that it was voluntary, and, on that ground, that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted.

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her colonies, and that it was maintained by numerous acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England who were engaged in trade, or owned and cultivated plantations in the colonies. No one can read his elaborate views and not be struck with the great difference between England and her colonies and the free and slave States of this

Union. While slavery in the colonies of England is subject to the power of the mother country, our States, especially in regard to slavery, are independent, resting upon their own sovereignties and subject only to international laws, which apply to independent States.

In the case of Williams, who was a slave in Granada, having run away, came to England, Lord Stowell said:

> The four judges all concur in this – that he was a slave in Granada, though a free man in England, and he would have continued a free man in all other parts of the world except Granada.

Strader v. Graham, 10 Howard 82 and 18 Curtis 305, has been cited as having a direct bearing in the case before us. In that case, the court say:

> It was exclusively in the power of Kentucky to determine for itself whether the employment of slaves in another State should or should not make them free on their return.

No question was before the court in that case except that of jurisdiction. And any opinion given on any other point is *obiter dictum,* and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed."

In the case of *Spencer v. Negro Dennis,* 8 Gill's Rep. 321, the court say:

> Once free, and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and the the liberated slave, [60 U.S. 561] nor by any condition subsequent attached by the master to the gift of freedom can a state of slavery be reproduced.

In *Hunter v. Bulcher,* 1 Leigh 172:

> By a statute of Maryland of 1796, all slaves brought into that State to reside are declared free; a Virginian-born slave is carried by his master to Maryland; the master settled there, and keeps the slave there in bondage for twelve years; the statute in force all the time; then he brings him as a slave to Virginia, and sells him there. Adjudged, in an action brought by the man against the purchaser, that he is free.

Judge Kerr, in the case, says:

> Agreeing, as I do, with the general view taken in this case by my brother Green, I would not add a word but to mark the exact extent to which I mean to go. The law of Maryland having enacted that slaves carried into that State for sale or to reside shall be free, and the owner of the slave here having carried him to Maryland, and voluntarily submitting himself and the slave to that law, it governs the case.

In every decision of a slave case prior to that of *Dred Scott v. Emerson,* the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the Ordinance of 1787, or the Missouri Compromise Act of 1820. The court treated these acts as in force, and held itself bound to execute them by declaring the slave to be free who had acquired a domicil under them with the consent of his master.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States nor acts of Congress in relation to Territories could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States, with some exceptions of recent cases.

In *Marie Louise v. Morat et al.,* 9 Louisiana Rep. 475, it was held, where a slave having been taken to the kingdom of France or other country by the owner, where slavery is not tolerated, operates on the condition of the slave, and produces immediate emancipation, and that, where a slave thus becomes free, the master cannot reduce him again to slavery.

Josephine v. Poultney, Louisiana Annual Rep. 329,

> where the owner removes with a slave into a State in which slavery is prohibited, with the intention of residing there, the slave will be thereby emancipated, and their subsequent return to the State of Louisiana cannot restore the relation of master and slave.

To the same import are the cases of *Smith v. Smith,* 13 Louisiana Rep. 441, *Thomas v. Generis,* Louisiana Rep. 483, *Harry et al. v. Decker and Hopkins,* Walker's Mississippi Rep. 36. It was held that

> slaves within the jurisdiction [60 U.S. 562] of the Northwestern Territory became freemen by virtue of the Ordinance of 1787, and can assert their claim to freedom in the courts of Mississippi.

Griffith v. Fanny, 1 Virginia Rep. 143. It was decided that a negro held in servitude in Ohio, under a deed executed in Virginia, is entitled to freedom by the Constitution of Ohio.

The case of *Rhodes v. Bell,* 2 Howard 307, 15 Curtis 152, involved the main principle in the case before us. A person residing in Washington city purchased a slave in Alexandria, and brought him to Washington. Washington continued under the law of Maryland, Alexandria under the law of Virginia. The act of Maryland of November, 1796, 2 Maxcy's Laws 351, declared anyone who shall bring any negro, mulatto, or other slave, into Maryland, such slave should be free. The above slave, by reason of his being brought into Washington city, was declared by this court to be free. This, it appears to me, is a much stronger case against the slave than the facts in the case of Scott.

In *Bush v. White,* 3 Monroe 104, the court say:

> That the ordinance was paramount to the Territorial laws, and restrained the legislative power there as effectually as a Constitution in an organized State. It was a public act of the Legislature of the Union, and a part of the supreme law of the land, and, as such, this court is as much bound to take notice of it as it can be of any other law.

In the case of *Rankin v. Lydia,* before cited, Judge Mills, speaking for the Court of Appeals of Kentucky, says:

> If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom.

And he further said:

> Free people of color in all the States are, it is believed, *quasi* citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them, at least such rights were evidently secured to them by the ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated Government to deny their existence in any other part? Is there less comity existing between State and State, or State [60 U.S. 563] and Territory, than exists between the despotic Governments of Europe?

These are the words of a learned and great judge, born and educated in a slave State.

I now come to inquire, under the sixth and last head, "whether the decisions of the Supreme Court of Missouri on the question before us are binding on this court."

While we respect the learning and high intelligence of the State courts, and consider their decisions, with others, as authority, we follow them only where they give a construction to the State statutes. On this head, I consider myself fortunate in being able to turn to the decision of this court, given by Mr. Justice Grier, in *Pease v. Peck,* a case from the State of Michigan, 18 Howard, 589, decided in December Term, 1855. Speaking for the court, Judge Grier said:

> We entertain the highest respect for that learned court (the Supreme Court of Michigan), and, in any question affecting the construction of their own laws where we entertain any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But although this may be correct, yet a rather strong expression of a general rule, it cannot be received as the annunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of the a State by its highest judicature established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. When the decisions of the State court are not consistent, we do not feel bound to follow the last if it is contrary to our own convictions, and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent.

These words, it appears to me, have a stronger application to the case before us than they had to the cause in which they were spoken as the opinion of this court, and I regret that they do not seem to be as fresh in the recollection of some of my brethren as in my own. For twenty-eight years, the decisions of the Supreme Court of Missouri were consistent on all the points made in this case. But this consistent course was suddenly terminated, whether by some new light suddenly springing up, or an excited public opinion, or both, it is not [60 U.S. 564] necessary to say. In the case of *Scott v. Emerson,* in 1852, they were overturned and repudiated.

This, then, is the very case in which seven of my brethren declared they would not follow the last decision. On this authority I may well repose. I can desire no other or better basis.

But there is another ground which I deem conclusive, and which I will restate.

The Supreme Court of Missouri refused to notice the act of Congress or the Constitution of Illinois under which Dred Scott, his wife, and children claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an act of Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the twenty-fifth section of the Judiciary Act, where a right to freedom being set up under the act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

CURTIS, J., dissenting

Mr. Justice CURTIS dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations to sustain the jurisdiction of the Circuit Court. The defendant denied, by a plea to the jurisdiction either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is whether the sufficiency of that plea is before this court for judgment upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the Circuit Courts, being limited to certain described cases and controversies, the question whether a particular [60 U.S. 565] case is within the cognizance of a Circuit Court may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final or subject to review by this appellate court must depend upon the will of Congress, upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the Judiciary Act of 1789, which allows a writ of error from final judgments of Circuit Courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court. Accordingly it has been held from the origin of the court to the present day that Circuit Courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that when a record comes here upon a writ of error or appeal, and on its inspection, it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed and the cause remanded to be dismissed for want of jurisdiction.

It is alleged by the defendant in error in this case that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that, upon this record, it must appear to this court that the case was not within the judicial power of the United States as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered first that the defendant, by pleading over after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here, there was no consent. And if the benefit of the plea was finally lost, it must be not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea when that decision is against the defendant. This is not the [60 U.S. 566] law. Whether the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff or against the defendant, the losing party may have any alleged error in law, in ruling such a plea, examined in this court on a writ of error when the matter in controversy exceeds the sum or value of two thousand dollars. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error. *Mollan v. Torrance,* 9 Wheat. 537. If the decision be against the defendant, though he must answer over and wait for a final judgment in the cause, he may then have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record touching the jurisdiction. The fact that he pleaded over to the merits, under compulsion, can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error and have the ruling reviewed here, while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected that, as the judgment of the Circuit Court was in favor of the defendant and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. *See* the rule. Upon a writ of error, the whole record is open for inspection, and if any error be found in it, the judgment is reversed. *Bank of United States v. Smith,* 11 Wheat. 171.

It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac.Ab., Error H. 4. And this court followed this practice in *Capron v. Van Noorden,* [60 U.S. 567] 2 Cranch 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not extend. The course of the court is where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction that jurisdiction does not exist, but even where it does not appear, affirmatively that it does exist. *Pequignot v. The Pennsylvania R.R. Co.,* 16 How. 104. It acts upon

the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae,* 7 How. 729. I consider, therefore, that, when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is *sua sponte,* if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction.

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship, but when he has done so, the defendant must interpose a plea in abatement the allegations whereof show that the court has not jurisdiction, and it is incumbent on him to prove the truth of his plea.

In *Sheppard v. Graves,* 14 How. 27, the rules on this subject are thus stated in the opinion of the court:

> That although, in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken, *prima facie,* as existing, and it is incumbent [60 U.S. 568] on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party taking the exception.

These positions are sustained by the authorities there cited, as well as by *Wickliffe v. Owings,* 17 How. 47.

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Ab., Abatement:

> Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded, or, if at all, not in the manner and form he now is.

This being, then, a plea in abatement to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows:

> And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit, the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

The plaintiff demurred, and the judgment of the Circuit Court was that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so treated, the plea was clearly bad, for it concludes with a verification, and not to the country, as a general traverse should. And though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement; all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea. Chitty on Pl. 465.

The truth is that, though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation [60 U.S. 569] of citizenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse contained in his excellent analysis of pleadings, Steph. on Pl. 176, it will be seen how precisely this plea meets one of his descriptions. No doubt the defendant might

have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country. The issue thus presented being joined, would have involved matter of law on which the jury must have passed under the direction of the court. But, by traversing the plaintiff's citizenship specially -- that is, averring those facts on which the defendant relied to show that, in point of law, the plaintiff was not a citizen, and basing the traverse on those facts as a deduction therefrom -- opportunity was given to do what was done -- that is, to present directly to the court, by a demurrer, the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special, and not a general or common, traverse, the rule is settled that the facts thus set out in the plea as the reason or ground of the traverse must of themselves constitute, in point of law, a negative of the allegation thus traversed. Stephen on Pl. 183, Ch. on Pl. 620. And upon a demurrer to this plea, the question which arises is whether the facts that the plaintiff is a negro of African descent, whose ancestors were of pure African blood and were brought into this country and sold as negro slaves, may all be true, and yet the plaintiff be a citizen of the State of Missouri within the meaning of the Constitution and laws of the United States which confer on citizens of one State the right to sue citizens of another State in the Circuit Courts. Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver, because, if his ancestors were sold as slaves, the presumption is they continued slaves, and, if so, the presumption is the plaintiff was born a slave, and, if so, the presumption is he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to to help out defective averments in pleading, especially in pleading in abatement, where the utmost certainty and precision are required. Chitty on Pl. 457. That the plaintiff himself was a slave at the time of action brought is a substantive fact having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born, or the plaintiff himself, if once a slave, might have [60 U.S. 570] became a freeman before action brought. To aver that his ancestors were sold as slaves is not equivalent, in point of law, to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous, and if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to, for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves, as amounting to an averment on the record that he was a slave because it may lay some foundation for presuming so is to hold that the facts actually alleged may be treated as intended as evidence of another distinct facts not alleged. But it is a cardinal rule of pleading, laid down in *Dowman's Case,* 9 Rep. 9b, and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact, and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. Stephen on Pleading 384, and authorities cited by him. In Com.Dig., Pleader E. 3, and Bac. Abridgement, Pleas I, 5, and Stephen on Pl., many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. Yelv. 223.

So, in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "this is an infallible argument that the defendant is not guilty, but it is no plea." Dyer a 43.

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied that Fosset was not steward. The court held this no issue, for it traversed the surrender only agrumentatively. Cro.Elis. 260.

In these cases and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the defendant was a slave at the time of action brought, even if it can be made at all from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of *Digby v. Alexander,* 8 Bing. 116. In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling, but as there was no positive allegation [60 U.S. 571] that he was so at the time of action brought, and, as every fact averred might be true and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seizin of land is presumed to continue. But if, in an action of trespass *quare clausum,* the defendant were

to plead that he was lawfully seized of the *locus in quo* one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. *See Mollan v. Torrance,* 9 Wheat. 537. So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be, as it is in this case, that if the defendant meant to aver a particular substantive fact as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments which are quite consistent with the contrary hypothesis. I cannot, therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought, and the inquiry recurs whether the facts that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri within the meaning of the Constitution and laws of the United States.

In *Gassies v. Ballon,* 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana, because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri in the courts of the United States.

So that, under the allegations contained in this plea and admitted by the demurrer, the question is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so, for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the Constitution [60 U.S. 572] uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. By the Articles of Confederation, a Government was organized, the style whereof was "The United States of America." This Government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the Government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the Confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the Government of the Confederation to act on any question of citizenship or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New [60 U.S. 573] York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of the *State v. Manuel,* 4 Dev. and Bat. 20, has declared the law of that State on this subject in terms which I believe to be as sound law in the other States I have enumerated, as it was in North Carolina.

"According to the laws of this State," says Judge Gaston, in delivering the opinion of the court,

> all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects – those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not, in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European King to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one and paid a public tax, and it is a matter of universal notoriety that, under it, free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color a few years since by our amended Constitution.

In the *State v. Newcomb,* 5 Iredell's R. 253, decided in 1844, the same court referred to this case of the *State v. Manuel,* and said:

> That case underwent a very laborious investigation, both by the bar and the bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling [60 U.S. 574] influence and authority on all questions of a similar character.

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State who know their own political history. It is true, beyond all controversy that persons of color, descended from African slaves, were by that Constitution made citizens of the State, and such of them as have had the necessary qualifications have held and exercised the elective franchise, as citizens, from that time to the present. *See Com. v. Aves,* 18 Pick. R. 210.

The Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant, who shall have resided," &c., making no discrimination between free colored persons and others. *See* Con. of N.Y., Art. 2, Rev.Stats. of N.Y., vol. 1, p. 126.

That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £ 50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry except to show that, before they were made, no such restrictions existed, and colored, in common with white, persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of

Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is that a calm comparison of these assertions of universal abstract truths and of their own individual opinions and acts would not leave [60 U.S. 575] these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them nor true in itself to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place of vindicate their memory. As I conceive, we should deal here not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written Constitutions of States and by the notorious practice under them. And they show, in a manner which no argument can obscure, that, in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The fourth of the fundamental articles of the Confederation was as follows:

> The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States.

The fact that free persons of color were citizens of some of the several States, and the consequence that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were, entitled to the [60 U.S. 576] privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, or those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States" by whom the Constitution was ordained and established, but, in at least five of the States, they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore,* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption, nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The first section of the second article of the Constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been in conformity with the common law that free persons born within either of the colonies were subjects of the King that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest, [60 U.S. 577] and thus to continue British subjects. *McIlvain v. Coxe's Lessee,* 4 Cranch 209; *Inglis v. Sailors' Snug Harbor,* 3 Pet. 99; *Shanks v. Dupont,* 3 Pet. 242.

The Constitution having recognised the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States, or

Second. That it has empowered Congress to do so, or

Third. That all free persons born within the several States are citizens of the United States, or

Fourth. That it is left to each State to determine what free persons born within its limits shall be citizens of such State, and thereby be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognises, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons born within the several States shall or shall not be citizens of the United States will not be pretended. It contains no such declaration. We may dismiss the first alternative as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons born within the several States shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For certainly no limits of that discretion can be found in the Constitution, which is wholly silent concerning it, and the necessary consequence is that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice President [60 U.S. 578] of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others, capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed therefore to examine all the provisions of the Constitution which may

have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this would do violence to the meaning of the term naturalization, fixed in the common law, Co.Lit. 8a, 129a; 2 Ves. sen. 286; 2 Bl.Com. 293, and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist No. 42; has been understood by Congress, by the Judiciary, 2 Wheat. 259, 269, 3 Wash.R. 313, 322, 12 Wheat. 277, and by commentators on the Constitution. 3 Story's Com. on Con., 1-3; 1 Rawle on Con. 84-88; 1 Tucker's Bl.Com. App. 255-259.

It appears, then that the only power expressly granted to Congress to legislate concerning citizenship is confined to the removal of the disabilities of foreign birth.

Whether there be anything in the Constitution from which a broader power may be implied will best be seen when we come to examine the two other alternatives, which are whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognised by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that, though [60 U.S. 579] the Constitution was to form a Government, and under it the United States of America were to be one united sovereign nation to which loyalty and obedience, on the one side, and from which protection and privileges, on the other, would be due, yet the several sovereign States whose people were then citizens were not only to continue in existence, but with powers unimpaired except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may well enough, for the purpose now in view, be divided into three parts. *First:* the power to remove the disabilities of alienage, either by special acts in reference to each individual case or by establishing a rule of naturalization to be administered and applied by the courts. *Second:* determining what persons should enjoy the privileges of citizenship in respect to the internal affairs of the several States. *Third:* what native-born persons should be citizens of the United States.

The first-named power -- that of establishing a uniform rule of naturalization -- was granted, and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The first clause of the second section of the third article of the Constitution is

> The judicial power shall extend to controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between States, or the citizens thereof, and foreign States, [60 U.S. 580] citizens, or subjects.

I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was to extend the judicial power to those controversies into which local feelings or interests might to enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark in passing that it has never been held -- I do not know that it has ever been supposed -- that any citizen of a State could bring himself under this clause and the eleventh and twelfth sections of the Judiciary Act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognises that, but it does not recognise citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship, but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that, if it had been intended to constitute a class of native-born persons within the States who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. [60 U.S. 581]

And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions, and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a Constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that Constitution, and as being decisive, to this extent -- that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us that, if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the Legislature of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognised the general principle of public law that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that, when we turn to the Constitution for an answer to the question what free persons born within the several States are citizens of the United States, the only answer we can receive from any of its express provisions is the citizens of the

several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this that the Constitution was ordained by the citizens of the several States that they were "the people of the United States," for whom [60 U.S. 582] and whose posterity the Government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution" within the meaning of those words in that instrument; that by them the Government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them -- the necessary conclusion is that those persons born within the several States who, by force of their respective Constitutions and laws, are citizens of the State are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that, in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again, it has been objected that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected that, if free colored persons, born within a particular State and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States, and, if so, then colored persons could vote, and be [60 U.S. 583] eligible to not only Federal offices, but offices even in those States whose Constitution and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. *See* 1 Lit.Kentucky R. 326. That this is not true under the Constitution of the United States seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights, and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided is a question to be determined by each State in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude

married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State by reason of the operation of causes other than mere citizenship are not conferred. Thus, if the laws of a State require, in addition to [60 U.S. 584] citizenship of the State, some qualification for office or the exercise of the elective franchise, citizens of all other States coming thither to reside and not possessing those qualifications cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges under its Constitution and laws. It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity -- if it confer it on all of them by reason of mere naked citizenship -- then it may be claimed by every citizen of each State by force of the Constitution, and it must be borne in mind that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." If each State may make such persons its citizens, they became, as such, entitled to the benefits of this article if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several States.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the fourth of the Articles of Confederation, with only slight changes of phraseology which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested that, in adopting it into the Constitution, the words "free inhabitants" were changed for the word "citizens." An examination of the forms of expression commonly used in the State papers of that day, and an attention to the substance of this article of the Confederation, will show that the words "free inhabitants," as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the war of the Revolution, and there were very few persons then embraced in the words "free inhabitants" who were not born on our soil. It was not a time when many save the [60 U.S. 585] children of the soil were willing to embark their fortunes in our cause, and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical, rather than a substantial, difference. If we look into the Constitutions and State papers of that period, we find the inhabitants or people of these colonies, or the inhabitants of this State or Commonwealth, employed to designate those whom we should now denominate citizens. The substance and purpose of the article prove it was in this sense it used these words; it secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt that, under this article, there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is that, though the Constitution cured an inaccuracy of language, it left the substance of this article in the National Constitution the same as it was in the Articles of Confederation.

The history of this fourth article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That, under this fourth article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong that the practical effect which it was designed to have, and did have, under the former Government, it was designed to have, and should have, under the new Government.

It may be further objected that, if free colored persons may be citizens of the United States, it depends only on the

will of a master whether he will emancipate his slave and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political status of the freed man depend, not on the will of the master, but on the will of the State, upon which the political status of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political status of its native-born [60 U.S. 586] inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated salve as a citizen of the United States. For whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognise such citizens. As has already been said, it recognises the great principle of public law that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and contrary to the laws and policy of the State where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution, and when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State who are its citizens under its Constitution and laws are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen cannot depend on laws which refer only to aliens, and do not affect the status of persons born in the United States. The utmost effect which can be attributed to them is to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if though fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added that the power to make colored persons citizens of the United States under the Constitution has been actually exercised in repeated and important instances. *See* the Treaties with the Choctaws, of September 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadalupe Hidalgo, February 2, 1848, art. 8.

I do not deem it necessary to review at length the legislation [60 U.S. 587] of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the Government that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus, the act of May 17, 1792, for the organization of the militia directs the enrollment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens would be as inconsistent with the just import of this language as that all citizens are able-bodied, or males.

So the Act of February 28, 1803, 2 Stat. at Large 205, to prevent the importation of certain persons into States when by the laws thereof their admission is prohibited, in its first section, forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, *a citizen,* or registered seaman of the United States," &c.

The Acts of March 3, 1813, section 1, 2 Stat. at Large 809, and March 1, 1817, section 3, 3 Stat. at Large 351, concerning seamen, certainly imply there may be persons of color, natives of the United States who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange if laws

were found on our statute book to that effect when, by solemn treaties, large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided that it should be the duty [60 U.S. 588] of the Legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State under any pretext whatever." One ground of objection to the admission of the State under this Constitution was that it would require the Legislature to exclude free persons of color, who would be entitled, under the second section of the fourth article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolution of Congress admitting the State was upon the fundamental condition

> that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States.

It is true that neither this legislative declaration nor anything in the Constitution or laws of Missouri could confer or take away any privilege or immunity granted by the Constitution. But it is also true that it expresses the then conviction of the legislative power of the United States that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That, as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That, as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States, and I regret I must go further and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise [60 U.S. 589] Act and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court as described by its repeated decisions, and as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of *Legrand v. Darnall,* reported in 2 Peters' R. 664. In that case, a bill was filed, by one alleged to be a citizen of Maryland against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves, and that the

defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer, and upon these and other facts, the court made its decree, founded on the principle that a devise of land by a master to a slave was, by implication, also a bequest of his freedom. The facts that the defendant was of African descent and was born a slave were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of *Legrand v. Darnall* by saying, among other things, that as the fact that the defendant was born a slave only came before this court on the bill and answer; it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in *Livingston v. Story,* 11 Pet. 351, the law has been settled that, when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record to see whether those averments are true except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs with reference to the personal disability of the plaintiff. This is the [60 U.S. 590] settled law of the court, affirmed so lately as *Shepherd v. Graves,* 14 How. 27, and *Wickliff v. Owings,* 17 How. 51. *See also De Wolf v. Rabaud,* 1 Pet. 476. But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri save that raised by the plea to the jurisdiction, and I do not hold any opinion of this Court, or any court, binding, when expressed on a question not legitimately before it. *Carroll v. Carroll,* 16 How. 275. The judgment of this Court is that the case is to be dismissed for want of jurisdiction because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this Court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the territory acquired from France lying north of latitude thirty-six degrees thirty minutes and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be whether the plaintiff's status as a slave was so changed by his residence within that territory that he was not a slave in the State of Missouri at the time this action was brought.

In such cases, two inquiries arise which may be confounded, but should be kept distinct.

The first is what was the law of the Territory into which the master and slave went respecting the relation between them?

The second is whether the State of Missouri recognises and allows the effect of that law of the Territory on the status of the slave on his return within its jurisdiction.

As to the first of these questions, the will of States and nations, [60 U.S. 591] by whose municipal law slavery is not recognised, has been manifested in three different ways.

One is absolutely to dissolve the relation, and terminate the rights of the master existing under the law of the country whence the parties came. This is said by Lord Stowell, in the *Case of the Slave Grace,* 2 Hag.Ad.R. 94, and by the Supreme Court of Louisiana in the *Case of Maria Louise v. Marot,* 9 Louis.R. 473, to be the law of France, and it has been the law of several States of this Union, in respect to slaves introduced under certain conditions. *Wilson v.*

Isabel, 5 Call's R. 430; *Hunter v. Hulcher,* 1 Leigh 172; *Stewart v. Oaks,* 5 Har. and John. 107.

The second is where the municipal law of a country not recognising slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave, and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned, to be the law of England, and by Mr. Chief Justice Shaw, in the case of the *Commonwealth v. Aves,* 18 Pick. 193, to be the law of Massachusetts.

The third is to make a distinction between the case of a master and his slave only temporarily in the country, *animo non manendi,* and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the status of a slave, and make him a freeman, and those where his master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities, out of Missouri, relied on by defendant, apply when the residence in the nonslaveholding Territory was permanent. In the *Commonwealth v. Aves,* 18 Pick. 218, Mr. Chief Justice Shaw said:

> From the principle above stated, on which a slave brought here becomes free, to-wit, that he becomes entitled to the protection of our laws, it would seem to follow as a necessary conclusion that, if the slave waives the protection of those laws and returns to the State where he is held as a slave, his condition is not changed.

It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the *Case of the Slave Grace.* To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthesis. If there had been an [60 U.S. 592] act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker in his opinion in the case of *Betty v. Horton,* 5 Leigh's Virginia R. 615. *See also Hunter v. Fletcher,* 1 Leigh's Va.R. 172; *Maria Louise v. Marot,* 9 Louisiana R.; *Smith v. Smith,* 13 *ib.* 441; *Thomas v. Genevieve,* 16 *ib.* 483; *Rankin v. Lydia,* 2 A. K. Marshall 467; *Davies v. Tingle,* 8 B.Munroe 539; *Griffeth v. Fanny,* Gilm.Va.R. 143; *Lumford v. Coquillon,* 14 Martin's La.R. 405; *Josephine v. Poultney,* 1 Louis.Ann.R. 329.

But if the acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife and their marriage and the birth of one or both of their children took place, falls under the first category, and is a law operating directly on the status of the slave. By the eighth section of the Act of March 6, 1820, 3 Stat. at Large 548, it was enacted that, within this Territory,

> slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: *Provided always* that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid.

By the Act of April 20, 1836, 4 Stat. at Large 10, passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the territory ceded by France, where Fort Snelling is, together with so much of the territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under a Territorial Government under the name of the Territory of Wisconsin. By the eighteenth section of this act, it was enacted

> That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of compact contained in the ordinance for the government of said Territory, passed on the 13th day of July, 1787, and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory.

The sixth article of that compact is

> there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in [60 U.S. 593] the punishment of crimes,

> whereof the party shall have been duly convicted. *Provided always* that any person escaping into the same, from whom labor or service is lawfully claimed in anyone of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid.

By other provisions of this act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory, the latter being subject to alteration and repeal by the legislative power of the Territory created by the act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as September 23, 1805, Am.State Papers, Indian Affairs, vol. 1, p. 744, and until the erection of the Territorial Government, the persons at that post were governed by the rules and articles of war, and such laws of the United States, including the eighth section of the Act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons residing there were under the dominion of those laws in all particulars to which the rules and articles of war did not apply.

It thus appears that, by these acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognised and cannot be aided by the municipal law. It is recognised for the purpose of being absolutely prohibited and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the Legislature to employ more explicit language to signify its will that the status of slavery should not exist within the Territory than the words found in the Act of 1820, and in the Ordinance of 1787, and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside that doubt must yield to the inference required by the words of exception. That exception is of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition, for it would be absurd, as well as useless, to except from a prohibition [60 U.S. 594] a case not contained within it. 9 Wheat. 200. I must conclude, therefore that it was the will of Congress that the state of involuntary servitude of a slave coming into the Territory with his master should cease to exist. The Supreme Court of Missouri so held in *Rachel v. Walker,* 4 Misso.R., 350, which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question whether the law of Missouri recognised and allowed effect to the change wrought in the status of the plaintiff by force of the laws of the Territory of Wisconsin.

I say the law of Missouri because a judicial tribunal in one State or nation can recognise personal rights acquired by force of the law of any other State or nation only so far as it is the law of the former State that those rights should be recognised. But, in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said per Chief Justice Taney, 13 Pet. 589, it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognise a change, wrought by the law of a foreign State, on the status of a person while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognise such changes of status by force of foreign law, as the rules of the law of nations require to be recognised. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and

action on the subject of slavery may afford a reason why the State should change its own action. To understand and give [60 U.S. 595] just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is therefore whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the status of a slave, by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. 1 Ter.Laws, 436. And the common law, as Blackstone says, 4 Com. 67, adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law concerning the recognition, in that State, of a change of status wrought by an extraterritorial law has been displaced or varied by the will of the State of Missouri.

I proceed then to inquire what the rules of international law prescribe concerning the change of status of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits *in itinere,* or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done not in conformity with the principles of international law, other States are not understood to be willing to recognise or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the status of the plaintiff was or was not such an operation as these principles of international law require other States to recognise and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case. [60 U.S. 596]

It appears that this case came on for trial before the Circuit Court and a jury upon an issue, in substance, whether the plaintiff, together with his wife and children, were the slaves of the defendant.

The court instructed the jury that, "upon the facts in this case, the law is with the defendant." This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court upon an agreed statement of facts, entered of record, in place of a special verdict, it would have been necessary for the court below, and for this court, to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the seventh article of the amendments of the Constitution, this court is precluded from finding any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions, made by the parties, were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment, exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences from the admissions made by the parties, and decided the case for the defendant. This course can be justified here, if at all, only by its appearing that, upon the facts agreed and all such inferences of fact favorable to the plaintiff's case as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by

jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed bearing on this part of the case are that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the army of the United States, his domicil of origin being unknown, and what, if anything, he had done to preserve or change his domicil prior to his residence at Rock Island being also unknown.

Now it is true that, under some circumstances the residence of a military officer at a particular place in the discharge of his official duties does not amount to the acquisition of a technical domicil. But it cannot be affirmed with correctness that it never does. There being actual residence, and this being presumptive evidence of domicil, all the circumstances [60 U.S. 597] of the case must be considered before a legal conclusion can be reached that his place of residence is not his domicil. If a military officer stationed at a particular post should entertain an expectation that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did not act and manifested no intent to have a domicil elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Government would prevent his acquisition of a technical domicil at the place of the residence of himself and his family. In other words, I do not think a military officer incapable of acquiring a domicil. *Bruce v. Bruce,* 2 Bos. and Pul. 230; *Munroe v. Douglass,* 5 Mad.Ch.R. 232. This being so, this case stands thus: there was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicil. The presumption is that it was. It is so laid down by this court, in *Ennis v. Smith,* 14 How. and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. *Fitchburg v. Winchendon,* 4 Cush. 190.

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say, on this record that Emerson had not his technical domicil at Fort Snelling. But, for reasons which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicil of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the status of a person, so that in accordance with the principles of international law that status should be recognised in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his status. But, in the United States, questions of this kind may arise where an attempt to decide solely with reference to technical domicil, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And, in my judgment, this is one of those cases.

The residence of the plaintiff, who was taken by his master, Dr. Emerson, as a slave, from Missouri to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to [60 U.S. 598] have been for the time being, and until he asserted his own separate intention, the same as the residence of his master, and the inquiry whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his status, must depend upon the circumstances under which Dr. Emerson went into that Territory and remained there, and upon the further question whether anything was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicil of origin of Dr. Emerson was, nor whether or not he had lost it, and gained another domicil, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the

Territory, and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation, and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitutionally enacted, govern their own servants, residing on their own Territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, and that they operated directly on the status of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse to recognise the effects [60 U.S. 599] of such legislation upon the status of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that, in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first named having been born on the Mississippi river, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognise and treat him as a free man when suing for the liberty of himself, his wife, and the children of the marriage. It is in reference to his status as viewed in other States and countries that the contract of marriage and the birth of children becomes strictly material. At the same time, it is proper to observe that the female to whom he was married having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her status, and that of the children of the marriage, are also affected by the same considerations.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory, they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere, and that no technical domicil at the place of the contract is necessary to make it so. *See* Bishop on Mar. and Div. 125-129, where the cases are collected.

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights, of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer [60 U.S. 600] husband and wife, and a child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim *partus sequitur ventrem.*

It must be borne in mind that, in this case, there is no ground for the inquiry whether it be the will of the State of Missouri not to recognise the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed and there contracts a marriage, or the validity of such a marriage where the master, being a citizen of the State of Missouri, voluntarily goes with his slave, *in itinere,* into a State or country which does not permit slavery to exist, and the slave there contracts marriage without the consent of his master, for in this case, it is agreed, Dr. Emerson did consent, and no further question can arise concerning his rights so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court that a bequest of property by a master to his slave by necessary implication entitles the slave to his freedom, because only as a freeman could he take and hold the bequest. *Legrand v.*

Darnall, 2 Pet.R. 664. It has also been held that, when a master goes with his slave to reside for an indefinite period in a State where slavery is not tolerated, this operates as an act of manumission, because it is sufficiently expressive of the consent of the master that the slave should be free. 2 Marshall's Ken.R. 470, 14 Martin's Louis.R. 401.

What, then, shall we say of the consent of the master that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume -- a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave than by the consent of the master that the slave should enter into a contract of marriage in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or anyone claiming under him the effect of which is to deny the validity of this marriage and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of the State [60 U.S. 601] of Missouri which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. *See* 4 Wheat. 629, 695, 696.

To avoid misapprehension on this important and difficult subject, I will state distinctly the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the status of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the status of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the status of the slave, and it is in conformity with the rules of international law that this change of status should be recognised everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the status of the plaintiff, and change his status to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws, and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State or of some right derived from them, which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which being to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or anyone claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage and bastardize their issue and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in *Scott v. Emerson,* 15 Missouri Reports 576, and that this decision is in conformity [60 U.S. 602] with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave, and the facts that he went there to reside indefinitely as an officer of the United States, and that the plaintiff was lawfully married there with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicil of Dr. Emerson

in that Territory is not questioned in that decision, and it is placed on a broad denial of the operation, in Missouri, of the law of any foreign State or country upon the status of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the status of the slave, and changed his status to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble, in his dissenting opinion in that case, said:

> I regard the question as conclusively settled by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it. . . . But, in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend.
>
> In this State, it has been recognized from the beginning of the Government as a correct position in law that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave.

Winney v. Whitesides, 1 Mo. 473; *Le Grange v. Chouteau,* 2 Mo. 20; *Milley v. Smith, ib.* 36; *Ralph v. Duncan,* 3 Mo. 194; *Julia v. McKinney, ib.* 270; *Nat v. Ruddle, ib.* 400; *Rachel v. Walker,* 4 Mo. 350; *Wilson v. Melvin,* 592. [60 U.S. 603]

Chief Justice Gamble has also examined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri, to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the status of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage, destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?

These questions, which arise exclusively under the Constitution and laws of the United States, this Court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the status of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognised in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. *See* *Swift v. Tyson,* 16 Peters's R. 1; *Carpenter v. The Providence Ins. Co., ib.* 495; *Foxcroft v. Mallet,* 4 How. 353; *Rowan v. Runnels,* 5 How. 134.

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In *Homer v. Brown,* 16 How. 354, this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject matter -- the claimant having become nonsuit in the State court in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar, but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point that this court ought to give effect to the construction put upon the will by the State [60 U.S. 604] court, to the end that rights respecting lands may be governed by one law, and that the law of the place where the lands are situated that they

referred to the State decision of the case, reported in 3 Cushing 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In *Millar v. Austin,* 13 How. 218, an action was brought by the endorsee of a written promise. The question was whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 Ves.L.J. 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held here that the last decision is not necessarily to be taken as the rule. *State Bank v. Knoop,* 16 How. 369; *Pease v. Peck,* 18 How. 599.

To these considerations I desire to add that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson, and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument that the laws of the United States respecting slavery in this Territory were constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side, it was maintained that the Constitution contains no express grant of power to organize and govern what is now known to the laws of the United States as a Territory. That whatever power of this kind exists is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government. [60 U.S. 605]

On the other side, it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States by the war carried on by them under a common Government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. 5 Jour. of Cong. 208, 442. Under the pressure of these circumstances, Congress earnestly recommended to the several States a cession of their claims and rights to the United States. 5 Jour. of Cong. 442. And before the Constitution was framed, it had been begun. That by New York had been made on the 1st day of March, 1781; that of Virginia on the 1st day of March, 1784; that of Massachusetts on the 19th day of April, 1785; that of Connecticut on the 14th day of September, 1786; that of South Carolina on the 8th day of August, 1787, while the Convention for framing the Constitution was in session.

It is very material to observe in this connection that each of these acts cedes, in terms, to the United States as well

the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made by North Carolina on the 25th day of February, 1790, and by Georgia on the 24th day of April, [60 U.S. 606] 1802. The terms of these last-mentioned cessions will hereafter be noticed in another connection, but I observe here that each of them distinctly shows upon its face that they were not only in execution of the general plan proposed by the Congress of the Confederation, but of a formed purpose of each of these States existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that when the Federal Constitution was framed and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit so far as it then had or might attain thereafter a pecuniary value, and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. And also that the relations of the United States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers, but a confident expectation, founded on their appreciation of the justice of the general claim and fully justified by the results, was entertained that these cessions would be made. The Ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay northwest of the river Ohio.

But it must have been apparent both to the framers of the Constitution and the people of the several States who were to act upon it that the Government thus provided for could not continue unless the Constitution should confer on the United States the necessary powers to continue it. That temporary Government, under the ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation, their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary act of legislation, deriving its force from the legislative power of Congress and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation, appointed and commissioned by the President and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the Northwestern Territory which all reflecting men must have foreseen would exist when the Government created by the [60 U.S. 607] Constitution should supersede that of the Confederation. That if the new Government should be without power to govern this Territory, it could not appoint and commission officers, and send them into the Territory to exercise there legislative, judicial, and executive power, and that this Territory, which was even then foreseen to be so important, both politically and financially, to all the existing States, must be left not only without the control of the General Government in respect to its future political relations to the rest of the States, but absolutely without any Government, save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this Northwestern Territory was not the only territory the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of

> all the territory included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the Eastern from the Western waters, then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river, to the said mountains, and thence to run a due west course to the river Mississippi.

It is true that, by subsequent explorations, it was ascertained that the source of the Tugaloo river, upon which the title of South Carolina depended, was so far to the northward that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession, and there

can be no doubt that the State of South Carolina, in making the cession, and the Congress, in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the treaty of peace, though its quantity or extent then remained to be ascertained.{1}

It must be remembered also, as has been already stated that not only was there a confident expectation entertained by the [60 U.S. 608] other States that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent that the just title to this "back country," as it was termed, had vested in the United States by the treaty of peace, and could not rightfully be claimed by any individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute Governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive that it was known to the Convention.{2} It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this ordinance. Jefferson's Works, vol. 9, pp. 251, 276; Federalist, Nos. 38, 43.

The importance of conferring on the new Government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived is clearly shown by the Federalist, No. 38, where this very argument is made use of in commendation of the Constitution.

Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory ceded and expected to be ceded could not have escaped the attention of those who framed or adopted the Constitution, and that, if it did not escape their attention, it could not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agitated, [60 U.S. 609] was nevertheless overlooked, or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States, to be framed out of the ceded territory, early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject, Res.No. 10, 5 Elliot 128, which, having been affirmed in Committee of the Whole, on the 5th of June, 5 Elliot 156, and reported to the Convention on the 13th of June, 5 Elliot 190, was referred to the Committee of Detail, to prepare the Constitution, on the 26th of July, 5 Elliot 376. This committee reported an article for the admission of new States "lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who, on the 18th of August, 5 Elliot 439, moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary Governments for new States arising therein.

On the 29th of August, 5 Elliot 492, the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows:

> New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress.
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.

That Congress has some power to institute temporary Governments over the territory, I believe all agree, and if it be admitted that the necessity of some power to govern the territory [60 U.S. 610] of the United States could not and did not escape the attention of the Convention and the people, and that the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory, and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the territory, and to convey to Congress some authority concerning it.

It would seem, also that when we find the subject matter of the growth and formation and admission of new States, and the disposal of the territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision, and that an indispensably necessary power to institute temporary Governments, and to legislate for the inhabitants of the territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus, Chief Justice Marshall, in *United States v. Bevans,* 3 Wheat. 386, says:

> What, then, is the extent of jurisdiction which a State possesses? We answer without hesitation the jurisdiction of a State is coextensive with its territory.

Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio, another tract, then of unknown extent, ceded by South Carolina, and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States and out of the limits of any particular State, and the cessions embraced the civil and political jurisdiction and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States" [60 U.S. 611] were not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects matter then existing and belonging to the United States and other similar subjects which might afterwards be acquired, and, this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States" as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity under which they hoped the United States might be what they have now become -- a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. *See Cerre v. Pitot,* 6 Cr. 336; *Am. Ins. Co.*

v. Canter, 1 Pet. 542. With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article which enabled Congress to admit new States refers to and includes new States to be formed out of this territory expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt by the framers of the Constitution to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions -- a circumstance in no way material as respects the necessity for rules and regulations or the propriety of conferring [60 U.S. 612] on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause, and when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims, so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States, and consequently to know whether it was within or without the authority conferred by this clause to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject matter of this article which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired, or that, though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true that, at the date of the treaty of 1803 between the United States and France for the cession of Louisiana, it was made a question whether the Constitution had conferred on the executive department of the Government of the United States power to acquire foreign territory by a treaty. [60 U.S. 613]

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the Government that this power did not exist cannot be admitted without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may them have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different Administrations. Six States formed on such territory are now in the Union. Every branch of this Government, during a period of more

than fifty years, has participated in these transactions. To question their validity now is vain. As was said by Mr. Chief Justice Marshall in the *American Insurance Company v. Canter*, 1 Peters 542,

> the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that Government possesses the power of acquiring territory either by conquest or treaty.

See Cerre v. Pitot, 6 Cr. 336. And, I add, it also possesses the power of governing it when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read

> Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the [60 U.S. 614] soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress -- that it is therefore necessarily a grant of power to legislate -- and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the territory is a power to pass all needful laws respecting it.

The word "regulate," or "regulation," is several times used in the Constitution. It is used in the fourth Section of the First Article to describe those laws of the States which prescribe the times, places, and manner, of choosing Senators and Representatives; in the Second Section of the Fourth Article to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the Second Section of the Third Article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and finally in the Eighth Section of the First Article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned in passing that, under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China, and has established judicatures with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or

regulation be needful must be finally determined by Congress itself. Whether a law be needful is a legislative or political, [60 U.S. 615] not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property, for without law, its ownership, its use, and the power of disposing of it, cease to exist in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States when, in the judgment of Congress, they should be fitted therefor, since these were the needs provided for, since it is confessed that Government is indispensable to provide for those needs, and the power is to make *all needful* rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress -- a question which of these is needful.

But it is insisted that, whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "*all* needful rules and regulations" respecting the territory belonging to the United States.

The assertion is, though the Constitution says "all," it does not mean all -- though it says "all" without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument to exhibit some solid and satisfactory reason, drawn from the subject matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification.

The subject matter is the territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their [60 U.S. 616] will respecting it, manifested in the Constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon until new States should be formed. It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognised subjects of municipal legislation; every State had in some measure acted thereon, and the only legislative act concerning the territory -- the Ordinance of 1787, which had then so recently been passed -- contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognised scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the territory." An enactment that slavery may or may not exist there is a regulation respecting the territory. Regulations must be needful, but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated

instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of the Constitution. *Stuart v. Laird,* 1 Cranch 269; *Martin v. Hunter,* 1 Wheat. 304; *Cohens v. Virginia,* 6 Wheat. 264; *Prigg v. Pennsylvania,* 16 Pet. 621; *Cooley v. Port Wardens,* 12 How. 315.

In this view, I proceed briefly to examine the practical construction placed on the clause now in question so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated that, after the Government of the United States was organized under the Constitution, the temporary Government of the Territory northwest of the River Ohio could no longer exist save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the Constitution. And, accordingly, an act was passed on the [60 U.S. 617] 7th day of August, 1789, 1 Stat. at Large 50, which recites:

> Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States.

It then provides for the appointment by the President of all officers, who, by force of the ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution, and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." Gen. Washington, who signed this bill as President, was the President of that Convention.

It does not appear to me to be important in this connection that that clause in the ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject, and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the Federalist, I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the ordinance a compact between "the original States and the people and States in the new territory," there being no new States then in existence in the territory with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty even if the Congress of the Confederation had had power to make one touching the government of that territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States, for it clearly shows that slavery was thereafter to be prohibited there, and it could be prohibited only by an exertion of the power of the United States under the Constitution, no other power being capable of operating within that territory after the Constitution took effect.

On the 2d of April, 1790, 1 Stat. at Large 106, the first Congress passed an act accepting a deed of cession by North [60 U.S. 618] Carolina of that territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "*Provided always* that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory, and, accordingly, when, a few days later, Congress passed the Act of May 20th, 1790, 1 Stat. at Large 123, for the government of the Territory south of the River Ohio, it provided,

> and the Government of the Territory south of the Ohio shall be similar to that now exercised in the Territory northwest of the Ohio except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled, "An act to accept a cession of the claims of the State of North Carolina to a certain district of western territory."

Under the Government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798, 1 Stat. at Large 649, an act was passed to establish a Government in the Mississippi Territory in all respects like that exercised in the Territory northwest of the Ohio, "excepting and excluding the last article of the ordinance made for the government thereof by the late Congress, on the 13th day of July, 1787." When the limits of this Territory had been amicably settled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession that the Ordinance of July 13th, 1787, "shall in all its parts extend to the Territory contained in the present act of cession, that article only excepted which forbids slavery." The Government of this Territory was subsequently established and organized under the act of May 10th, 1800, but so much of the ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of acts, in one of which Congress has extended the Ordinance of 1787, including the article prohibiting slavery, over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected Governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the Government under the ordinance which excluded slavery.

Of the first class are the Act of May 7th, 1800, 2 Stat. at [60 U.S. 619] Large 58, for the government of the Indiana Territory; the Act of January 11th, 1805, 2 Stat. at Large 309, for the government of Michigan Territory; the Act of May 3d, 1809, 2 Stat. at Large 514, for the government of the Illinois Territory; the Act of April 20th, 1836, 5 Stat. at Large 10, for the government of the Territory of Wisconsin; the Act of June 12th, 1838, for the government of the Territory of Iowa; the Act of August 14th, 1848, for the government of the Territory of Oregon. To these instances should be added the Act of March 6th, 1820, 3 Stat. at Large 548, prohibiting slavery in the territory acquired from France, being northwest of Missouri and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established Governments by which slavery was recognised and allowed, are: the Act of March 26th, 1804, 2 Stat. at Large 283, for the government of Louisiana; the Act of March 2d, 1805, 2 Stat. at Large 322, for the government of the Territory of Orleans; the Act of June 4th, 1812, 2 Stat. at Large 743, for the government of the Missouri Territory; the Act of March 30th, 1822, 3 Stat. at Large 654, for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States, and six distinct instances in which Congress organized Governments of Territories by which slavery was recognised and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

It appears, however, from what has taken place at the bar that, notwithstanding the language of the Constitution and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories. [60 U.S. 620]

One is that, though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is that the Constitution itself

secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general concerning the right of self-government and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens, and inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery not found therein nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible -- because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical [60 U.S. 621] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress, or, what in my opinion would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown by anything in the Constitution itself that, when it confers on Congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted, or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court closely analogous to this one in which such an attempt to introduce an exception not found in the Constitution itself has failed of success.

By the eighth section of the first article, Congress has the power of exclusive legislation in all cases whatsoever within this District.

In the case of *Loughborough v. Blake,* 5 Whea. 324, the question arose whether Congress has power to impose direct taxes on persons and property in this District. It was insisted that, though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle that taxation and representation are inseparable. It would not be easy to fix on any political truth better established or more fully admitted in our country than that taxation and representation must exist together. We went into the war of the Revolution to assert it, and it is

incorporated as fundamental into all American Governments. But however true and important [60 U.S. 622] this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this District. Their decision was embodied in the words of the Constitution, and as that contained no such exception as would permit the maxim to operate in this District, this court, interpreting that language, held that the exception did not exist.

Again, the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, 9 Wheat. 192,

> a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this,

I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent as a ground of legal judgment was relied on -- that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was that, under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution, and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of *United States v. Marigold,* 9 How. 560, says:

> Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations, and however, at periods of high excitement, an application of the terms "to regulate commerce" such as would embrace absolute prohibition may have been questioned, yet, since the passage of the embargo and nonintercourse laws and the repeated judicial sanctions these statutes have received, it can scarcely at this day be open to doubt that every subject falling legitimately [60 U.S. 623] within the sphere of commercial regulation may be partially or wholly excluded when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it.

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the territory;" while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant; while no other clause of the Constitution can be shown which requires the insertion of an exception respecting slavery; and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit also that the kind of Government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate,

and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save [60 U.S. 624] that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. In *Prigg v. Pennsylvania,* 10 Pet. 611, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In *Rankin v. Lydia,* 2 Marsh. 12, 470, the Supreme Court of Appeals of Kentucky said:

> Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law.

I am not acquainted with any case or writer questioning the correctness of this doctrine. *See also* 1 Burge, Col. and For.Laws 738-741, where the authorities are collected.

The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while in others, the law may recognise a right of the slave to be protected from cruel treatment. In other words, the status of slavery embraces every condition from that in which the slave is known to the law simply as a [60 U.S. 625] chattel, with no civil rights, to that in which he is recognised as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the status of slavery must depend on the municipal law which creates and upholds it.

And not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status must be defined, protected, and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws that they must cease to be available as property, when their owners voluntarily place them permanently within another

jurisdiction, where no municipal laws on the subject of slavery exist, and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting [60 U.S. 626] slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject, and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re,* the foreign municipal laws which constituted, regulated, and preserved, the status of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as "the people of the United States," under the Constitution of the United States, to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress, to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances or sectional differences of condition cannot, in my opinion, be recognised in this court without arrogating to the judicial branch of the Government powers not committed to it, and which, with all the unaffected respect I feel for it when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position that a prohibition to bring slaves into a Territory deprives anyone of his property without due process of law bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta, was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of [60 U.S. 627] the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the Ordinance of 1787 also violated it, and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, of the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that, if brought, they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it, as may be seen in *Wilson v. Isabel,* 5 Call's R. 425. *See also Hunter v. Hulsher,* 1 Leigh 172, and a similar law has been recognised as valid in Maryland in *Stewart v. Oaks,* 5 Har. and John. 107. I am not aware that such laws, though they exist in many States, were ever supposed to be

in conflict with the principle of Magna Charta incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves, and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can similar regulation respecting a Territory violate the fifth amendment of the Constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this territory was in the words, "that slavery, &c., shall be and is hereby *forever* prohibited." But the insertion of the word "*forever*" can have no legal effect. Every enactment not expressly limited in its [60 U.S. 628] duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is that Congress cannot so legislate as to bind the future States formed out of the territory, and that, in this instance, it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be to disturb what has been settled, every law made by Congress may be repealed, and, saving private rights and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should forever be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a Territory, that, at some future day, States might exist there, and so the law was invalid because, by its terms, it was to continue in force forever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it includes cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may, in its terms, attempt to include others on which it cannot operate. In other words, this court cannot declare void an act of Congress which constitutionally embraces some cases, though other cases within its terms are beyond the control of Congress or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery from this territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law so long as Congress has the exclusive legislative power in the territory. [60 U.S. 629]

But it is further insisted that the treaty of 1803 between the United States and France, by which this territory was acquired, has so restrained the constitutional powers of Congress that it cannot, by law, prohibit the introduction of slavery into that part of this territory north and west of Missouri and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation for the exercise of those powers is quite another matter. That responsibility is to be met, and justified to the foreign nation according to the requirements of the rules of public law, but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The second section of the fourth article is

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.

This has made treaties part of our municipal law, but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign Government. I do not consider, I am not aware it has ever been considered that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the treaties with France by the Act of July 7th, 1798, 1 Stat. at Large 578, was in conformity with these views. In the case of *Taylor et al. v. Morton,* 2 Curtis' Cir.Ct.R. [60 U.S. 630] 454, I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or no a case existed sufficient to justify a refusal to execute such a stipulation would not be a judicial, but a political and legislative, question, wholly beyond the authority of this Court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. *Foster v. Nicolson,* 2 Peters 314; *Garcia v. Lee,* 12 Peters 519.

But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States respecting the territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri was then a wilderness, uninhabited save by savages whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this territory which the United States might think fit to make, and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights, and the United States, as a just Government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory which, in the language of the treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern [60 U.S. 631] whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess.

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded territory then uninhabited. The first is that, manifestly, its sole object was to protect individual rights of the then inhabitants of the territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure

to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish Governments, while they held the country, as well as the United States, when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation that the then inhabitants of Louisiana should be protected in their property can have no reference to their use of that property where they had no right, under the treaty, to go with it save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty had afterwards taken property then owned by him, consisting of firearms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the Act of Congress of March 30, 1802, 2 Stat. at Large 139, adopted and extended to this territory by the Act of March 26, 1804, (2 Stat. at Large 283.)

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the act of Congress, as to such rights of his, would be inoperative, but it [60 U.S. 632] would be valid and operative as to all other persons, whose individual rights did not come under the protection of the treaty. And inasmuch as it does not appear that any inhabitant of Louisiana whose rights were secured by treaty had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed, and second, that if any did exist, the entire law was void -- not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the cases of *New Orleans v. De Armas et al.,* 9 Peters, 223, the question was whether a title to property which existed at the date of the treaty continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said:

> This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible on an equal footing with the other States, and the other that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had anyone of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this Court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States."

The cases of *Chouteau v. Marguerita,* 12 Peters 507, and *Permoli v. New Orleans,* 3 How. 589, are in conformity with this view of the treaty.

To convert this temporary stipulation of the treaty in behalf of French subjects who then inhabited a small portion of Louisiana into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the [60 U.S. 633] ceded territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject matter and the evident design of the parties that I cannot assent to it. In my opinion, this treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the

different questions on which I have found it necessary to pass to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

Footnotes

DANIEL, J., separate opinion (Footnotes)

1. *Vide* Gibbons's Decline and Fall of the Roman Empire. London edition of 1825, vol. 3d, chap. 44, p. 183.

2. Letter from James Madison to Robert Walsh, November 27th, 1819, on the subject of the Missouri Compromise.

CAMPBELL, J., concurring (Footnotes)

1. Mr. Varnum said: "The bill provided such a Government as had never been known in the United States." Mr. Eustis: "The Government laid down in this bill is certainly a new thing in the United States." Mr. Lucas: "It has been remarked that this bill establishes elementary principles never previously introduced in the Government of any Territory of the United States. Granting the truth of this observation," &c. Mr. Macon: "My first objection to the principle contained in this section is that it establishes a species of government unknown to the United States." Mr. Boyle: "Were the President an angel instead of a man, I would not clothe him with this power." Mr. G. W. Campbell: "On examining the section, it will appear that it really establishes a complete despotism." Mr. Sloan: "Can anything be more repugnant to the principles of just government? Can anything be more despotic?" -- Annals of Congress, 1803-1804

2. Mr. Jefferson wrote:

> The Missouri question is the most portentous one that ever threatened our Union. In the gloomiest moments of the revolutionary war, I never had any apprehension equal to that I feel from this source.

CURTIS, J., dissenting (Footnotes)

1. This statement that some territory did actually pass by this cession is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of *Howard v. Ingersoll,* reported in 13 How. 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession. But as the fact is not important to the argument, I have not thought it necessary further to investigate it.

2. It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to Gen. Washington on the 15th of July. *See* p. 261, Cor. of Am.Rev., vol. 4, and Writings of Washington, vol. 9, p. 174.

Slaughterhouse Cases*
83 U.S. 36

ERROR TO THE SUPREME COURT OF LOUISIANA

1. The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have and maintain slaughterhouses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State (a territory which, it was said -- *see infra,* p. 85 -- contained 1154 square miles, including the city of New Orleans, and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughterhouses, landings for cattle, and yards for cattle intended for sale or slaughter, within those limits, and requiring that all cattle and other animals intended for sale or slaughter in that district, should be brought to the yards and slaughterhouses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine. *Held,* that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all [83 U.S. 37] butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the state legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment.

2. The Parliament of Great Britain and the State legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class, and has, until now, never been denied.

Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.

3. In giving construction to any of those articles, it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview, whether the party concerned be of African descent or not.

While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade when they amount to slavery or involuntary servitude, and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery of whatever class or name.

The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions.

The second clause protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States,* as distinguished from the privileges and immunities of citizens of the States.

These latter, as defined by Justice Washington in *Corfield v. Coryell,* and by this court in *Ward v. Maryland,* embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments, and of this class are those set up by plaintiffs.

4. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof, and it is these which are placed under the protection of Congress by this clause of the Thirteenth amendment.

It is not necessary to inquire here into the full force of the clause forbidding a State to enforce any law which deprives a person of life, liberty, [83 U.S. 38] or property without due process of law, for that phrase has been often the subject of judicial construction, and is, under no admissible view of it, applicable to the present case.

5. The clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and, for this purpose, the clause confers ample power in Congress to secure his rights and his equality before the law.

The three cases -- the parties to which, as plaintiff and defendants in error, are given specifically as a subtitle, at the head of this report, but which are reported together also under the general name which, in common parlance, they had acquired -- grew out of an act of the legislature of the State of Louisiana, entitled

> An act to protect the health of the City of New Orleans, to locate the stock landings and slaughterhouses, and to incorporate "The Crescent City Live-Stock Landing and Slaughter-House Company,"

which was approved on the 8th of March, 1869, and went into operation on the 1st of June following, and the three cases were argued together.

The act was as follows:

> SECTION 1. *Be it enacted, &c.,* That from and after the first day of June, A.D. 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, pens, slaughterhouses, or abattoirs at any point or place within the city of New Orleans, *or the parishes of Orleans, Jefferson, and St. Bernard,* or at any point or place on the east bank of the Mississippi River within the corporate limits of the city of New Orleans, or at any point on the west bank of the Mississippi River above the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, *except* that the "Crescent City Stock Landing and Slaughter-House Company" may establish *themselves* at any point or place as hereinafter provided. Any person or persons, or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering or keeping any animal or animals in violation of this act, shall be liable to a fine of $250 for each and [83 U.S. 39] every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction.

The second section of the act created one Sauger and sixteen other person named, a corporation, with the usual privileges of a corporation, and including power to appoint officers and fix their compensation and term of office, to fix the amount of the capital stock of the corporation and the number of shares thereof.

The act then went on:

> SECTION 3. *Be it further enacted, &c.,* That said company or corporation is hereby authorized to establish and erect at its own expense, a any point or place on the east bank of the Mississippi River within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States Barracks, or at any point or place on the west bank of the Mississippi River below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, and from and after the time such buildings, yards, &c., are ready and complete for business, and notice thereof is given in the official journal of the State, the said Crescent City Live-Stock Landing and Slaughter-House Company shall have *the sole and exclusive privilege of conducting and carrying on the livestock landing and slaughterhouse business within the limits and privileges granted by the provisions of this act,* and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the livestock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation, and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said company or corporation, $10; for each steamboat or other watercraft, $5, and for each horse, mule, bull ox, or cow landed at their wharves, for each and every day kept, 10 cents; for each and every hog, calf, sheep, or goat, for each and every day kept, 5 cents, all without including the feed, and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But [83 U.S. 40] if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction, in any two newspapers published in the city of New Orleans, for five days, and after the expiration of said five days, the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of such sales shall be taken by the said company or corporation and applied to the payment of the charges and expenses aforesaid, and other additional costs,

and the balance, if any, remaining from such sales, shall be bold to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of $250, to be recovered with costs of suit before any court of competent jurisdiction.

The company shall, before the first of June, 1869, build and complete A GRAND SLAUGHTERHOUSE of sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day; also a sufficient number of sheds and stables shall be erected before the date aforementioned to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of forfeiture of their charter.

SECTION 4. *Be it further enacted, &c.,* That the said company or corporation is hereby authorized to erect, at its own expense, one or more landing places for livestock, as aforesaid, at any points or places consistent with the provisions of this act, and to have and enjoy from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having landed at their wharves or landing places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson,* and are hereby also authorized (in connection) to erect at its own expense one or more slaughterhouses, at any points or places [83 U.S. 41] consistent with the provisions of this act, and to have and enjoy, from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having slaughtered therein all animals the meat of which is destined for sale in the parishes of Orleans and Jefferson.*

SECTION 5. *Be it further enacted, &c.,* That whenever said slaughterhouses and accessory buildings shall be completed and thrown open for the use of the public, said company or corporation shall immediately give public notice for thirty days, in the official journal of the State, and within said thirty days' notice, and within, from and after the first day of June, A.D. 1869, *all other stock landings and slaughterhouses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined for sale within the parishes aforesaid, under a penalty of $100, for each end every offence, recoverable, with costs of suit, before any court if competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughtehouses erected by the said company or corporation,* and upon a refusal of said company or corporation to allow any animal or animals to be slaughtered after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of $250, recoverable, with costs of suit, before any court of competent jurisdiction; said fines and penalties to be paid over to the auditor of public accounts, which sum or sums shall be credited to the educational fund.

SECTION 6. *Be it further enacted, &c.,* That the governor of the State of Louisiana shall appoint a competent person, clothed with police powers, to act as inspector of all stock that is to be slaughtered, and whose duty it will be to examine closely all animals intended to be slaughtered, to ascertain whether they are sound and fit for human food or not, and if sound and fit for human food, to furnish a certificate stating that fact to the owners of the animals inspected, and without said certificate no animals can be slaughtered for sale in the slaughterhouses of said company or corporation. The owner of said animals so inspected to pay the inspector 10 cents for each and every animal so inspected, one-half of which fee the said inspector shall retain for his services, and the other half of said fee shall be [83 U.S. 42] paid over to the auditor of public accounts, said payment to be made quarterly. Said inspector shall give a good and sufficient bond to the State, in the sum of $5,000, with sureties subject to the approval of the governor of the State of Louisiana, for the faithful performance of his duties. Said inspector shall be fined for dereliction of duty $50 for each neglect. Said inspector may appoint as many deputies as may be necessary. The half of the fees collected as provided above, and paid over to the auditor of public accounts, shall be placed to the credit of the educational fund.

SECTION 7. *Be it further enacted, &c.,* That all persons slaughtering or causing to be slaughtered cattle or other animals in said slaughterhouses shall pay to the said company or corporation the following rates or perquisites, viz.: for all beeves, $1 each; for all hogs and calves, 50 cents each; for all sheep, goats, and lambs, 30 cents each, and the said company or corporation shall be entitled to the head, feet, gore, and entrails of all animals excepting hogs, entering the slaughterhouses and killed therein, it being understood that the heart and liver are not considered as a part of the gore and entrails, and that the said heart and liver of all animals slaughtered in the slaughterhouses of the said company or corporation shall belong, in all cases, to the owners of the animals slaughtered.

SECTION 8. *Be it .further enacted, &c.,* That all the fines and penalties incurred for violations of this act shall be recoverable in a civil suit before any court of competent jurisdiction, said suit to be brought and prosecuted by said company or corporation in all cases where the privileges granted to the said company or corporation by the provisions of this act are violated or interfered with; that one-half of all the fines and penalties recovered by the said company or corporation [*sic* in copy – REP.] in consideration of their prosecuting the violation of this act, and the other half shall be paid over to the auditor of public accounts, to the credit of the educational fund.

SECTION 9. *Be it further enacted, &c.,* That said Crescent City Livestock Landing and Slaughter-House Company shall have the right to construct a railroad from their buildings to the limits of the city of New Orleans, and shall have the right to run cars thereon, drawn by horses or other locomotive power, as they may see fit; said railroad to be built on either of the public roads running along the levee on each side of the Mississippi [83 U.S. 43] River. The said company or corporation shall also have the right to establish such steam ferries as they may see fit to run on the Mississippi River between their buildings and any points or places on either side of said river.

SECTION 10. *Be it further enacted, &c.,* That at the expiration of twenty-five years from and after the passage of this act, the privileges herein granted shall expire.

The parish of Orleans containing (as was said{1}) an area of 150 square miles, the parish of Jefferson of 384, and the parish of St. Bernard of 620, the three parishes together 1154 square miles, and they having between two and three hundred thousand people resident therein, and, prior to the passage of the act above quoted, about 1,000 persons

employed daily in the business of procuring, preparing, and selling animal food, the passage of the act necessarily produced great feeling. Some hundreds of suits were brought on the one side or on the other; the butchers, not included in the "monopoly" as it was called, acting sometimes in combinations, in corporations, and companies and sometimes by themselves, the same counsel, however, apparently representing pretty much all of them. The ground of the opposition to the slaughterhouse company's pretensions, so far as any cases were finally passed on in this court, was that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States. The language relied on of these articles is thus:

> AMENDMENT XIII
>
> either slavery nor *involuntary servitude* except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction.
>
> AMENDMENT XIV
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States* and of the State wherein they reside. [83 U.S. 44]
>
> No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States,* nor shall any State deprive any person of life, *liberty, or property,* without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court of Louisiana decided in favor of the company, and five of the cases came into this court under the 25th section of the Judiciary Act in December, 1870, where they were the subject of a preliminary motion by the plaintiffs in error for an order in the nature of a supersedeas. After this, that is to say, in March, 1871, a compromise was sought to be effected, and certain parties professing, apparently, to act in a representative way in behalf of the opponents to the company, referring to a compromise that they assumed had been effected, agreed to discontinue "all writs of error concerning the said company, now pending in the Supreme Court of the United States;" stipulating further "that their agreement should be sufficient authority for any attorney to appear and move for the dismissal of all said suits." Some of the cases were thus confessedly dismissed. But the three of which the names are given as a subtitle at the head of this report were, by certain of the butchers, asserted not to have been dismissed. And Messrs. M. H. Carpenter, J. S. Black, and T. J. Durant, in behalf of the new corporation, having moved to dismiss them also as embraced in the agreement, affidavits were filed on the one side and on the other; the affidavits of the butchers opposed to the "monopoly" affirming that they were plaintiffs in error in these three cases, and that they never consented to what had been done, and that no proper authority had been given to do it. This matter was directed to be heard with the merits. The case being advanced was first heard on these, January 11th, 1872; Mr. Justice Nelson being indisposed and not in his seat. Being ordered for reargument, it was heard again February 3d, 4th, and 5th, 1873. [83 U.S. 57]

MILLER, J., lead opinion

Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Livestock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

The cases named on a preceding page,* with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or supersedeas, [83 U.S. 58] pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace 273.

On account of the importance of the questions involved in these cases, they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing, one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court, under these circumstances, ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page,* who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court [83 U.S. 59] to review the judgment of the State court on those questions is clear, and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled

> An act to protect the health of the city of New Orleans, to locate the stock landings and slaughterhouses, and to incorporate the Crescent City Livestock Landing aud Slaughter-House Company.

The first section forbids the landing or slaughtering of animals whose flesh is intended for food within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughterhouses or abattoirs within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stockyards, stock landings, and slaughterhouses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughterhouse of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the livestock landing and slaughterhouse business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock landings and slaughtered at the slaughterhouses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock landings [83 U.S. 60] and slaughterhouses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughterhouses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens -- the whole of the butchers of the city -- of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege, the one in reference to stock landings and stockyards, and [83 U.S. 61] the other to slaughterhouses. That the landing of livestock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous it needs no argument to prove. Nor can it be injurious to the general community that, while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing places, and receiving a fair compensation for the service.

It is, however, the slaughterhouse privilege which is mainly relied on to justify the charges of gross injustice to the public and invasion of private right.

It is not, and cannot be successfully controverted that it is both the right and the duty of the legislative body -- the supreme power of the State or municipality -- to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively, it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else.*

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so to slaughter in their houses, and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place, and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the [83 U.S. 62] duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

> Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,

says Chancellor Kent,{2}

> be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.

This is called the police power, and it is declared by Chief Justice Shaw{3} that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private social life, and the beneficial use of property. "It extends," says another eminent judge,{4}

> to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State, . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. [83 U.S. 63]

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In *Gibbons v. Ogden,*{5} Chief Justice Marshall, speaking of inspection laws passed by the States, says:

> They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government – all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation.

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the *City of New York v. Miln.*{6} In that case, the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port in that of New York City to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this, it was held to be an exercise of the police power properly within the control of the State, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce. [83 U.S. 64]

To the same purpose are the recent cases of the *The License Tax,*{7} and *United States v. De Witt.*{8} In the latter case, an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void because, as a police regulation, the power to make such a law belonged to the States, and did not belong to Congress.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughterhouses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that, in creating a corporation for this purpose, and conferring upon it exclusive privileges -- privileges which it is said constitute a monopoly -- the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have

been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch v. The State of Maryland*{9} in relation to the power of Congress to organize [83 U.S. 65] the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And, in this respect, we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are, on the whole, exorbitant or unjust.

The proposition is therefore reduced to these terms: can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question has displayed a research into the history of monopolies in England and the European continent only equalled by the eloquence with which they are denounced.

But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies,* reported by Coke and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown, for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly [83 U.S. 66] establishes that the contest was between the crown and the people represented in Parliament.

But we think it may be safely affirmed that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have, from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges -- privileges denied to other citizens -- privileges which come within any just definition of the word monopoly, as much as those now under consideration, and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established that the authority of the legislature of Louisiana to pass the present statute is ample unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error, accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment. [83 U.S. 67]

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that, we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these, all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the first eight years, three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history, for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights, [83 U.S. 68] additional powers to the Federal government; additional restraints upon those of the States. Fortunately, that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle, slavery, as a, legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard-pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts when he declared slavery abolished in them all. But the war being over, those who had succeeded in reestablishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence, the thirteenth article of amendment of that instrument. [83 U.S. 69] Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government -- a declaration designed to establish the freedom of four millions of slaves -- and with a microscopic search endeavor to find in it a reference to servitudes which may have been attached to property in certain localities requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that, in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase on a writ of habeas corpus under this article, illustrates this course of observation. {10} And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration. [83 U.S. 70]

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865 and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government were laws which imposed upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that, by the thirteenth article of amendment, they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection until they [83 U.S. 71] ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked, as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right

of suffrage.

Hence, the fifteenth amendment, which declares that

> the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.

The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, [83 U.S. 72] mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican of Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is that, in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished as far as constitutional law can accomplish it.

The first section of the fourteenth article to which our attention is more specially invited opens with a definition of citizenship -- not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether [83 U.S. 73] this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a State, the first clause of the first section was framed.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard

to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. [83 U.S. 74] Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.*" It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. [83 U.S. 75]

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the articles of the old Confederation.

It declares

> that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation, we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately, we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell,* decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.{11} [83 U.S. 76]

"The inquiry," he says,

> is what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland,*{12} while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of *Paul v. Virginia,*{13} the court, in expounding this clause of the Constitution, says that

> the privileges and immunities secured to citizens of each State in the several States by the provision in question are those privileges and immunities which are common to the citizens in the latter [83 U.S. 77] States under the constitution and laws by virtue of their being citizens.

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority that, up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection beyond the very few express limitations which the Federal Constitution imposed upon the States -- such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But, with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow if the proposition of the [83 U.S. 78] plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens,

with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges [83 U.S. 79] and immunities of citizens of the United States which no State can abridge until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to he found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada.* {14} It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution,

> to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.

And quoting from the language of Chief Justice Taney in another case, it is said

> that, *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*

and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada.*

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, [83 U.S. 80] are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the thirteenth amendment under consideration.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it [83 U.S. 81] is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has [83 U.S. 82] never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights the rights of person and of property was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts. [83 U.S. 83]

The judgments of the Supreme Court of Louisiana in these cases are

AFFIRMED.

FIELD, J., dissenting

Mr. Justice FIELD, dissenting.

I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the

State of Louisiana, entitled

> An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughterhouses, and to incorporate "The Crescent City Live-Stock Landing and Slaughter-House Company,"

which was approved on the eighth of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to

> land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughterhouses, or abattoirs within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard,

except as provided in the act, and imposes a penalty of two hundred and fifty dollars for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river,

> wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals,

and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs shall be landed at the landings and yards of the company, and be there [83 U.S. 84] yarded, sheltered, and protected, if necessary, and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and, if not paid within fifteen days, to take proceedings for their sale. Every person violating any of these provisions, or landing, yarding, or keeping animals elsewhere, is subjected to a fine of two hundred and fifty dollars.

The act then requires the corporation to erect a grand slaughterhouse of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the port of New Orleans, at the same time authorizing the company to erect other landing-places and other slaughterhouses at any points consistent with the provisions of the act.

The act then provides that, when the slaughterhouses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time,

> all other stock-landings and slaughterhouses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of one hundred dollars for each and every offence.

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore, and entrails of all animals except of swine.

Other provisions of the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only follows [83 U.S. 85] from the provisions I have cited, but it is declared in express terms in the act. In the third section, the language is that the corporation

> shall have the sole and exclusive privilege of conducting and carrying on the livestock, landing, and slaughterhouse business within the limits and privileges granted by the provisions of the act.

And in the fourth section, the language is that, after the first of June, 1869, the company shall have

> the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson,

and "the exclusive privilege of having slaughtered" in its slaughterhouses all animals the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson 384 square miles, and the parish of St. Bernard 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation to prevent the assertion and enforcement of these privileges. The second case was instituted by the attorney general of the State, in the name of the State, to protect the corporation in the enjoyment of these privileges and to prevent an association of stock dealers and butchers from acquiring a tract of land in the same district with the corporation upon which to erect suitable buildings for receiving, keeping, and slaughtering cattle and preparing animal food for market. The third case was commenced by the corporation itself to restrain the defendants from carrying on a business similar to its own in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error [83 U.S. 86] is this: that, prior to the passage of the act in question, they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard animals suitable for human food, and in preparing such food for market; that, in the prosecution of this business, they had provided in these parishes suitable establishments for landing, sheltering, keeping, and slaughtering cattle and the sale of meat; that, with their association about four hundred persons were connected, and that, in the parishes named, about a thousand persons were thus engaged in procuring, preparing, and selling animal food. And they complain that the business of landing, yarding, and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is made by that act unlawful for anyone except the corporation named, and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day, is made by that act unlawful for them to pursue afterwards except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over

for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error, and I shall endeavor to [83 U.S. 87] show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and, when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations -- the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars, the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such [83 U.S. 88] object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively [83 U.S. 89] for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to single individual. If they may be granted for twenty-five years, they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter, they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market, they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therefore, one of the gravest importance not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment, the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.

The counsel for the plaintiffs in error have contended with great force that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had [83 U.S. 90] previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evidence that the language of the amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and, as such, to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, [83 U.S. 91] and would equally constitute an element of servitude. The counsel of the plaintiffs in error therefore contend that

> wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons which deprives the one class of their freedom or their property or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others,

there involuntary servitude exists within the meaning of the thirteenth amendment.

It is not necessary, in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the Civil Rights Act, which was framed and adopted upon a construction of the thirteenth amendment, giving to its language a similar breadth. That amendment was ratified on the eighteenth of December, 1865, {1} and, in April of

the following year, the Civil Rights Act was passed.{2} Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that

> such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens.

This legislation was supported upon the theory that citizens of the United States, as such, were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others was, to the extent of the denial, subjecting him to an involuntary [83 U.S. 92] servitude. Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the Southern States discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said:

> I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty, and it is in fact a badge of servitude which by the Constitution is prohibited.{3}

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale must carry him to the yards and stables of this company and for their use pay a like tribute. He is not allowed to do his work in his own buildings, or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables, and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French [83 U.S. 93] writer, the peasant was prohibited

> to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market.

The exclusive right to all these privileges was vested in the lords of the vicinage. "The history of the most execrable tyranny of ancient times," says the same writer, "offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights."

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that

> all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

It then declares that

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due [83 U.S. 94] process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment, there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number, the opinion prevailed that there was no such citizenship independent of the citizenship of the State. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill in 1833, referring to the reliance expressed by a senator upon the fact that we are citizens of the United States, he said:

> If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and, as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States.{4}

In the Dred Scott case, this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws. [83 U.S. 95]

The Chief Justice, in that case, and a majority of the court with him, held that the words "people of the United States" and "citizens" were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be, citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive [83 U.S. 96] their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging

to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgment by State legislation?

In the first section of the Civil Rights Act, Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right

> to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.

That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation [83 U.S. 97] of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress reenacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.{5}

The terms "privileges" and "immunities" are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and they have been the subject of frequent consideration in judicial decisions. In *Corfield v. Coryell,*{6} Mr. Justice Washington said he had

> no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental, which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;

and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be

> all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.

This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions [83 U.S. 98] in Congress upon the passage of the Civil Rights Act, repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth "as appertaining to every freeman."

The privileges and immunities designated in the second section of the fourth article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States. No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.

Nor is there anything in the opinion in the case of *Paul v. Virginia,*{7} which at all militates against these views, as is supposed by the majority of the court. The act of Virginia of 1866 which was under consideration in that case provided that no insurance company not incorporated under the laws of the State should carry on its business within the State without previously obtaining a license for that purpose, and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars. No such deposit was required of insurance companies incorporated by the State, for carrying on [83 U.S. 99] their business within the State; and in the case cited, the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that, though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State, under the laws of which it was created, and to this extent would treat a corporation was a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, it had never been held in any case which had come under its observation, either in the State or Federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each State to the privileges and immunities of citizens in the several States. And the court observed that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own States were not secured in other States by the provision; that it was not intended by it to give to the laws of one State any operation in other States; that they could have no such operation except by the permission, expressed or implied, of those States; and that the special privileges which they conferred must, therefore, be enjoyed at home unless the assent [83 U.S. 100] of other States to their enjoyment therein were given. And so the court held that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.

The whole purport of the decision was that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each State do carry with them into other States, and are secured by the clause in question in their enjoyment upon terms of equality with citizens of the latter States. This equality in one particular was enforced by this court in the recent case of *Ward v. The State of Maryland,* reported in the 12th of Wallace. A statute of that State required the payment of a larger sum from a nonresident trader for a license to enable him to sell his merchandise in the State than it did of a resident trader, and the court held that the statute, in thus discriminating against the nonresident trader, contravened the clause securing to the citizens of each State the privileges and immunities of citizens of the several States. The privilege of disposing of his property, which was an essential incident to his ownership possessed by the nonresident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the nonresident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for [83 U.S. 101] the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If, under the fourth article of the Constitution, equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment, the same equality is secured between citizens of the United States.

It will not be pretended that, under the fourth article of the Constitution, any State could create a monopoly in any

known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude nonresident citizens from engaging in a similar manufacture or sale. The nonresident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so, it would be in the power of the State to exclude at any time the citizens of other States from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were [83 U.S. 102] held void at common law in the great *Case of Monopolies,* decided during the reign of Queen Elizabeth.

A monopoly is defined

> to be an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables, and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings, and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case, a patent had been granted to the plaintiff giving him the sole [83 U.S. 103] right to import playing cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and, as such, had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. "All trades," said the court,

> as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is *against the common law and the benefit and liberty of the subject.* {8}

The case of Davenant and Hurdis was cited in support of this position. In that case, a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a clothworker not being a brother of the society should put one-half of his cloth to some brother of the same society who exercised the art of a clothworker, upon pain of forfeiting ten shillings,

> and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, *because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that, in effect, would be a monopoly,* and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void. [83 U.S. 104]

Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I, by which it was declared

> that all monopolies and all commissions, grants, licenses, charters, and letters-patent, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything

within the realm or the dominion of Wales were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties."{9} [83 U.S. 105] Of the statutes the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the Colonies separated from the mother country, no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men

> with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.

If it be said that the civil law, and not the common law, is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely, under the fourteenth amendment, every [83 U.S. 106] citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments in the pursuit of the ordinary avocations of life been regarded that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law under which the present cases have arisen came before the Circuit Court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen.{10} The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a State could not by its laws invade, but that, so far as the question under consideration was concerned, it might be safely said that

> it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments.

And again:

> There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

In the *City of Chicago v. Rumpff,*{11} which was before the Supreme Court of Illinois, we have a case similar in all its [83 U.S. 107] features to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an ordinance in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege of slaughtering there by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said:

> The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable, and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the General Assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business. Whether we consider this as an ordinance or a contract, it is equally unauthorized as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a [83 U.S. 108] similar contract with some other person that all of the vegetables, or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle.

It is true that the court in this opinion was speaking of a municipal ordinance, and not of an act of the legislature of a State. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of the *Norwich Gaslight Company v. The Norwich City Gas Company,*{12} which was before the Supreme Court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas pipes in the streets during that time. The plaintiffs, having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said:

> As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no

> exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly, and, although we have no direct constitutional provision against a monopoly, [83 U.S. 109] yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares "that no man or set of men are entitled to exclusive public emoluments or privileges from the community," to render them void.

In the *Mayor of the City of Hudson v. Thorne*,{13} an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions within certain specified limits in the city without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said:

> If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business.

In all these cases, there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, [83 U.S. 110] throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but, when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and, unless adhered to in the legislation of the country, our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.{14} As stated by the Supreme Court of Connecticut in [83 U.S. 111] the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.{15}

I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY to state that they concur with me in this dissenting opinion.

BRADLEY, J., dissenting

Mr. Justice BRADLEY, also dissenting.

I concur in the opinion which has just been read by Mr. Justice Field, but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The fourteenth amendment to the Constitution of the United States, section 1, declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretence of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughterhouses, landings for cattle, and yards for [83 U.S. 112] confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughterhouses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughterhouses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby, and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to-wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Secondly. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughterhouses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country, and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, [83 U.S. 113] and an equality of rights with every other citizen, and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one, than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every States in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a State legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular State? Or if a State legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that State as citizens of the United States, or only as citizens of the State? Would they have no redress but to appeal to the courts of that particular State?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of [83 U.S. 114] his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government, that, prior to the union of our North American States, the citizens of one State could not claim the privileges of citizens in another State, or that, after the union was formed, the citizens of the United States, as such, could not claim the privileges of citizens in any particular State, yet the citizens of each of the States and the citizens of the United States would be entitled to certain privileges and immunities as citizens at the hands of their own government -- privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

The people of this country brought with them to its shores the rights of Englishmen, the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta:

> No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn [83 U.S. 115] him but by lawful judgment of his peers or by the law of the land.

English constitutional writers expound this article as rendering life, liberty, and property inviolable except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of habeas corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to-wit: the right of personal security, the right of personal liberty, and the right of private property. And, of the last, he says:

> The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically, this is so, but practically it is not. England has no written constitution, it is true, but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right, but personal rights were deemed equally sacred, and were claimed by the very first Congress of the Colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the Declaration of Independence, which [83 U.S. 116] was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition:

> That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

Here again we have the great three-fold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I

contend, belong to the citizens of every free government.

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right, he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect, and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country, at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.

On this point, the often-quoted language of Mr. Justice Washington, in *Corfield v. Coryell*,* is very instructive. Being [83 U.S. 117] called upon to expound that clause in the fourth article of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," he says:

> The inquiry is what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.

It is pertinent to observe that both the clause of the Constitution referred to and Justice Washington, in his comment on it, speak of the privileges and immunities of citizens in a State, not of citizens of a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says,

> privileges and immunities which are, in their nature, fundamental; [83 U.S. 118] which belong, of right, to the citizens of all free governments.

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of habeas corpus, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property without due process of law.*

These and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities [83 U.S. 119] of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a State, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated, and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

II. The next question to be determined in this case is: is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughterhouses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?

The keeping of a slaughterhouse is part of, and incidental to, the trade of a butcher -- one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughterhouse and pay him a toll therefor is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the [83 U.S. 120] qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughterhouses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughterhouses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws, made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

The granting of monopolies, or exclusive privileges to individuals or corporations is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made, and was successful. The statute of 21st James abolishing monopolies was one of those constitutional landmarks of English liberty which the English nation so highly prizes and so jealously preserves. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle, no English-speaking people have ever endured such an odious badge of tyranny.

It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets, and other establishments of a public kind. It requires but a slight [83 U.S. 121] acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

Lastly: can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment, this could not be done, except in a few instances, for the want of the requisite authority.

As the great mass of citizens of the United States were also citizens of individual States, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the State, and no provision being made, and no machinery provided by the Constitution, except in a few specified cases, for any interference by the General Government between a State and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one State went into another State) was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves.

Admitting, therefore, that formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except [83 U.S. 122] in a few specified cases, that cannot be said now, since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.

The first section of this amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, proceeds to declare further that

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;

and that Congress shall have power to enforce by appropriate legislation the provisions of this article.

Now here is a clear prohibition on the States against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The amendment also prohibits any State from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was [83 U.S. 123] violated by State law, which was sustained by the State court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences, but that spirit of

insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the amendment will lead to enactments by Congress interfering with the internal affairs of the States, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the State governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of State tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.

In my judgment, no such practical inconveniences would arise. Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would [83 U.S. 124] be regularly raised in a suit at law, and settled by final reference to the Federal court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the National courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is what is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance.

In my opinion the judgment of the Supreme Court of Louisiana ought to be reversed.

SWAYNE, J., dissenting

Mr. Justice SWAYNE, dissenting.

I concur in the dissent in these cases and in the views expressed by my brethren, Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

The first eleven amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the States which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the General Government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than sixty years. The thirteenth amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on [83 U.S. 125] the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven.{1}

Fairly construed, these amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings, and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war, it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject, except in the Territories.

The fourteenth amendment consists of five sections. The first is as follows:

> All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The fifth section declares that Congress shall have power to enforce the provisions of this amendment by appropriate legislation.

The fifteenth amendment declares that the right to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude. Until this amendment was adopted the subject [83 U.S. 126] to which it relates was wholly within the jurisdiction of the States. The General Government was excluded from participation.

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

(1) Citizens of the States and of the United States are defined.

(2) It is declared that no State shall, by law, abridge the privileges or immunities of citizens of the United States.

(3) That no State shall deprive any person, whether a citizen or not, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and, in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as a bills of attainder, *ex post facto* [83 U.S. 127] laws, and laws impairing the obligation of contracts,{2} are left to the guardianship of the bills of rights, constitutions, and laws of the States respectively. Those rights may all be enjoyed in every State by the citizens of every other State by virtue of clause 2, section 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

In the next category, obviously *ex industria*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases "citizens of the United States" and "privileges and immunities" are dropped, and more simple and comprehensive terms are substituted. The substitutes are "any person," and "life," "liberty," and "property," and "the equal protection of the laws." Life, liberty, and property are forbidden to be taken "without due process of law," and "equal protection of the laws" is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. "The equal protection of the laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness.{3} [83 U.S. 128]

It is admitted that the plaintiffs in error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions.

(1) Does the act of the legislature creating the monopoly in question abridge the privileges and immunities of the plaintiffs in error as citizens of the United States?

(2) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the State, they being persons "within its jurisdiction?"

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion, the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the sixth section. The judgments before us should, therefore, be reversed.

These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language "citizens of the United States" was meant all such citizens; and by "any person" [83 U.S. 129] was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known, and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact all are entitled to enjoy. Without such authority, any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation, it turns, as it were, what was meant for bread into a stone. By the Constitution as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former, this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere than in this court ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction. [83 U.S. 130]

I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

Footnotes

MILLER, J., lead opinion (Footnotes)

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The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company.

Paul Esteban, L. Ruch, J. P. Rouede, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J. D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J. P. Aycock, D. Verges, The Live-Stock Dealers' and Butchers' Association of New Orleans, and Charles Cavaroc v. The State of Louisiana, ex rel. S. Belden, Attorney-General.

The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company.

1. *See infra,* pp. 85, 86.
2. 2 Commentaries 340.
3. *Commonwealth v. Alger,* 7 Cushing 84.
4. *Thorpe v. Rutland and Burlington Railroad Co.,* 27 Vermont 149.
5. 9 Wheaton 203.
6. 11 Peters 102.
7. 5 Wallace 471.
8. 9 *id.,* 41.
9. 4 Wheaton 316.
10. *Matter of Turner,* 1 Abbott United States Reports 84.
11. 4 Washington's Circuit Court 371.
12. 12 Wallace 430.
13. 8 *id.,* 180.
14. 6 Wallace 36.

FIELD, J., dissenting (Footnotes)

1. The proclamation of its ratification was made on that day (13 Stat. at Large 774).
2. 14 *id.* 27.
3. Congressional Globe, 1st Session, 39th Congress, part 1, page 474.
4. Calhoun's Works, vol. 2, p. 242.
5. May 31st, 1870; 16 Stat. at Large 144.
6. 4 Washington's Circuit Court 380.
7. 8 Wallace 168.
8. Coke's Reports, part 11, page 86.

9. Journals of Congress, vol. i, pp. 28-30.

10. *Live-Stock &c. Association v. The Crescent City, &c., Company,* 1 Abbott's United States Reports 398.

11. 45 Illinois 90.

12. 25 Connecticut 19.

13. 7 Paige 261.

14. "The property which every man has in his own labor," says Adam Smith,

> as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.

(Smith's Wealth of Nations, b. 1, ch. 10, part 2.)

In the edict of Louis XVI, in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says:

> It was the allurement of these fiscal advantages, undoubtedly, that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error, and to repel the conclusion. God, in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all.

He, therefore, regards it

> as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity.

15.

> Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.

1 Sharswood's Blackstone 127, note 8.

BRADLEY, J., dissenting (Footnotes)

* 4 Washington 380.

SWAYNE, J., dissenting (Footnotes)

1. *Barron v. Baltimore,* 7 Peters 243; *Livingston v. Moore, ib.* 551; *Fox v. Ohio,* 5 Howard 429; *Smith v. Maryland,* 18 *id.* 71; *Pervear v. Commonwealth,* 5 Wallace 476; *Twitchell v. Commonwealth,* 7 *id.* 321.

2. Constitution of the United States, Article I, Section 10.

3. *Corfield v. Coryell,* 4 Washington 380; *Lemmon v. The People,* 26 Barbour 274, and 20 New York 626; *Conner v. Elliott,* 18 Howard 593; *Murray v. McCarty,* 2 Mumford 399; *Campbell v. Morris,* 3 Harris & McHenry 554; *Towles's Case,* 5 Leigh 748; *State v. Medbury,* 3 Rhode Island 142; 1 Tucker's Blackstone 145; 1 Cooley's Blackstone

125, 128.

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TITLE XXV.

CITIZENSHIP.

Who are citizens.

9 April, 1866, c. 31, s. 1, v. 14, p. 27.

SEC. 1992. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Planters' Bank *v.* St. John, 1 Woods, 585; McKay *v.* Campbell, 2 Saw., 118.

Citizenship of children of citizens born abroad.

14 April, 1802, c. 28, s. 4, v. 2, p. 155.
10 Feb., 1855, c. 71, s. 1, v. 10, p. 604.

SEC. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Citizenship of married women.

10 Feb., 1855, c. 71, s. 2, v. 10, p. 604.

SEC. 1994. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

—Kelly *v.* Owen, 7 Wall., 496.

Of persons born in Oregon.

18 May, 1872, c. 172, s. 3, v. 17, p. 134.

SEC. 1995. All persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States on the 18th May, 1872, are citizens in the same manner as if born elsewhere in the United States.

Rights as citizens forfeited for desertion, &c.

3 Mar., 1865, c. 79, s. 21, v. 13, p. 490.

SEC. 1996. All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

Certain soldiers and sailors not to incur the forfeitures of the last section.

19 July, 1867, c. 28, v. 15, p. 14.

SEC. 1997. No soldier or sailor, however, who faithfully served according to his enlistment until the 19th day of April, 1865, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the Army or Navy; but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion.

Avoiding the draft.

3 Mar., 1865, c. 79, s. 21, v. 13, p. 490.

SEC. 1998. Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

Right of expatriation declared.

27 July, 1868, c. 249, s. 1, v. 15, p. 223.

SEC. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all

nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

Protection to naturalized citizens in foreign states.

27 July, 1868, c. 249, s. 2, v. 15, p. 224.

SEC. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.

Release of citizens imprisoned by foreign governments to be demanded.

27 July, 1868, c. 249, s. 3, v. 15, p. 224.

SEC. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

BRIEHL V. DULLES, 248 F2d 561, 583 (1957)

06/27/57 Walter BRIEHL, v. John Foster DULLES,

[1] UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT.

[2] Walter BRIEHL, Appellant,

v.

[3] John Foster DULLES, Secretary of State, Appellee.

[4] No. 13317

BLUE BOOK CITATION FORM: 1957.CDC.104 (http://www.versuslaw.com)

[5] Date Decided: June 27, 1957.

[6] DECISION OF THE COURT DELIVERED BY THE HONORABLE JUDGE EDGERTON

[7] Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting en banc.

[8] EDGERTON, Chief Judge, announced the judgment and division of the court as follows:

[9] The judgment of the District Court, granting the Secretary's motion for summary judgment, is affirmed. Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm. Judges Edgerton and Bazelon vote to reverse. Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary. Judge Burger took no part in the consideration or decision of this case.

[10] Judge Prettyman files an opinion in which Judges Miller, Danaher and Bastian concur. Judge Washington files an opinion concurring in the result reached by Judges Prettyman, Miller, Danaher and Bastian. 101 U.S.App.D.C. 254, 248 F.2d 576. Judge Bazelon files a dissenting opinion in which Judge Edgerton concurs. 101 U.S.App.D.C. 257, 248 F.2d 579. Judge Edgerton also files a separate dissent. 101 U.S.App.D.C. 274, 248 F.2d 596. Judge Fahy files a dissenting opinion. 101 U.S.App.D.C. 275, 248 F.2d 597.

[11] PRETTYMAN, Circuit Judge, with whom WILBUR K. MILLER, DANAHER and BASTIAN, Circuit Judges, concur: Appellant, Dr. Walter Briehl, applied in April, 1955, to the Department of State for renewal of a passport, stating his desire to attend an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. He was and is engaged in the practice of medicine, specializing in psychiatry. In prior years he had attended international meetings in this field. The Director of the Passport Office wrote him that "it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations. Dr. Briehl's attorney replied, saying in part:

[12] "My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments."

[13] The attorney described Dr. and Mrs. Briehl's professional interests and concluded by saying: "Demand is hereby made that passports as applied for by them be issued forthwith."

[14] Thereupon the Director of the Passport Office wrote Dr. Briehl, saying in part:

[15] "I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

[16] "In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist."

[17] Dr. Briehl's attorney replied in part:

[18] "[My clients] wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country."

[19] Thereafter the attorney wrote several times demanding the issuance of the passports and "an evidentiary hearing". An "informal" hearing was arranged. Dr. Briehl, his attorney, and two representatives of the State Department attended. The attorney made an extended statement, in the course of which he recounted the correspondence, described Dr. Briehl's purposes in seeking to go abroad, and made three points as follows:

[20] "Our first point, therefore is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to participate in conferences by injecting this issue of politics in connection with his travel abroad. When a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliations, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. . . . My second point is that everyone has the right to travel regardless of political considerations. . . . Now we turn to the third point. . . . that you confront us with the evidence against Dr. Briehl. . . . It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. . . . [We] have a right to what the courts have now called a quasijudicial hearing, . . . and . . . it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States."

[21] The attorney later said:

[22] ". . . Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with

respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal."

[23] In response to a letter from Dr. Briehl's attorney, counsel for the Board of Passport Appeals replied:

[24] "It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office. The Board has not been advised of any further processing of this case under Section 51.137 of the Passport Regulations.

[25] "In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156(2) and 51.147 (22 CFR) of the Rules of the Board."

[26] And a few days later the Passport Office wrote:

[27] "You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

[28] "In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl."

[29] Dr. Briehl filed a civil action in the District Court, naming the Secretary of State as defendant. He prayed for a judgment decreeing that he is entitled to a passport under the statutes, that the passport regulations of the Secretary of State are invalid and illegal, and that the refusal to renew the passport was in violation of his (Briehl's) rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations; enjoining the Secretary from continuing to deny the passport; and directing him to renew the passport.

[30] The Secretary answered, and a motion and a cross motion for summary judgment were made, with supporting affidavits and exhibits. The court rendered a brief opinion, denied the plaintiff's motion, and granted the motion of the Secretary.

[31] In this court Dr. Briehl divides his argument into four main points:

[32] *fn1. Appellant's constitutional right to travel could not be conditioned upon his execution of a non-Communist affidavit or compliance with any other political test.

[33] *fn2. Appellee's regulations deprive appellant of procedural due process and the quasi-judicial hearing to which he is entitled under the recent decisions of this Court.

[34] *fn3. The regulations are not authorized by statute, they conflict with the will of Congress and were invalidity promulgated.

[35] *fn4. The Secretary has not made out a case against appellant, even under the Regulations.

[36] The arguments thus advanced involve consideration of six basic subjects.

I

[37] The nature of the Communist movement. Dr. Briehl's underlying premise, as shown by the statements we have quoted, is that Communist membership or affiliation is a matter of politics, an issue of political affiliation, a political consideration, a political test, and thus is subject to the same rules which apply to political beliefs generally. But it is not so. The Communist organization and program have long since passed beyond the area of mere politics and political opinion. All three branches of the Federal Government - the executive, the legislature, and the judiciary - have declared unequivocally that the Communist movement today is an international conspiracy aimed at world domination and a threat to the internal security of this country. The foreign policy and a large part of the fiscal policy of the Government are based upon that proposition.

[38] The Congress declared in 1650:

[39] "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."1

[40] President Truman declared in 1950:2

[41] "WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

[42] "WHEREAS, if the goal of communist imperialism were to be achieved the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; . . .."

[43] In his Inaugural Address of January, 1957, President Eisenhower said:

[44] "The divisive force is international communism and the power that it controls.

[45] "The designs of that power, dark in purpose, are clear in practice. It strives to seal forever the fate of those it has enslaved. It strives to break the ties that unite the free. And it strives to capture - to exploit for its own greater power - all forces of change in the world, especially the needs of the hungry and the hopes of the oppressed."3

[46] In his State of the Union speech on January 10, 1957, the President had said: "The existence of a strongly armed imperialistic dictatorship poses a continuing threat to the free

world's and thus to our own Nation's security and peace."4 He referred to "Communist persecution" and to "Soviet aggression".*fn5

[47] The Supreme Court has held valid and sufficient the findings of Congress*fn6 and the findings of a jury*fn7 to the same import as the foregoing declarations. In Galvan v. Press the Court quoted the above-quoted congressional finding and said: "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."*fn8 In American Communications Ass'n v. Douds*fn9 the Court, balancing the interest of the public against a partial abridgement of speech, upheld the statutory requirement that a person must swear he is not a member of the Communist Party before he can avail himself or his organization of the processes of the Labor Board.*fn10

[48] There exists in some quarters a dogged insistence that the Communist movement be treated as any other political organization. It is as though one argued that, since opiates and aspirin both possess medicinal properties, they must be subjected to the same permissions and restrictions. The fact is that opiates are to be and are regulated because of their own peculiar characteristics. And so is the Communist movement and its affiliates. It would be inexcusably naive for any court to declare in the present state of the world that adherence to the Communist cause is a mere matter of politics or political opinion. We shall treat the Communist movement according to what the Congress, the President, and the Supreme Court have declared it to be.

II

[49] The power of government in foreign affairs. Whatever may be the dispute - and it has been extended and intense - as to the division of this power as between the President and the Congress, it seems settled beyond dispute that those two branches between them possess the totality of the power. In a long line of cases, beginning perhaps with Foster v. Neilson*fn11 and extending down to United States v. Curtiss-Wright Corp.,12 United States v. Belmont,13 Chicago & Southern Air Lines v. Waterman Corp,14 and Ludecke v. Watkins,15 the Supreme Court has laid down the rule that foreign affairs and decisions upon foreign policy are political matters entrusted by the Constitution to the political departments of the Government, and that the judiciary has no part in them. Mr. Justice Jackson, writing for the Court in the Chicago & Southern Air Lines case, stated the proposition in succinct, quotable terms.He wrote:

[50] "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."16

[51] The range of permissible judicial action in the case at bar is narrowed also by the fact that the Secretary is acting in the context of a national emergency. Only the President may

declare an emergency; he has done so.17 The existence of an emergency indisputably enhances both executive and legislative power.18 The Secretary has acted pursuant to two acts of Congress,19 which not only recognize the administrative function of the executive in this area but also delegate to the executive any rule-making power it may have lacked. Thus the Secretary's acts are buttressed by the sovereign power to defend the nation.

[52] There are of course in any government formed upon a constitution residual areas within which the judicial branch may act in respect to a power even so unfettered as is the executive power in foreign affairs.If the President were in gross defiance of constitutional limitations, or perhaps even of congressional prohibitions, the judiciary might act. The Supreme Court has also held20 that, where the Secretary refused to issue a passport solely upon an erroneous finding of mixed law and fact (in that case citizenship), a decree precluding his denial on that ground could issue.

[53] It must be kept in mind that the power of the judiciary to inquire is vastly different from its power to act. A court often has jurisdiction to determine whether it has jurisdiction. The books are full of cases in which the courts have examined with meticulous care complaints alleging invalidity of executive action in foreign affairs. But seldom if ever have the courts found grounds to impose upon such executive action their own ideas of propriety or wisdom. So in the case at bar it is not suggested that the court could not entertain a complaint against the Secretary of State alleging the illegality of his action. The point is that having examined the allegations the court is without power to act save in a narrow and limited class of extraordinary circumstances.

[54] The inquiry in the case before us is whether the Secretary has so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review.21

III

[55] The nature of a passport. In Urtetiqui v. D'Arbel22 the Supreme Court said in 1835:

[56] "It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."23

[57] But, whatever may have been its nature in the past, the pertinent characteristic of a passport in the present controversy is that it is a requisite for going abroad. And thus it has become a tool with which the Department of State can prevent the presence of any American citizen in a foreign country.

[58] A statute,24 alluded to by the Supreme Court in Johnson v. Eisentrager,25 provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So one of the questions here is whether the Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion

might involve the United States Government in international complications.

IV

[59] The right to travel. The present dispute over passport denials is less than a decade old, but its antecedents are to be found deep in the history of Anglo-American law. The English sovereign had for many centuries a recognized right to prevent foreign travel and to recall subjects from abroad.26 Late in the Eleventh Century Anselm, Archbishop of Canterbury, was forbidden by William Rufus, son of William the Conqueror, to go to Rome to receive the pallium from Pope Urban II.27 The Magna Carta, as signed by John Lackland at Runnymede in 1215, deprived the King of the right to prevent foreign travel. However John died shortly afterward, and William Marshall, regent of Henry III, republished the Charter without the guarantees of freedom of travel.28 In the following centuries the kings frequently exercised their prerogative, usually through the issuance of a writ Ne Exeat Regnum.29 Parliament also exercised the prerogative by passing statutes which forbade foreign travel to certain classes30 or which recognized the right of the King to limit travel.31 However the writ has gradually fallen into disuse. It is most unlikely that a writ Ne Exeat Regnum would issue in modern England, except in time of war.32 This does not mean that an Englishman has an enforceable right to a passport.33

[60] The Articles of Confederation34 and the Constitution of the United States35 clearly recognized the right of citizens to travel among the various states. But whether the liberty mentioned in the Fifth Amendment included liberty to leave this country and circulate among foreign nations was not so clear. A three-judge federal District Court recognized in 1952 that a citizen has at least a limited right to international travel.36 This court has since recognized that right.37 However the existence of this limited right does not preclude the existence in the sovereign of a right to limit travel. The Supreme Court has established the power of the Government to recall a person from abroad to appear in a lawsuit, an exercise of the same sort of control over movement available to the English sovereign through Ne Exeat Regnum. In Blackmer v. United States38 the Court made the broad statement:

[61] "What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States."

[62] While Blackmer refers to the power to limit foreign travel as being exercised by the Congress, the power is not solely congressional. In matters pertaining to war and emergency or to the foreign policy, the power may reside in the executive or in both branches jointly. Whatever the theoretical residence of such power, the power to limit travel has in fact been exercised through the cooperative efforts of Congress and the President. During the War of 1812 Congress forbade citizens to travel into enemy countries without passports.39 During the Civil War passports were required of all persons entering or leaving the country.40 In 1861 Secretary of State Seward ordered that "Until further notice, no person will be allowed to go abroad from a port of the United States without a passport either from this Department or countersigned by the Secretary of State". This action was taken by the executive branch on its own initiative, without the sanction of Congress.

[63] In 1856 Congress had granted the Secretary of State sole authority to issue passports.41 The Secretary was authorized to issue them "under such rules as the President shall designate and prescribe". In 1918 Congress, leaving intact the broad discretion inherent in the words just quoted, gave the President power to make it unlawful to leave the country in time of war without a passport.42 The President exercised this power by an

appropriate proclamation.43 The period between the two World Wars saw Congress reaffirm in the executive the broad discretion declared in the 1856 act, the new language being "may grant".44 This was in a 1926 act which remains today the underpinning of congressionally-granted executive power in the field. That period also witnessed the condification in 1938 of State Department passport regulations and their affirmation by executive order.45

[64] The machinery which today enables the State Department to regulate travel through passport control began to take shape in June of 1941, when Congress46 amended the act of 191847 to enable the President to make it a crime to leave the country without a passport, not only in time of war but also during the existence of the national emergency proclaimed by the President on May 27, 1941.48 On November 14, 1941, President Roosevelt exercised the authority over entry and exit vested in him by the amendment.49 President Truman declared the termination of that state of emergency on April 28, 1952.50 But the termination of the World War II emergency did not affect the Korean emergency, declared by President Truman on December 16, 1950.51 Consequently our nation has been in a continuing state of emergency since May of 1941.

[65] By act of June 27, 1952,52 Congress declared:

[66] "SEC. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, . . .

[67] "(b) . . . and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

[68] This statute applies to any national emergency. It would appear that the Korean emergency, existing when the statute became law, made the section above quoted immediately operative. Any doubt on this score was removed by President Truman's proclamation of January 17, 1953,53 specifically invoking the 1952 act.

[69] Two conclusions emerge from this complex series of laws, proclamations and orders. First, it is forbidden to leave this country without a passport. This rule was specifically provided by the Congress in the 1952 act, by the President in Proclamation No. 3004,54 and by the Secretary in Section 53.1 of his Regulations.55 Second, it is within the power of the Secretary of State to refuse to issue a passport. This power is lodged in him by the act of 1926,56 as implemented in Section 124 of Executive Order No. 7856;57 is both claimed by the Secretary in Sections 53.1-53.9 of the Regulations and exercised by him thereunder; and is reaffirmed by the President in Proclamation No. 3004. The restrictions of the 1952 act upon travel without a passport can be read intelligibly only in the light of the Secretary's long-recognized power to refuse a passport.

[70] Shortly after the passage of the 1952 act the Secretary issued additional regulations to govern the issuance of passports.58 This was done pursuant to Executive Order No. 7856 (supra) which specifically provided that the Secretary may make rules additional to the rules contained therein, so long as they are not inconsistent therewith.

V

[71] The regulations of the Department. The regulations which the Secretary promulgated59 provide in substance that, in order that persons who support the world Communist movement may not through the use of United States passports further the purposes of that movement, no passport shall be issued to persons who are members of the Communist Party or to certain others who are believed to engage in activities which will advance that movement; that a person whose application is tentatively denied under the foregoing will be notified in writing, including notice of the reasons as specifically as security considerations permit; that such person will be entitled to present his case informally to the Passport Division and to appear before a hearing officer with counsel; and that if the decision is adverse it shall be in writing with reasons and the applicant shall be entitled to appeal to the Board of Passport Appeals, where he will be accorded a hearing with counsel. The regulations provide:60

[72] "Oath or affirmation by applicant as to membership in Communist Party. At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

[73] The substantive part of the regulations61 provides that no passport shall be issued to certain described classes of persons. Roughly paraphrased those classes are (1) members of the Communist Party, (2) persons who have recently terminated Party membership under certain circumstances, (3) persons who support the Communist movement under certain circumstances, and (4) persons as to whom there is reason to believe they are going abroad for the purpose knowingly of advancing the Communist movement. We do not know from the record presently before us whether the Secretary would finally refuse a passport to Dr. Briehl if the matter were to progress to final decision, and we do not know in what proscribed class the Secretary might find Dr. Briehl upon the evidence before him if that evidence caused a refusal of the passport. And so we intimate no opinion upon the merits of Dr. Briehl's application; we have no opinion upon that subject. But, since we must determine the validity of the procedural provisions of the regulations, we face the validity of the underlying substantive provisions. We think those regulations62 are valid as regulations.

[74] The regulations in no way attempt to implement an unlimited discretion in the Secretary. They provide for peremptory denial of a passport under only one circumstance, admitted present membership in the Communist Party (Sec. 51.142). Standards for denials upon other grounds are set up. That section of the regulations (51.135) obviously contemplates findings upon facts. It uses such terms as "under such circumstances as to warrant the conclusion", "not otherwise rebutted by the evidence", and "on the balance of all the evidence". Thus the regulations clearly require facts - revealed or unrevealed - and an evaluation of information. They do not provide for an unfettered discretion. Such provisions are the normal content of statutes or regulations which establish criteria for administrative action. Moreover, as we read the regulations, they refer to knowing associations with Communism.63

[75] As we have pointed out, the Communist movement is, in the view of this Government, an aggressive conspiracy potentially dangerous to this country. Travel abroad by members of or adherents to the Communist movement is obviously an easy method of communication between such persons or organizations in this country and the prime

sources of Communist policy and program in the Soviet Union and its satellites. Once a person with a passport is out of this country, this Government has no control over where he goes. His travel is controlled entirely by whatever countries he thereafter wishes to leave and to enter. The Department of State has authority to refuse to facilitate that communication.

[76] In the second place, unless all the major foreign and fiscal policies of this Government, under two administrations of opposing political parties, have been a gigantic fraud, it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites. To that end the Secretary may refuse to permit an adherent of the Communist movement, clothed with American citizenship, from being present in places where he may readily create incidents or may assert statutory rights to activity on the part of this Government in his behalf. The Secretary may preclude potential matches from the international tinderbox.

[77] As is recognized throughout this opinion, consistently with the other opinions of this court in this field,64 the restrictions imposed by these regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights. And so the problem in the case is once more the familiar problem of balancing private right against public requirement.65 Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under the regulation.

[78] We therefore conclude that persons properly found to come within Section 51.135 of the Regulations are not illegally denied any constitutional right if they are refused passports.

[79] It is suggested to us that, since the Internal Security Act of 195066 made certain provisions pertaining to passports to members of registered Communist organizations, it preempted the field and rendered null all other statutes and regulations relating to Communists and passports. Such a conclusion would have to be an inference; we find no specific provision to that effect. We think the inference is not supportable. The 1950 act made it unlawful for a member of a registered Communist organization to apply for a passport or to use one, and made it unlawful for any officer or employee of the United States to issue a passport to such a member. It prescribed penalties up to $10,000 fine and five years' imprisonment for violation.67 So the 1950 act relating to passports is a criminal statute. It applies to only a portion of the people to whom the Secretary's regulations apply, as is easily seen by reference to Section 51.135. Moreover the 1952 statute, making it a crime for any person to leave the country without a passport during an emergency, was passed after the 1950 act. The 1952 act continued in effect the system of travel control by passport denial employed since 1941. That fact compels the conclusion that the criminal sanctions of the 1950 act are in addition to, not to the exclusion of, that control. Passport regulations under the later act are not prohibited by the former. We think the 1950 act did not preempt the field in respect to passports and adherents to the Communist movement.

VI

[80] The reguirement for an affidavit. In the case at bar Dr. Briehl was advised in writing that it had been alleged he was a Communist. He was required to admit or deny that allegation under oath before the proceeding on his application went further. Dr. Briehl urges, as we have seen, that he is entitled to be confronted with witnesses and evidence

sustaining the Secretary's suggestions of Communist affiliations. He says he is entitled to that revelation without first filing an affidavit in response to the suggestions. He says this is a requisite of due process. But our judicial process knows no such requirement. Our judicial process is that a party must plead before he is entitled to trial. There is nothing new or novel about that. Dr. Briehl says he is entitled to know his opponent's evidence before he pleads. Under the rules of civil procedure, if a defendant party does not plead, a default judgment is entered against him. We know of no reason why Dr. Briehl should not be required to admit or deny the Secretary's allegations before he gets an evidentiary hearing.

[81] It is said that if Dr. Briehl should admit being a member of the Communist Party his application would thereupon promptly be denied, and therefore, it is said, no administrative remedy is really afforded him. But precisely the same thing happens to any party to a lawsuit. If he admits his opponent's allegations of fact he gets no evidentiary hearing; he gets an oral argument and perhaps a summary judgment against him. We know of no rule or doctrine that, if a party to a controversy admits adversary allegations of fact, the proceeding is void if no evidentiary hearing is thereafter afforded him. It is elementary that a party must raise an issue of fact in order to get a hearing on the facts.

[82] In National Council of American-Soviet Friendship v. Brownell,68 we held, citing several cases, that a party to an administrative proceeding could not default and still continue to litigate.

[83] Moreover Dr. Briehl is an applicant. There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an application for a passport should not be treated by the usual rules pertaining to applications. If Communist Party affiliations are pertinent to the Secretary's decision upon the possible consequences or complications of an applicant's presence in foreign countries or his roving about foreign areas in present world conditions, we see no reason why Communist affiliations should not be part of the data required by the application.

[84] Dr. Briehl complains that the evidence in respect to the allegations asserted in the Secretary's advices to him may be in part confidential, and he argues that such possibility effectively nullifies the due process of the procedure. He seeks to bring the situation within the doctrine followed by the Ninth Circuit in Parker v. Lester,69 that, if it be established in advance that a proffered administrative remedy will not afford due process, the remedy need not be pursued. It is true that a passport denial may be based upon confidential information. But due process of law is a term of variable content.70 The necessity for secrecy in the conduct of foreign affairs has been asserted, seemingly without question, ever since President Washington refused to submit to the House of Representatives the documents relating to the Jay Treaty.71 The Supreme Court said in the Curtiss-Wright case:72

[85] "The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned." And recognition of the necessity for secrecy in foreign affairs, coupled with a

strong admonition to the judiciary against any attempts on its part to peer into or to unveil such confidential material, is contained in the Court's opinion in the Chicago & Southern Air Lines case, from which we have quoted. That case concerned the right of an American company to do business abroad. That was a right of the applicant if he could meet the appropriate specifications. But the Supreme Court specifically and emphatically pointed out that the President could deny the application for secret and confidential reasons. We know of no reason why an individual's right to travel abroad is to be treated by different constitutional standards than is his right to do business abroad. And we know of no reason why treatment of alleged Communist affiliation is to be put upon a preferred basis as compared with ordinary commercial infirmities or adverse suggestions.

[86] Further justification for secrecy in a case of this type is supplied by the fact that the nation is in a state of national emergency, caused by the infiltration program of the Communist movement. During such an emergency cabinet officers may be forced to act on the basis of information the publication of which is inconsistent with national security.When the Secretary of State avows that in the interest of national security he cannot spread certain information on an open record, and explains with as much particularity as possible the reasons why he cannot do so, courts must rely upon his integrity and accept his statement.

[87] We held in Boudin v. Dulles73 that, where a passport has been denied by the Secretary on the authority of a specific regulation, he (the Secretary) must make findings in writing responsive to the requirements of that regulation, and in such a case must state whether the findings are based on evidence openly produced or on secret information and, if the latter, "should explain with such particularity as in his judgment the circumstances permit the nature of the reasons why such information may not be disclosed." We adhere to that ruling. We are of the view that due process in passport proceedings does not prevent the use of confidential information when foreign affairs or the national security is involved.

[88] In summary on this point we are of opinion that, if a person falls within one of the classes described in the regulations, the Secretary may refuse him a passport; and if follows that, if it be alleged he is in one of those classes and he refuses to admit or deny the allegation, the passport may be refused.

[89] From the foregoing basic considerations some conclusions are easily reached. We summarize. In the deliberate judgment of this Government the Communist movement is today a conspiracy for world domination sufficiently threatening to the security of this nation to justify the expenditure of billions of dollars every year to thwart its ambitions.Limitations and prohibitions upon leaving one's country and traveling abroad have been enforced in periods of stress since time immemorial. It would be idle, if not ridiculous, in view of the absorption of the whole world in the problem of the Communist program and of the extent of the attention and activity of our own Government in that respect, for any court to say the present is not a period of stress in international affairs. The present limitations upon travel effectuated by passport control are authorized by statute and by presidential proclamation. They are, as we said in Shachtman v. Dulles,74 an impingement upon a natural right of a citizen to travel. But no right, even the right to life, is absolute, and so the inquiry must be whether the impingement is valid. Executive action in the field of foreign affairs has been clothed in secrecy since the foundation of the Republic, and the Supreme Court has invariably protected that secrecy and repeatedly warned the judiciary not to invade that realm of executive prerogative. The rule has been applied by the Court even where the matter involved was transportation over international routes. Requirements that one admit or deny an adversary's allegations of fact before the right to an evidentiary hearing arises are elementary in judicial process; a fortiori in quasi-judicial

process. And requirements that an applicant for a permit submit prescribed pertinent data as a prerequisite to consideration of his application are usual and valid in administrative procedure.

[90] Analyzed to its underlying elements the critical problem in the case before us is simply whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party. We think he may. Or to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions. We think it is.

[91] We are of opinion that the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them. The judgment of the District Court, granting the Secretary's motion for summary judgment is

[92] Affirmed.

IN AGREEMENT

[93] WASHINGTON, Circuit Judge (concurring in the result).

[94] The record discloses a "tentative" refusal by the Passport Office to renew Dr. Briehl's passport, and an official determination by that Office not to render a final decision on the matter because of Dr. Briehl's refusal at his hearing to furnish an affidavit, as provided for in Section 51.142 of the Passport Regulations, "with respect to present or past membership in the Communist Party." Unlike the applicant in Robeson v. Dulles, 98 U.S.App.D.C. 313, 235 F.2d 810, certiorari denied, 1956, 352 U.S. 895, 77 S. Ct. 131, 1 L. Ed. 2d 86, the appellant in this case has pursued the administrative and judicial steps open to him to raise the question whether the Secretary of State may validly require such an affidavit as a condition precedent to the rendering of a final decision.That question must now be decided.

[95] The Secretary seeks to uphold his power to elicit information as to Communist Party membership as a procedure incident to the substantive power to restrict foreign travel through passport denial. Affidavit requirements of this sort are ordinarily valid if the information elicited is relevant to the exercise of a valid power. Cf. Garner v. Board of Public Works, 1951, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317.1 Implicit in the decisions of this court is the holding that the Secretary possesses a substantial measure of authority to restrict travel by passport denial.2 While the precise extent of that authority is still in process of being defined, Congress has not been silent or inactive. In the 1941 travel control statute, 8 U.S.C.A. § 1185, Congress provided, in substance, that when the President has proclaimed a national emergency and when he has found that the interests of the United States require additional restrictions on the departure of persons from the United States, it shall be unlawful for a citizen to leave the country without a valid passport. As Judge Prettyman points out, this statute has become operative. I read it as having been intended to authorize the Secretary to control, by passport denial, the travel of those whose journeying abroad is reasonably found to be contrary to the interests of the United States.

[96] In the Internal Security Act of 1950, Congress made the following legislative finding, whose validity today can hardly be subject to challenge:

[97] "Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of

the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." 50 U.S.C.A. § 781(8).

[98] Congress implemented that finding by Section 6 of the Internal Security Act, 50 U.S.C.A. § 785, a provision which the framers of the Act no doubt thought would come into effect at a much earlier date than in fact has proved possible. But the congressional finding remains as an admonition to the executive branch to use its authority in all lawful ways to control the "travel of Communist members, representatives, and agents" so as not to facilitate communication or otherwise "further the purposes of the Communist movement." Therefore, I have no doubt that the Secretary has the power - in some cases at least - to deny passports on grounds to which past or present membership in the Communist Party "may prove relevant." Garner (supra) 341 U.S. at page 720, 71 S. Ct. at page 912.

[99] It must be admitted, I think, that the affidavit requirement does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment.3 But if the interests of the public are also involved, the problem is "to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." American Communications Ass'n v. Douds (supra) 339 U.S. at page 399, 70 S. Ct. at page 684. The information as to Communist Party membership is asked for in connection with a passport application and might prove relevant to a valid denial of a passport. Under all the circumstances, it seems clear that the benefit to the public order, in having information of this sort available to the Secretary to enable him to exercise his lawful authority, substantially outbalances any abridgement of individual interests that may result. As Mr. Justice Murphy observed, concurring in West Virginia State Board of Education v. Barnette, 1943, 319 U.S. 624, 645, 63 S. Ct. 1178, 1188, 87 L. Ed. 1628: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government require it for the preservation of an orderly society, - as in the case of compulsion to give evidence in court." In the exercise of his powers over the granting or withholding of passports, the Secretary is similarly entitled to relevant information.

[100] For these reasons, I find no infirmity in the statutory and regulatory system which authorizes the Secretary to withhold a passport from any person who, by refusing to furnish the required affidavit, fails to complete his application.4 Appellant has not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having - like the present one - the force of law.5 Surely if a person desiring to vote declines to answer a question which may prove relevant to a valid ground of denial - such as his age, or where and when he last voted - an election board may thereupon refuse to permit him to vote until the question is answered, and need not make a considered determination that in fact he is ineligible.And even if the decision to deny a right could be said to require an exercise of discretion, I do not see why the decision-maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

[101] It is important to bear in mind the distinction, which the Supreme Court pointed out in Konigsberg v. State Bar of California, 1957, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810, between the two courses of governmental action that can follow a refusal to answer a particular question propounded by a government agency. In Konigsberg, an adverse inference was drawn from a refusal to answer, and governmental action - denial of bar

membership - was based in part on this inference. The Court held the inference to be unreasonable, since the refusal appeared to be based on a good faith reliance on a constitutional privilege and therefore would not necessarily give rise to the adverse inference which the State had drawn. On the other hand, in the case at bar, no adverse inference was drawn from a refusal to answer. Here the government agency asserted its right to have certain information which was relevant to the exercise of valid authority, and declared in advance that it would not proceed until the information was forthcoming. This is precisely the sort of situation which the Court in Konigsberg contrasted with the inference-drawing approach that had been used there. As to this situation, the Court indicated that a serious First Amendment question would be raised, as has been recognized in this opinion, and that there would be a question of fairness courses of governmental action that can consequence of failure to answer. Here the regulations plainly indicate the result of a refusal to answer.

[102] At this stage we are concerned only with a request for identification of affiliation vel non, unaccompanied by any direct penalty stemming from such identification. "No doubt issues like those now before us cannot be completely severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision." American Communications Ass'n v. Douds (supra) 339 U.S. at page 416, 70 S. Ct. at page 693 (Frankfurter, J., concurring in part). The question whether past or present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership.6

[103] It is also unnecessary and inappropriate for us to decide such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always hold a hearing, and the like. We need not in the present case attempt fully to define the scope of the Secretary's power, or that of the courts. We should do no more than decide the question actually before us.

[104] MINORITY OPINION

[105] BAZELON, Circuit Judge, with whom EDGERTON, Chief Judge, concurs (dissenting).

[106] The Secretary of State says his regulations, pursuant to which he denies passports to persons who "support the Communist movement," are a valid exercise of discretion delegated to him by the President. I think they are invalid because (1) the President did not undertake to delegate the discretion the Secretary claims and (1) the President himself did not have this discretion.

[107] For many years the Secretary of State has claimed an unlimited discretion to deny passports.1 During the greater part of our history, when a passport was merely a comfort to the traveller, but not a necessity,2 his claim went unchallenged. Since 1941, however, a passport has been a travel necessity,3 and when the Secretary began denying or revoking passports on such grounds as "activities contrary to the best interests of the United States," or Communist membership or support, applicants turned to the courts for relief.4

[108] Bauer v. Acheson, D.C.1952, 106 F.Supp. 445, was the first reported case. There the Secretary based his authority on the President's inherent foreign relations power, and on the provision of 22 U.S.C.A. 211a that the Secretary "may grant . . . passports . . . under such rules as the President shall designate and prescribe . . .." The court held there was no

authority to refuse or revoke a passport without notice and hearing. Less than two months later and presumably as a result of that decision, the Secretary promulgated the regulations now before us, declaring Communist supporters ineligible for passports and establishing a notice and hearing procedure.5 Until then, the only substantive passport qualification ever imposed by any statute6 or regulation was citizenship.7

[109] As authority for his new regulations, the Secretary relied on 22 U.S.C.A. § 211a,8 the same statute he had relied on in Bauer. He continued this reliance in later cases. In the present case he says: "In the light of the broad language of this statute, there is no occasion here to determine whether the President's plenary executive power over foreign affairs in itself furnishes sufficient authority to the Secretary to deny passports to American citizens in accordance with the reasonable standards prescribed by him."9 But he adds that "if some additional source of authority were needed, it is supplied by the travel control statutes which Congress has repeatedly enacted";10 and "the language of the [travel control] statute makes it plain that during [a proclaimed emergency] this authorization becomes incorporated, in effect, into § 211a itself."

[110] But in Stewart v. Dulles, 101 U.S.App.D.C. 280, 248 F.2d 602, briefed and argued after the present case and now awaiting decision, the Secretary conceded that § 211a "confers no substantive power," and he "[assumed]" that he "had no authority to impose this kind of direct restraint upon travel." "It was for this very reason," he said, "that Congress enacted what is now 8 U.S.C.A. § 1185, authorizing the President, in times of war or national emergency, to use his inherent powers in the field of passport issuance as a means of directly controlling the travel of citizens." The argument now is that (1) 22 U.S.C.A. § 211a and the inherent executive power, though ineffective to control travel, give the Secretary discretion as to passport issuance; and (2) under 8 U.S.C.A. § 1185, upon proclamation of an emergency by the President, any person to whom the Secretary, in his discretion, refuses a passport, may not leave the country. Thus, the Secretary claims that Congress has delegated to him, through the President, the power to establish categories of persons ineligible to leave the country.

I. The Claimed Delegation

[111] The authority conferred on the President by 22 U.S.C.A. § 211a was exercised through Executive Order No. 7856, on March 31, 1938.11 The Executive Order designated only one general category of passport eligibility, that created by 22 U.S.C.A. § 212, namely, persons who are citizens of the United States. 22 C.F.R. § 51.2 (1949). Beyond that, the order confined itself to specifying the formal requirements of the passport application (e.g., the type and size of photographs to be attached), id., § 51.23q, and the evidence of citizenship to be furnished, and providing for amendment, renewal and extension of passports and specifying the fees to be collected. In addition, it authorized the Secretary of State, "in his discretion to refuse to issue a passport . . ." and "to make regulations . . . additional to the rules in this part and not inconsistent therewith." Id., §§ 51,75, 51.77. Pursuant to this latter authority, the Secretary, on the day of the President's order, issued Departmental Order 749, promulgating the Department's regulations, consisting merely of procedural implementation of the President's rules.*fn12

[112] The regulations in question in the present case, which the Secretary added four years later and after the Bauer decision, were the first attempt, by regulations issued under 22 U.S.C.A. § 211a, to affect anything more than procedure or form.*fn13 In view of the purely procedural nature of the President's rules, his accompanying grant to the Secretary of authority to make "additional . . . and not inconsistent" regulations confers no power to create substantive disqualifications.

[113] Nor did the President's Proclamation No. 3004,*fn14 making operative the travel control provision of 8 U.S.C.A. § 1185, give the Secretary this authority. Section 1185 prohibits departure from the United States without a valid passport during a proclaimed emergency, "except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe . . .." When the proclamation was issued, regulations existing under an earlier proclamation were in force, providing generally that no person could enter or leave the country without a valid passport, except for travel to and from certain countries. 22 C.F.R. §§ 53.1-53.9 (1949). Proclamation No. 3004 did not undertake to grant power to the Secretary to control travel by establishing additional categories of passport ineligibility. It merely declared that departure and entry would be subject to the already established travel control regulations, 22 C.F.R. §§ 53.1-53.9, referring to them specifically and incorporating them into the proclamation.*fn15 It added an authorization to the Secretary "to revoke, modify or amend such regulations as he may find the interests of the United States to require." This authorization, like the authorization of Executive Order No. 7856 to issue "additional" passport regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

[114] Thus neither Executive Order No. 7856, which confers upon the Secretary authority received by the President under 22 U.S.C.A. § 211a, nor Proclamation No. 3004, which confers upon the Secretary authority the President holds under 8 U.S.C.A. § 1185, undertakes to delegate to the Secretary any power to create substantive passport disqualifications.

[115] Nor could the President delegate such power, for neither statute conferred it upon him.

II. The President's Statutory Power

[116] A. The Passport Statutes Do Not Purport to Confer the Power Here Claimed.

[117] Section 211a of 22 U.S.C.A. says nothing about categories of ineligibility. Indeed, the Secretary concedes that the purpose of the Act of August 18, 1856,*fn16 from which § 211a derives, was to prohibit passport issuance by anyone other than the Secretary of State. Nothing in the legislative history of the 1856 statute suggests that the words "may grant and issue" confer power to set up substantive categories of ineligibility. From the little that history reveals, it appears that the purpose of Congress was merely to control the procedure of passport issuance.*fn17 Fairly read § 211a grants the Executive only such discretion as may be necessary for elaborating a procedure for issuing passports, e.g., as to the type and quantum of evidence of citizenship.*fn18 And so the statute was read by our Presidents in former times.*fn19

[118] Nor did 8 U.S.C.A. § 1185 authorize the President to create such substantive passport disqualifications as are contained in the regulations before us. Subsection (a) of § 1185 did not purport to give the President power to establish criteria for restricting anyone's right to travel. It merely authorized him to invoke restrictions set forth in the statute if he found that "those provided otherwise than by this section" were inadequate to protect the public safety. Moreover, when the Act was first adopted in 1918 and when it was reenacted in 1941,*fn20 there were no restrictions on citizens' travel "provided otherwise than by this section." What Congress had in mind, therefore, in § 1185(a), was the problem of movements of aliens, not citizens. And Congress set forth, in subparagraphs (1) through (7) of subsection (a), a

system of exit and entry permits to control movements of aliens.

[119] It is subsection (b) of § 1185 which is relevant to citizens. That subsection provided that, upon issuance of the President's proclamation, "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." Thus citizens were forbidden to travel without passports, but the President was authorized to establish conditions and exceptions to this prohibition. But the subsection did not authorize the President to decide which categories of citizens might receive passports.

[120] Though neither 22 U.S.C.A. § 211a nor 8 U.S.C.A. § 1185 explicitly confers the authority the Secretary claims, he urges us to read them through a wide lens and find in them a congressional intent to authorize his regulations. His contention comes to this, that Congress has by implication, though not expressly, authorized the Executive to decide which Americans shall be confined within our boundaries. In my opinion such an intention may not be read into the statutes because (1) it would conflict with other expressions of congressional policy and (2) it would raise grave constitutional doubts.

[121] B. The Secretary's Reading of the Statutes Conflicts with Congressional Policy.

*[122] Almost a century ago, Congress declared that "**the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,**" and decreed that "**any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.**" 15 Stat. 223-224 (1868), R.S. § 1999, 8 U.S.C. § 800 (1940).*fn21 Although designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress "is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." Savorgnan v. United States, 1950, 338 U.S. 491, 498 note 11, 70 S. Ct. 292, 296, 94 L. Ed. 287.*fn22 The Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 "are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed." Id., 338 U.S. at pages 498-499, 70 S. Ct. at page 296.That same light, I think, illuminates 22 U.S.C.A. § 211a and 8 U.S.C.A.§ 1185. Since expatriation is today impossible without leaving the country,*fn23 the policy expressed by Congress in 1868 and never repealed precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving.*

[123] The Secretary's construction of the statutes would impinge also upon the Internal Security Act of 1950.*fn24 Congress there made it unlawful for a member of a Communist organization to apply for or use a passport, but only after such organization has registered under the Act or has been finally ordered et do so. Neither of those events has occurred.*fn25 Moreover, the prohibition was circumscribed by procedural safeguards not found in the Secretary's "Communist supporter" regulations involved here; and it was substantively limited to "members" of the proscribed organization, whereas the Secretary's regulations apply "regardless of the formal state of [the applicant's] affiliation with the Communist party . . .."*fn26 These declarations of congressional policy make it unlikely that by other statutes Congress intended to authorize a different policy.*fn27 "The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing and analysis." Davis, Administrative Law 57

(1951).

[124] I would not construe the statutes as conferring upon the Secretary by implication broad powers which they do not explicitly confer, United States v. Minker, 1956, 350 U.S. 179, 190, 76 S. Ct. 281, 100 L. Ed. 185, especially when serious restraints on liberty are entailed. Ex parte Endo, 1944, 323 U.S. 283, 299-300, 65 S. Ct. 208, 89 L. Ed. 243.

[125] C. The Secretary's Reading of the Passport Statutes Is Constitutionally Doubtful.

[126] The broad construction the Secretary would have us place on the passport statutes would raise grave constitutional doubts.*fn28 Statutes must be construed narrowly if to do so avoids a serious constitutional question. United States v. Rumely, 1953, 345 U.S. 41, 46, 73 S. Ct. 543, 97 L. Ed. 770; United States v. Witkovich, 353 U.S. 194, 77 S. Ct. 779, 1 L. Ed. 2d 765.

[127] We recognized in Shachtman that the individual's right to travel is a natural right protected by the Constitution.*fn29 Since denial of a passport now abridges that right, passport applicants are entitled to both the procedural*fn30 and substantive*fn31 safeguards of the Fifth Amendment. The broad interpretation urged by the Secretary would require us to decide whether it is consistent with due process of law, and with First Amendment rights,*fn32 to deprive an individual of so large a part of his liberty under the standards and procedures the Secretary employs; and whether, if Congress possesses such power, it may validly delegate to the Secretary or the President a "discretion . . . unconfined and vagrant . . . [not] canalized within banks that keep it from overflowing."*fn33

[128] The word "Communist" is not an incantation subverting at a stroke our Constitution and all our cherished liberties. If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist,*fn34 tomorrow the same logic will justify control of movement from one state to another, for that is no less useful in communication than travel abroad. By no great extension of the court's reasoning, an oath can be required as a condition to the enjoyment of every other right we have. Food, clothing, shelter, education, recreation - all help to sustain the individual, develop his powers, and make him a more dangerous antagonist.

[129] The due process problem is not avoided by reliance upon Galvan v. Press, 1954, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911; nor the First Amendment problem by reliance upon American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925.

[130] In holding in Galvan that Congress could constitutionally provide for deportation of an alien who becomes a Communist after entry, the Supreme Court said: "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."*fn35 The greater power which the Government possesses in respect of aliens*fn36 may legitimatize treatment which could not lawfully be directed against citizens. Galvan provides no constitutional basis for banishing a citizen who becomes a Communist.

[131] So far as the First Amendment problem is concerned, whether we apply the "clear and present danger test,"*fn37 or some aspect of the "reasonable relation" test,*fn38 we are engaged in weighing the individual's need to be free against the Government's need to restrain him. Each case is bound to turn on the nature of the freedom involved, the public

detriment it conflicts with and the type of restraint imposed. It is unlikely that a case arising in one context will determine a case arising in another. Douds falls far short of determining our present problem.

[132] In Douds the Court upheld the constitutionality of § 9(h) of the National Labor Relations Act, 29 U.S.C.A. § 159(h) withdrawing N.L.R.B. privileges from unions whose officers fail to submit non-Communist affidavits. The Court found that, since unions are clothed by Federal law with great powers for good or evil, "the public interest in the good faith exercise of that power is very great." 339 U.S. at pages 401-402, 70 S. Ct. at page 686. It observed that (1) "Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint," id. 339 U.S. at page 404, 70 S. Ct. at page 687; (2) there is no constitutional right to occupy the position of a labor leader in the sense that "the loss of [the] particular position [would be] the loss of life or liberty," id. 339 U.S. at page 409, 70 S. Ct. at page 689; (3) 9 (h) imposes no direct restraint on freedom of belief or association, since its "discouragements" operate "only against the combination of [particular] affiliations or beliefs with occupancy of a position of great power over the economy of the country," id. 339 U.S. at pages 403-404, 70 S. Ct. at page 686;*fn39 and (4) § 9(h), if not complied with, makes it not impossible, but only more difficult for unions to remain effective, id. 339 U.S. at page 390, 70 S. Ct. 679.*fn40

[133] Whether travel by Communists is a danger on a par with their occupancy of powerful union offices is at least questionable. Prevention of travel does not prevent communication. Conspirators could still use the mails, cables, telephones, radio and, not least, foreign embassies and consulates in the United States. The discomfiture of a few individuals who would have to send messages rather than make speeches*fn41 may not, in the constitutional balancing process outweigh the citizen's right to travel. On the other side of the scales, it appears that (1) the passport statutes, unlike that in Douds, touch not a handful of persons, but many thousands (in the Secretary's view, as many thousands as he may choose to suspect); (2) unlike the statute in Douds, these involve a constitutionally protected right to travel; (3) they not only impose what Douds called an indirect restraint on First Amendment rights by "discouragement" of freedom of belief and association, but also directly affect the right to travel which may itself be a First Amendment right;*fn42 and (4) these statutes make travel not difficult, but impossible.

[134] If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political teste, they are the very type of legislation the First Amendment forbids.*fn43 Thomas v. Collins, 1945, 323 U.S. 516, 65 S. Ct. 315; Near v. Minnesota, 1931, 283 U.S. 697, 51 S. Ct. 625, our political taste, they are the very travel on account of "political affiliations and beliefs," they are expressly condemned in Douds: "[such] circumstances [are] ordinarily irrelevant to permissible subjects of government action." 339 U.S. at page 391, 70 S. Ct. at page 680. It is most frequently argued, in justification of the power the Secretary claims, that travel of Communists may serve to promote an international conspiracy. Whether, under the Douds*fn44 reasoning, that possibility justifies these regulations and puts to rest the constitutional doubts that arise is open to serious question.

[135] Another alleged reason for abrogating the constitutional right to travel is that the American abroad may not only talk, but may also act in ways that conflict with our policies and interests and tend to cause international incidents.The Secretary of State embodies that reason in 51.136 of his regulations,*fn45 which is not invoked in this case.

[136] During a recent visit to the United States by a foreign chief of state at the invitation of the President, an American mayor declared that the guest was unwelcome in his city. That announcement could hardly have been more prejudicial to our foreign relations if the mayor had been abroad when he made it. Yet no one has suggested that he could constitutionally have been prevented from making his announcement. At home our citizens are as free to do lawful acts as they are to speak their minds. The expectation that they may do things abroad which violate no laws is, I think, an insufficient basis for abrogating their right to leave the country.

[137] If it is the fear of illegal conduct which purportedly justifies travel restriction, a factor which may tip the constitutional scale is "the availability of more moderate controls than those which the state has imposed." Mr. Justice Frankfurter, concurring in Dennis v. United States, 1951, 341 U.S. 494, 542, 71 S. Ct. 857, 95 L. Ed. 1137, quoting Freund, On Understanding the Supreme Court. There are penal sanctions against the commission or the attempt or conspiracy to commit espionage, sabotage, treason, sedition and subversion.*fn46 The Internal Security Act deals with conspiracies to do anything which would substantially contribute to the establishment of a foreign-directed totalitarian dictatorship.*fn47 For persons who become or remain members of the Communist Party with knowledge, of its violent objectives, we have the Communist Control Act of 1954.*fn48 We have statutes dealing with persons who act as agents of a foreign government,*fn49 or those who have "correspondence" with a foreign government with intent to influence its measures in relation to disputes or controversies with our Government, or to defeat the measures of the United States.*fn50 Our law even prohibits leaving the country with intent to avoid prosecution or punishment for certain listed offenses or to avoid giving testimony in certain criminal proceedings.*fn51 In that they require proof of criminality and provide trial by jury, these statutes, despite their severe penalties, are more moderate controls than those the Secretary imposes. He claims that the peril involved in the possible machinations of such persons would justify a statute permitting him to deprive them of the right to travel even though he has no evidence which would justify prosecuting them under any of the penal statutes. I think it very doubtful that a statute could constitutionally grant the power to confine citizens to the country in such circumstances.*fn52

[138] Section 1732 of 22 U.S.C.A. calls upon the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The majority says that since "an American with Communist affiliations" who gets into trouble abroad through his "political indiscretion" may invoke this statute, the Secretary of State must have the power to prevent the citizen from going abroad. But the American who becomes embroiled with foreign authorities can only request the aid of his Government; he cannot compel it. United States ex rel. Keefe v. Dulles, 1954, 94 U.S.App.D.C. 381, 384-385, 222 F.2d 390, 393-394, certiorari denied, 1955, 348 U.S. 952, 75 S. Ct. 440, 99 L. Ed. 743.

[139] That the purported need to confine citizens to the country is claimed to spring from emergency conditions does not dispense with their constitutional rights.*fn53 Mr. Justice Jackson pointed out in his concurring opinion in Youngstown Sheet & Tube Corp. v. Sawyer, 1952, 343 U.S. 579, 649-650, 72 S. Ct. 863, 877, 96 L. Ed. 1153:

[140] "The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for

usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

[141] The constitutional questions I have discussed are, in my view, not before us for decision. I mention them, as the Supreme Court said in Ex parte Endo, 1944, 323 U.S. 283, 299-300, 65 S. Ct. 208, 217, 89 L. Ed. 243, ". . . not to stir the constitutional issues which have been argued at the bar but to indicate the approach which think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of right specifically guaranteed by the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

III. The President's Inherent Power

[142] The Secretary of State has always treated it as a matter within his own discretion whether he would give a travelling citizen a document surrounding him with the aura of this Government's protection and commending him to other governments. In Shachtman we noted the authorities "which have recognized a great breadth of Executive authority and discretion" in this regard.*fn54 But, we pointed out: "Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport."*fn55 The question is whether the Executive has power, by withholding a passport, to confine a citizen within the United States. The Constitution grants no such power. But the Secretary purports to find it in "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .." United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, 320, 57 S. Ct. 216, 221.

[143] Numerous cases both before and after Curtiss-Wright support the proposition that the President has broad powers in the field of foreign relations. But there is a great gulf between the powers involved in those cases and the power the Secretary claims here. Those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments. What the Court upheld in Curtiss-Wright was the President's "power to negotiate with foreign governments."*fn56 It sustained delegation to the President of the function of declaring an embargo of munitions sales, because the function was to be exercised "after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as [the President] may deem necessary . . .."*fn57 The other cases have recognized that it is for the Executive, or the Executive with Congress, free from judicial interference, to deal with such matters as recognition of foreign governments,*fn58 assessment of treaty obligations,*fn59 resolution of disputed sovereignites,*fn60 acquisition of new lands,*fn61 exclusion*fn62 or expulsion*fn63 of aliens, imposition of emergency controls over alien property,*fn64 establishment of an international war crimes tribunal,*fn65 allocation of an international air route,*fn66 or creation of an international "Mixed Claims Commission."*fn67 None of the "foreign affairs" cases, it has been observed, "involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual."*fn68 Chief Justice Marshall, describing those Executive powers which are beyond judicial control and citing the foreign affairs power as an example, said: "The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."*fn69 Marbury v. Madison, 1803, 1 Cranch 137, 166, 2 L. Ed. 60. A characteristic of the political power which is to be exercised free of judicial interference is its "lack of satisfactory criteria for a judicial determination." Coleman v. Miller, 1939, 307 U.S. 433, 454-455, 59 S. Ct. 972,

982, 83 L. Ed. 1385.*fn70 By this test I think it clear that the power the Secretary asserts here is not a political power.*fn71

[144] The Secretary finds authority to abridge the right to travel in what Curtiss-Wright recognized as an inherent executive power to deal with "a situation entirely external to the United States, and falling within the category of foreign affairs . . .." 299 U.S. at page 315, 57 S. Ct. at page 218. Extending to internal affairs the President's inherent power over external affairs has dangerous implications.*fn72 Those implications have caused some authorities to shrink from the inherent power doctrine as from something "revolutionary and subversive of our constitutional system";73 or to anticipate from it a carry-over to our national government of all the royal prereogatives which ancient common law associated with the foreign affairs powers of the King of England;74 or to fear that it "would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State."75

[145] In our complex world there are very few purely internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared that "There is no longer any real distinction between 'domestic' and 'foreign' affairs."76 If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits heretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress.

[146] But the Supreme Court has confined the inherent foreign affairs power within accountable limits.77 I am convinced from my review of the authorities and my study of history that the power here claimed by the Secretary is beyond those limits. Curtiss-Wright declares that an extra-constitutional foregin relations power passed to the President from the British Crown. To say that all the powers of the Crown devolved upon the President would, of course, be inconsistent with the basic principle that every branch of the national government has only a limited power, and Curtiss-Wright does not even suggest such a thing.78

[147] The British Crown had a prerogative to confine subjects to the realm by writs ne exeat regno.79 But it was not one of the prerogatives which devolved upon our President. It had its roots in the Crown's earliest constitutional controversies with the clergy80 and the barons.81 By the year 1382, restraints against clerics and notables were relaxed, but a prohibition was placed upon unlicensed departure from the realm by the common subjects of the King. 5 Rich. II, c. 2, §§ 6, 7. In 1607 that prohibition was repealed, 4 James I, c. 1, so that ostensibly freedom of travel was restored, except to persons covered by special statutes.82 It is undeniable, however, that the Crown continued to exercise its prerogative to confine subjects to the realm, at least until about one hundred years before our Revolution.83

[148] The manner in which British kings employed ne exeat was in some ways strikingly similar to our State Department's present policies and practices. The writ first used "to hinder the clergy from going to Rome . . ., was afterward extended to laymen machinating and concerting measures against the state . . .."84 At one time the class confined to the realm included "all archers and artificers, lest they should instruct foreigners to rival us in their several trades and manufactures.'85 Bacon says the writs were issuable "in respect of attempts prejudicial to the King and State: (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without cause, or upon such information as his Lordship shall think of weight) 86

[149] The power to confine subjects to the realm, though it had fallen into disuse,87 was still part of the king's prerogative when we became an independent nation. The draftsmen of our Constitution were familiar with it through Blackstone, "that handbook of the American revolutionary."88

[150] Blackstone divided the prerogatives of the Crown into two general categories: those relating to "intercourse with foreign nations"; and those relating to "domestic government and civil polity." 1 Commentaries (Wendell's ed. 1854) 252. It is the first branch of the royal prerogative to which Curtiss-Wright refers and upon which the Secretary here relies.

[151] "With regard to foreign concerns," says Blackstone, "the king is the delegate or representative of his people. . . . In the king, therefore, as in a center, all the rays of his people are united . . .."89 Ibid. The king's foreign affairs prerogative included the following components: (1) "the sole power of sending embassadors to foreign states, and receiving embassadors at home," id. at 252-56; (2) making "treaties, leagues and alliances with foreign states and princes," id. at 256; (3) "making war and peace," id. at 256-57; (4) issuing "letters of marque and reprisal," id. at 257-59; and (5) granting "safe conducts" or "passports" to aliens coming to the realm, id. at 259-60.90

[152] The foreign affairs prerogative did not include the power to confine subjects to the realm. This was part of the domestic prerogative having to do with military affairs. Id. at 265. Blackstone says, id. at 262:

[153] "The king is considered . . . as the generalissimo, or the first in the military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community; and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchial government is allowed to be the fittest of any for this purpose; it follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince."

[154] And, "because that every man ought of right to defend the king and his realm, therefore the king, at his pleasure, may command him by his writ that he go not beyond the seas, or out of the realm, without license . . .." Id. at 265.

[155] Since the king's ne exeat power was part of his domestic military prerogative, rather than his foreign affairs prerogative, Curtiss-Wright lends no support to a theory that the power devolved upon our President.

[156] It is plain that out Constitution, with respect to things military, conveyed to Congress most of the powers which were the king's prerogative,91 leaving the President only the command function. The President's military power, said Hamilton, "would amount to nothing more than the supreme command and direction of the military and naval forces, a first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies; all of which, by the Constitution under consideration, would appertain to the legislature." The Federalist, No. 69 (Ford ed. 1898), p. 460.92 Since the American citizen does not owe the President such a duty of defense as the British subject owes his monarch, there is no basis for implying a grant to the President of the ne exeat power which might be necessary to enforce such a duty. We own our duties to the nation, not to its chief executive.93

[157] The notion that the President possesses inherent military power to deal with internal

affairs involving private rights was disposed of in Youngstown Sheet & Tube Co. v. Sawyer, 1952, 343 U.S. 579, 72 S. Ct. 863. The Court ruled that it could not "with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." Id. 343 U.S. at page 587, 72 S. Ct. at page 867. Mr. Justice Douglas concurring, declared that "our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs." Id. 343 U.S. at page 632, 72 S. Ct. at page 888, Mr. Justice Jackson added: "That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. . . . [The President's] command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress." Id. 343 at pages 644, 645-666, 72 S. Ct. at pages 874, 875-885.94

[158] At the time of Youngstown our Armed Forces were engaged in active combat in Korea. The record before the Court contained a number of affidavits by high Government officials, typical of which was that of the Secretary of Defense, which stated:

[159] ". . . any curtailment in the production of steel even for a short period of time will have serious effects on the programs of the Department of Defense which are essential to national security. A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the nation."

[160] Chief Justice Vinson, dissenting, thought "the uncontroverted affidavits in this record amply support the [President's] finding that 'a work stoppage would immediately jeopardize and imperil our national defense.'" Id. 343 U.S. at page 679, 72 S. Ct. at page 935. He also cited our numerous international undertakings - United Nations, Korea, Truman Plan, Marshall Plan, North Atlantic Treaty Organization and Mutual Security - all of which might be imperilled if the President's seizure were not upheld. Id. 343 U.S. at pages 668-672, 72 S. Ct. 929-931. He found support for the seizure not only in the President's military power and in his foreign relations power, id. 343 U.S. at pages 679, 681, 72 S. Ct. 934, 935, but also in the fact that the emergency required emergency action. Id. 343 U.S. at pages 668, 708-710, 72 S. Ct. 948-949. The Court, however, repudiated these views. It held that the seizure of steel mills involved in labor strife was within Congress' "exclusive constitutional authority . . . in both good and bad times." Id. 343 U.S. at pages 588-589, 72 S. Ct. 867.

[161] The military power has in the past been argued to be broad enough to subject to court-martial civilians who obstruct the successful prosecution of hostilities.95 But as Professor Edmund M. Morgan pointed out: "Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation."96 When, during World War I, legislation was offered to subject all spies to court-martial, on the theory that the whole of the United States was a war zone, President Wilson said: "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and and affecting to despise."97

IV. Conclusion

[162] My conclusions are that (1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two

statutes relied on by the Secretary as a source of such power - 22 U.S.C.A. § 211a and 8 U.S.C.A. § 1185 - grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

[163] The broad power to curtail the movements of citizens of the United States, to the extent that our Government possesses it, is vested in Congress, not in the President. Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense. Whether our internal security requires the drastic measure of restricting travel and, if so, to what extent and by what criteria and procedures is for Congress to decide. If and when Congress acts, there will presumably be hearings, reports and debates which may serve to limit what Congress elects to do and may help to interpret what it does. The constitutionality of any such measure will, of course, depend on its provisions and the circumstances in which it is enacted.

[164] The question before us is whether the Secretary of State has power to establish such substantive criteria for travel as are here involved. We need not decide and I do not say that there are no circumstances under which the Secretary may restrain a citizen's travel. Whether he may deny a passport to prevent a flight from justice98 or in aid of the enforcement of some specific law, e.g., the Universal Military Training and Service Act,99 are questions that may arise in other cases. In any event, the exercise of such powers would be a far cry from the Secretary's present undertaking.

[165] EDGERTON, Chief Judge (dissenting).

[166] We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world. I think the Secretary should be directed to issue a passport.

[167] "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by . . . the Constitution." Williams v. Fears, 179 U.S. 270, 274, 21 S. Ct. 128, 45 L. Ed. 186. We have held that the right to leave the country is an attribute of personal liberty and that restrictions on it "must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law'." Shachtman v. Dulles, 96 U.S.App.D.C. 287, 290, 225 F.2d 938, 941.

[168] But we need not and therefore should not1a decide any constitutional question. As Judge Bazelon's opinion shows, the President and Congress have not undertaken to delegate to the Secretary the authority he claims. This is very clear when the statutes and executive orders on which he relies are construed narrowly. Delegations of authority must be construed narrowly when a narrow construction avoids serious constitutional questions. United States v. Rumely, 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770.

[169] The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secretary does not suggest, which the Secretary thinks, for reasons known only to him, will be

contrary to what, for reasons known only to him, he conceives to be "the national interest". If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? Since neither Congress nor the President has undertaken to give the Secretary the authority he claims, we need not consider these constitutional questions.

[170] FAHY, Circuit Judge (dissenting).

[171] The discretion of the Secretary in issuing passports prior to the enactment in 1941, of 66 Stat. 190, 8 U.S.C. § 1185(b) (1952), 8 U.S.C.A. § 1185(b), see Shachtman v. Dulles, 96 U.S.App.D.C. 287, 225 F.2d 938, was subject to no clear limitation except that the applicant must qualify as one who owed allegiance to the United States.1b A passport was in the nature of a political document; one need not have it in order to obtain passage and depart from the United States. So no deprivation of liberty and no justiciable controversy were involved in denial of a passport. But 8 U.S.C. § 1185(b), 8 U.S.C.A. § 1185(b), changed all this. By that statute Congress provided that when the United States is at war or during the existence of any national emergency proclaimed by the President no citizen may lawfully depart from the United States without a valid passport, with exceptions not here pertinent.This was an assertion by Congress of restraint upon travel based upon the war power, coupled with the executive control over passports incident to the conduct of foreign affairs noted in Shachtman. The new statute, however, did not enumerate other specific criteria, notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U.S.C. § 1185(b), 8 U.S.C.A. § 1185(b), of more specific criteria renders nugatory the control in question.2a The statute explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports. Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. Moreover, we do not have here, as in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, an attempted exercise of executive authority alone; the problem is more like that involved in Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774, where there was a combination of legislative and executive authority. Here Congress seeks to control travel and to that end to enlarge the significance of executive control over passports, in time of war or national emergency. When the Act of Congress is considered with the authority of the executive I think the courts would not be justified in entirely nullifying all control other than that incident to ascertainment by the issuing authority of whether or not the applicant owes allegiance to the United States. I am reassured in this view by the fact that the passport to be issued need be only a simple pass or permit which enables the possessor to depart lawfully from the United States, and no more; and, furthermore, the control is always limited by the requirements of the Due Process Clause. Shachtman v. Dulles, supra; Bauer v. Acheson, D.C., 106 F.Supp. 445. Upon these considerations I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. This gives valid content to the Act of Congress, a result to be preferred, when reasonably possible, to a holding that Congress has entirely failed in its intended purpose. Cf. United States v. Rumely, 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770, and Ullman v. United States, 350 U.S. 442, 76 S. Ct. 497, 100 L. Ed. 511.

[172] We come then to the question whether, taking the above approach, the denial of appellant's application is consistent with due process and satisfies the criteria referred to. In reaching this question I construe the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file a statement in accordance with section 51.142 of the Passport Regulations, 22 C.F.R. 51.142 (Supp.1957). The denial flows from the regulation and not from an independent conclusion of the Secretary with respect either to appellant or to any particular geographical area. The information sought by the regulation is relevant to the criteria by which the Secretary must be guided; for travel abroad at this time by persons who owe allegiance to the United States but who are or have been members of the Communist Party may reasonably be deemed to be related to the national defense and to the conduct of foreign affairs. It does not follow, however, that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process. It must be borne in mind that the denial deprives him of liberty to depart from the United States, a right which he has unless lawfully deprived thereof. In Garner v. Los Angeles Board, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, the relevany information which the Court held the applicant must supply was required by law, and was with respect to retaining State employment. These two factual differences are enough I think to distinguish that case from this one. Not only has Congress not specified here that the information refused must be furnished as a condition to obtaining a passport, but the liberty to travel is on a different footing from a desire to retain State employment. In the one case there is the taking away of an existing liberty. yn the other there is State control over the qualifications of its employees. And the degree of restraint involved, as well as the nature of the liberty restrained, are pertinent in determining the sufficiency of the reason assigned for the restraint. Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, cf. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810, or for other good faith reasons, such as fear of prosecution for making a false statement. Of course the reason may have been that to answer truthfully would have disclosed Communist Party membership and thereby automatically have caused the application to be denied under section 51.135(a) of the Regulations. But we are not required to assume this reason, or now to decide the validity of denial of a passport based on such assumption. It is true, as pointed out in Judge Washington's concurring opinion, that Congress has declared that travel of Communist members facilitates communication and is a prerequisite for carrying on of activities to further the purposes of the Communist movement. The Secretary cannot be required to assume that a real Communist Party Member who is a citizen of or otherwise owes allegiance to the United States, can be relied upon to adhere to his obligation of citizenship when it conflicts with the responsibility he has assumed by Party membership. For this reason a general uncertainty as to the conduct of those involved in Communist membership or discipline has a justifiable place in considering passports. But such general uncertainty is not a substitute for a decision by the issuing authority where, in any event, Party membership or discipline is not shown. An applicant who refuses to file the statement required by section 51.142 may have no derogatory information to supply, or he may need to depart for personal or other reasons unrelated to some possible Communist involvement. Yet the Secretary, though satisfied to either effect, could not permit the departure. Thus to create a general restriction on travel by those who refuse the information, without more, is not reasonable. It prohibits travel by an individual whose own reason to depart does not come within the criteria upon the basis of which the Secretary may validly refuse him permission to depart. The intended travel might be wholly unrelated to any problem of national defense or foreign affairs.To avoid this difficulty a conclusion should be reached by the issuing authority in the individual case, or with respect to the territorial area involved, on the question whether the travel would be reasonably likely to be detrimental to the national defense or to the conduct of our foreign affairs. While the issuing authority may take into consideration the refusal of the applicant to comply with section 51.142, due

process is not afforded in peacetime by applying to an individual case the general restriction referred to when there is opportunity for a particular judgment. The exigencies of the situation do not require a blanket rule which, for administrative convenience or otherwise, obviates the necessity of a judgment reached by the issuing authority in the individual case. We are not at war. There is a presidentially proclaimed period of national emergency, but we must not construe the authority to be exercised as equal to that available in wartime. To bring the regulation of travel within the requirements of substantive due process, Shachtman v. Dulles (supra) calls I think for the exercise by the issuing authority of its own decisional processes to a greater degree than inheres in denial of a passport through the self-executing effect of an applicant's refusal to supply the information sought by section 51.142 of the Regulations.

[173] Being of the views thus expressed I would reverse and remand, with direction that the case be returned by the District Court to the Secretary for reconsideration consistently with these views and with procedures required by our decision in Boudin v. Dulles, 98 U.S. App.D.C. 305, 235 F.2d 532.

***** BEGIN FOOTNOTE(S) HERE *****

[174] *fn1 64 Stat. 987, 50 U.S.C.A. § 781(1).

[175] *fn2 Proc. No. 2914, 64 Stat. A454, 50 U.S.C.A.Appendix note preceding section 1.

[176] *fn3 103 Cong.Rec. 729 (daily ed. Jan. 21, 1957).

[177] *fn4 103 Cong.Rec. 389 (daily ed. Jan. 10, 1957).

[178] *fn5 Id. at 390.

[179] *fn6 Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

[180] *fn7 Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

[181] *fn8 Supra note 6, 347 U.S. at page 529, 74 S. Ct. 737.

[182] *fn9 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

[183] *fn10 And see the opinion of Mr. Justice Jackson in American Communications Ass'n v. Douds, id., 339 U.S. at page 424 et seq., 70 S. Ct. 674, with its accumulation of underlying data.

[184] *fn11 2 Pet. 253, 27 U.S. 253, 7 L. Ed. 415 (1829).

[185] *fn12 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

[186] *fn13 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937). Belmont is discussed at length and with approval in United States v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

[187] *fn14 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948).

[188] *fn15 335 U.S. 160, 68 S. Ct. 1429, 92 L. Ed. 1881 (1948).

[189] *fn16 Supra, 333 U.S. at page 111, 68 S. Ct. 431. Extensive discussions of the doctrines underlying the powers of the President are in the opinions in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

[190] *fn17 Proc. No. 2914, supra note 2.

[191] *fn18 Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

[192] *fn19 44 Stat. 887 (1926), 22 U.S.C.A. § 211a; 66 Stat. 190 (1952), 8 U.S.C.A. § 1185.

[193] *fn20 Perkins v. Elg, 307 U.S. 325, 349, 59 S. Ct. 884, 83 L. Ed. 1320 (1939).

[194] *fn21 See Carrington, Political Questions: The Judicial Check on the Executive, 42 Va.L.Rev. 175 (1956).

[195] *fn22 9 Pet. 692, 34 U.S. 692, 699, 9 L. Ed. 276.

[196] *fn23 See 3 Hackworth, Digest of International Law § 259 (1942).

[197] *fn24 15 Stat. 224 (1868), 8 U.S.C. § 903b [now 22 U.S.C.A. § 1732].

[198] *fn25 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950).

[199] *fn26 1 Bl.Comm. . . . 265; 3 Co.Inst. . . . 178; 1 Holdsworth, History of English Law 230 (6th ed. 1938); Taswell-Langmead, English Constitutional Law 128-130 (4th ed. 1890).

[200] *fn27 2 Encyclopaedia Britannica, Anselm (1945); Beames, Ne Exeat Regno 1-2 (2d ed. 1824).

[201] *fn28 See Note, Passports and Freedom of Travel: The Conflict of a Right and a Privilege, 41 Geo.L.J. 63 (1952), for a detailed account of the history of the Magna Carta and the status of the common law in this regard.

[202] *fn29 3 Co.Inst. . . . 179.

[203] *fn30 Id. at . . . 178-179.

[204] *fn31 5 Richard II, c. 2, §§ 6, 7 (1381), 2 Stat. at L. 236 (Pick.1762).

[205] *fn32 See Note, 41 Gel.L.J., supra note 28, at 70; Diplock, Passports and Protection in International Law, 32 Grotius Soc. 42, 44 (1947).

[206] *fn33 Diplock, supra note 32, at 53.

[207] *fn34 Art. IV.

[208] *fn35 Art. IV, § 2. See Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927); Williams v. Fears, 179 U.S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900).

[209] *fn36 Bauer v. Acheson, D.C.D.C., 106 F.Supp. 445.

[210] *fn37 Shachtman v. Dulles, 96 U.S.App.D.C. 287, 225 F.2d 938 (1955).

[211] *fn38 284 U.S. 421, 437-438, 52 S. Ct. 252, 76 L. Ed. 375 (1932).

[212] *fn39 3 Stat. 199 (1815).

[213] *fn40 Dep't of State, The American Passport - History and Digest 50 (G.P.O.1898).

[214] *fn41 11 Stat. 60.

[215] *fn42 40 Stat. 559, 22 U.S.C.A. §§ 223-226b.

[216] *fn43 40 Stat. 1829 (1918).

[217] *fn44 44 Stat. 887 (1926), 22 U.S.C.A. § 211a.

[218] *fn45 Exec.Order No. 7856, 3 Fed.Reg. 681, 22 C.F.R. §§ 51.1-51.77 (1949).

[219] *fn46 55 Stat. 252, 22 U.S.C.A. § 223.

[220] *fn47 Supra note 42.

[221] *fn48 Proc. No. 2487, 55 Stat. 1647, 50 U.S.C.A.Appendix, note preceding section 1.

[222] *fn49 Proc. No. 2523, 55 Stat. 1696, U.S.Code Cong.Service 1941, p. 883.

[223] *fn50 Proc. No. 2974, 66 Stat. C31, 50 U.S.C.A.Appendix note preceding section 1.

[224] *fn51 Proc. No. 2914, supra note 2.

[225] *fn52 66 Stat. 190, 8 U.S.C.A. § 1185.

[226] *fn53 Proc. No. 3004, 67 Stat. C31, U.S.Code Cong. and Adm.News 1953, p. 915.

[227] *fn54 Ibid.

[228] *fn55 22 C.F.R. § 53.1 (1949).

[229] *fn56 Supra note 44.

[230] *fn57 Supra note 45.

[231] *fn58 17 Fed.Reg. 8013 (1952), 22 C.F.R. §§ 51.135-51.143 (Supp.1952).

[232] *fn59 Ibid.

[233] *fn60 22 C.F.R. § 51.142 (Supp.1955).

[234] *fn61 Id. § 51.135, reading in full text as follows:

[235] "Limitations on issuance of passports to persons supporting Communist movement.

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

[236] "(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion - not otherwise rebutted by the evidence - that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

[237] "(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion - not otherwise rebutted by the evidence - that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

[238] "(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

[239] *fn62 Ibid.

[240] *fn63 Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

[241] *fn64 E.g., Shachtman v. Dulles, supra note 37; Boudin v. Dulles, infra; Robeson v. Dulles, 98 U.S.App.D.C. 313, 235 F.2d 810 (1956), certiorari denied 352 U.S. 895, 77 S. Ct. 131, 1 L. Ed. 2d 86 (1956); Dulles v. Nathan, 96 U.S.App.D.C. 190, 225 F.2d 29 (1955).

[242] *fn65 See American Communications Ass'n v. Douds (supra).

[243] *fn66 Sec. 6, 64 Stat. 993, 50 U.S.C.A. § 785.

[244] *fn67 Sec. 15, 64 Stat. 1002, 50 U.S.C.A. § 794.

[245] *fn68 1957, 100 U.S.App.D.C. 116, 243 F.2d 222.

[246] *fn69 1955, 227 F.2d 708.

[247] *fn70 Moyer v. Peabody, 212 U.S. 78, 84, 29 S. Ct. 235, 53 L. Ed. 410 (1909); Federal Communications Comm. v. WJR, 337 U.S. 265, 275, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).

[248] *fn71 See United States v. Curtiss-Wright Corp. (supra) 299 U.S. at page 320, 57 S. Ct. at page 221.

[249] *fn72 Id., 299 U.S. at page 321, 57 S. Ct. at page 221.

[250] *fn73 98 U.S.App.D.C. 305, 235 F.2d 532 (1956).

[251] *fn74 Supra note 37.

IN AGREEMENT FOOTNOTES

[252] *fn1 When the Supreme Court in Garner determined that the state agency may properly elicit from city employees information "that may prove relevant to their fitness and suitability for the public service," 341 U.S. at page 720, 71 S. Ct. at page 912, it apparently assumed the proposition that the state agency had power to bar from employment those who are not fit or suitable for the public service.

[253] *fn2 See Shachtman v. Dulles, 1955, 96 U.S.App.D.C. 287, 225 F.2d 938; Boudin v. Dulles, 1956, 98 U.S.App.D.C. 305, 235 F.2d 532; Dayton v. Dulles, 1956, 99 U.S.App.D.C. 47, 237 F.2d 43; cf. Kraus v. Dulles, 1956, 98 U.S.App.D.C. 343, 235 F.2d 840. The highly restrictive position taken by Judge Bazelon in his learned dissent is opposed to the spirit if not the letter of these decisions. But it may be agreed that further congressional action in the passport field would be very desirable.

[254] *fn3 See American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 402, 70 S. Ct. 674; see also United States v. Rumely, 1953, 345 U.S. 41, 56, 73 S. Ct. 543, 97 L. Ed. 770.

[255] *fn4 22 U.S.C.A. § 213 requires every passport applicant to furnish under oath an application containing "a true recital of each and every matter of fact which may be required by law or by any rules authorized by law." See also 22 C.F.R. 51.14. Section 51.142 of the regulations authorizes the affidavit, and Section 51.74 specifies that the affidavit "shall be considered as, and become, a part of the application."

[256] *fn5 The thrust of appellant's argument is that the issuance of a passport is being unlawfully conditioned upon the requirement of a "test oath." But as the Supreme Court pointed out in Garner (supra) entirely different issues are raised by a requirement that certain conduct or affiliation be denied under oath, and by a requirement that information "with respect to" a stated subject matter be given.

[257] *fn6 See Garner, supra 341 U.S. at page 720, 71 S. Ct. at page 912: "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party . . .. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge."

[258] MINORITY OPINIONFOOTNOTES

[259] *fn1 See 3 Hackworth, Digest of International Law § 268 (1942).

[260] *fn2 Shachtman v. Dulles, 1955, 96 U.S.App.D.C. 287, 289-290, 225 F.2d 938, 940-941.

[261] *fn3 Actually the first requirement of a passport for travel was during World War I. Act of May 22, 1918, 40 Stat. 559, 22 U.S.C.A. §§ 223-226b, Proclamation No. 1473, Aug. 8, 1918, 40 Stat. 1829. These controls expired March 3, 1921. Pub.Res. No. 64, 41 Stat. 1359. By Act of June 21, 1941, 55 Stat. 252, 22 U.S.C.A. § 223, Congress amended the 1918 Act to apply during a proclaimed emergency and, on November 14, 1941, the President issued Proclamation No. 2523, 55 Stat. 1696, U.S.Code Cong.Service 1941, p. 883, restoring travel controls which have remained in effect since then. The 1941 statute was replaced by § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8

U.S.C.A. 1185, and on January 17, 1953, the revised statutory authority was invoked by Proclamation No. 3004, 67 Stat. C31, U.S.Code Cong. and Adm.News 1953, p. 915.

[262] In addition to being legally required as an exit permit, a passport has become a practical necessity because foreign countries have increasingly been requiring it as a condition to entry. See Shachtman v. Dulles, 96 U.S.App.D.C. at page 290, 225 F.2d at page 941; Bauer v. Acheson, D.C., 1952, 106 F.Supp. 445, 451; Comment, 61 Yale L.J., infra note 28, at pages 171-172.

[263] *fn4 See, for example, Bauer v. Acheson, supra note 3; Dulles v. Nathan, 1955, 96 U.S.App.D.C. 190, 225 F.2d 29; Shachtman v. Dulles, supra note 2; Boudin v. Dulles, 1956, 98 U.S.App.D.C. 305, 235 F.2d 532; Robeson v. Dulles, 1956, 98 U.S.App.D.C. 313, 235 F.2d 810, certiorari denied, 1956, 352 U.S. 895, 77 S. Ct. 131, 1 L. Ed. 2d 86; Dayton v. Dulles, 1956, 99 U.S.App.D.C. 47, 237 F.2d 43.

[264] *fn5 17 Fed.Reg. 8013, Sept. 4, 1952, 22 C.F.R. §§ 51.135-51.143 (1957 Supp.).

[265] *fn6 Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C.A. § 785, which makes it a crime for a "member of [a Communist] organization" to apply for or use a passport, is inoperative until such an organization has registered or been finally ordered to do so. Neither of these events has occurred. Communist Party v. Subversive Activities Control Board, 1956, 351 U.S. 115, 76 S. Ct. 663, 100 L. Ed. 1003, reversing, 1954, 96 U.S.App.D.C. 66, 223 F.2d 531.

[266] *fn7 The Act of May 30, 1866, 14 Stat. 54, disqualified noncitizens. By Act of June 14, 1902, 32 Stat. 386, the law was amended to disqualify persons not owing allegiance to the United States, "whether citizens or not." The amendment was designed to cover citizens of Puerto Rico, Hawaii, and the Philippines. 35 Cong.Rec. 5697-99, 6588-89, 57th Cong., 1st Sess. (1902). The statute is now codified as 22 U.S.C.A. § 212. For convenience, the class of eligibles will be referred to herein as "citizens."

[267] *fn8 22 C.F.R. p. 98 (1957 Supp.); 17 Fed.Reg. 8013.

[268] *fn9 See also the Secretary's brief in Boudin v. Dulles, supra note 4, at p. 16.

[269] *fn10 Supra note 3.

[270] *fn11 3 Fed.Reg. 799, 22 C.F.R. §§ 51.1-51.77 (1949).

[271] *fn12 22 C.F.R. §§ 51.101-51.134 (1949); and see source note at p. 103. "A study of the executive order and the departmental order indicates that the chief element in the discretion exercised by the Secretary of State concerned the type of proof required to establish citizenship or allegiance." Note, 41 Geo.L.J., infra note 28, at 76.

[272] *fn13 See Department of State, The American Passport, ch. IV (1898); Exec.Order No. 654, June 13, 1907; Exec.Order No. 4359-A, Dec. 19, 1925; Exec.Order No. 4382-A, Feb. 12, 1926; Exec.Order No. 4488, Aug. 3, 1926; Exec.Order No. 5860, June 22, 1932; Exec.Order No. 6650, March 23, 1934.

[273] *fn14 Supra note 3.

[274] *fn15 The regulations involved in this case, which were also in existence when the

proclamation was issued, were not referred to directly or indirectly.

[275] *fn16 11 Stat. 60; reenacted in substantially the same form by the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887. The language of the original act was "shall be authorized to grant" rather than "may grant," but the effect is the same.

[276] *fn17 Comment, 23 U.Chi.L.Rev., infra note 28, at 272 n. 25; Doman, A Comparative Analysis: Do Citizens Have the Right to Travel, 43 A.B.A.J. 307, 308 (1957).

[277] *fn18 The original 1856 Act, 11 Stat. 60, combined the present § 211a with the present § 212 which disqualifies non-citizens.

[278] *fn19 Supra note 13.

[279] *fn20 Supra note 3.

[280] *fn21 This act, though no longer included in the United States Code, has not been repealed and is still in effect. Savorgnan v. United States, 1950, 338 U.S. 491, 498-499, 70 S. Ct. 292.

[281] *fn22 See also op. cit. supra note 1, p. 163.

[282] *fn23 8 U.S.C.A. §§ 1481 and 1483; Savorgnan v. United States, 338 U.S. at page 503, 70 S. Ct. at page 298.

[283] *fn24 Supra note 6.

[284] *fn25 Ibid.

[285] *fn26 In the last session of Congress, legislation was introduced by Representative Walter, which would have amended the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq. to provide for a passport review procedure and would have denied passports to persons under Communist discipline in much the fashion now employed by the State Department. The bill died in committee. H.R. 9991, 102 Cong.Rec. 4266, 84th Cong., 2d Sess., March 15, 1956.

[286] *fn27 See Note, 41 Geo.L.J., infra note 28, at page 89.

[287] *fn28 Comment, The Passport Puzzle, 23 U.Chi.L.Rev. 260 (1956); Note, Passports and Freedom of Travel: The Conflict of a Right and a Privilege, 41 Geo.L.J. 63, 88 (1952); Note, "Passport Denied": State Department Practice and Due Process, 3 Stan.L.Rev. 312 (1951); Parker, The Right to Go Abroad: To Have and to Hold a Passport, 40 Va.L.Rev. 853, 870 (1954); Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 Yale L.J. 171 (1952).

[288] *fn29 96 U.S.App.D.C. at page 290, 225 F.2d at page 941. See also Williams v. Fears, 1900, 179 U.S. 270, 274, 21 S. Ct. 128, 130, 45 L. Ed. 186, referring to "freedom or egress from the state."

[289] *fn30 Dayton v. Dulles, supra note 4; Boudin v. Dulles, supra note 4; Bauer v. Acheson, supra note 3; see also Dulles v. Nathan, supra note 4, remanding Nathan v. Dulles, D.C.1955, 129 F.Supp. 951, for vacation of judgment and dismissal of complaint on

ground of mootness.

[290] *fn31 Shachtman v. Dulles, supra note 2; see Kraus v. Dulles, 1956, 98 U.S.App.D.C. 343, 235 F.2d 840.

[291] *fn32 In saying in the Communist Party case "that the Government may validly decline" a passport to a Communist, this court was referring to the passport in its aspect as a documentary assurance of "the protection and good offices of American diplomatic and consular officers abroad," 1954, 96 U.S.App.D.C. 66, 90, 223 F.2d 531, 555, and not as an exit permit indispensable to travel. As for the latter aspect of a passport, i.e., whether a restriction upon liberty to travel is constitutional, the court said, ". . . we need not, and do not, enter upon consideration of that question . . .." 96 U.S.App.D.C. at page 91, 223 F.2d at page 556. Later in Shachtman, the court did consider that question and concluded, as we have already seen, that there is a constitutionally protected right, supra note 29; but how much protection springs from the First Amendment has not been determined.

[292] *fn33 Mr. Justice Cardozo dissenting in Panama Refining Co. v. Ryan, 1935, 293 U.S. 388, 440, 55 S. Ct. 241, 256, 79 L. Ed. 446. The Secretary argues that standardless delegation is not invalid in a field where the Executive possesses inherent power, citing United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255.As I shall show, however, the delegation problem cannot thus be avoided, for the authority here claimed is not encompassed within the President's inherent power in the field of foreign relations.

[293] *fn34 The majority finds "nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath." [248 F.2d 574] But the analogy sought to be established founders upon the hard fact that the passport applicant does not seek a permit or a license - he seeks to implement a constitutionally protected right. The requirement of the affidavit is also sought to be defended by analogy to ordinary pleading rules. But this analogy also collapses. Pleadings may be in the alternative; they may be inconsistent or hypothetical; they are not under oath. A defendant is not required to submit to a test oath as a qualification of his right to receive justice.

[294] *fn35 347 U.S. at page 530, 74 S. Ct. at page 742.

[295] *fn36 See discussion at note 90 infra and related text.

[296] *fn37 Thomas v. Collins, 1945, 323 U.S. 516, 532, 65 S. Ct. 315, 323, 89 L. Ed. 430.

[297] *fn38 Dennis v. United States, 1951, 341 U.S. 494, 510, 71 S. Ct. 857, 95 L. Ed. 1137, adopting the statement of Chief Judge Hand below, United States v. Dennis, 2 Cir., 1950, 183 F.2d 201, 212.

[298] *fn39 See also the concurring opinion of Mr. Justice Jackson.

[299] *fn40 That some unions have remained powerful and effective without the privileges of the Labor Relations Act is common knowledge.

[300] *fn41 One of the individuals who has sought in vain for many years to go abroad was recently reported to have sent a "cordial message of greetings" to the Soviet Union which was published in the Communist Party newspaper Pravda, and broadcast by the Moscow radio. N.Y. Times, Jan. 2, 1957, p. 16, col. 6."Spies and traitors do not usually travel

abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have amply demonstrated." Parker, op. cit. supra note 28 at 873.

[301] *fn42 Wyzanski, Freedom to Travel, The Atlantic Monthly, Oct. 1952, 66, 68.

[302] *fn43 Ibid.

[303] *fn44 See also Communist Party v. Subversive Activities Control Board, supra note 32.

[304] *fn45 "Limitations on issuance of passports to certain other persons. In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 C.F.R. § 51.136 (Supp.1957).

[305] *fn46 18 U.S.C. §§ 371, 791-97, 2151-56, 2381-90.

[306] *fn47 50 U.S.C.A. § 783.

[307] *fn48 Id., § 843.

[308] *fn49 18 U.S.C. § 951.

[309] *fn50 Id., § 953.

[310] *fn51 Id., § 1073.

[311] *fn52 It has been observed that, since the common law attributes to personal liberty, according to Blackstone, "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct," "the distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree." Comment, 61 Yale L.J. supra note 28, at 190; see also Doman, op. cit. supra note 17 at 310.

[312] Constitutional safeguards are "especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed." Mr. Justice Jackson, dissenting in Shaughnessy v. U.S. ex rel. Mezei, 1953, 345 U.S. 206, 225, 73 S. Ct. 625, 97 L. Ed. 956. In other legal systems, as Mr. Justice Jackson points out, other considerations may govern. He cites the testimony of Hermann Goring at the Nuremburg trials:

[313] ". . . those who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody, and these were the people who were taken to concentration camps.. . . Likewise, if for political reasons . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." Id. 345 U.S. at pages 225-226, n. 8, 73 S. Ct. at page 636.

[314] *fn53 The Emergency Detention Act of 1950 (Title II of the Internal Security Act), to deal with "fifth column" problems, authorizes the President, in time of invasion, declared

state of war or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend and detain persons as to whom there is reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C.A. §§ 812, 813, 64 Stat. 1021 (1950). The original bill, S. 4130, 81st Cong., 2d Sess. (1950), had contained provisions authorizing detention during such "cold war" emergencies as an "imminent invasion" or a congressionally declared emergency, but these provisions were eliminated because of doubtful constitutionality. Note, The Internal Security Act of 1950, 51 Col.L.Rev. 606, 651 (1951).

[315] *fn54 96 U.S.App.D.C. at page 289, 225 F.2d at page 940.

[316] *fn55 96 U.S.App.D.C. at page 290, 225 F.2d at page 941.

[317] *fn56 Mr. Justice Clark concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at page 661 n. 3, 72 S. Ct. at page 883. See the authorities collected in Z & F Assets Realization Corp. v. Hull, 1940, 72 App.D.C. 234, 114 F.2d 464.

[318] *fn57 48 Stat. 811 (1934).

[319] *fn58 United States v. Palmer, 1818, 3 Wheat. 610, 633-634, 4 L. Ed. 471; Jones v. United States, 1890, 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Oetjen v. Central Leather Co., 1918, 246 U.S. 297, 38 S. Ct. 309, 62 L. Ed. 726; United States v. Belmont, 1937, 301 U.S. 324, 330, 57 S. Ct. 758, 81 L. Ed. 1134; United States v. Pink, 1942, 315 U.S. 203, 229, 62 S. Ct. 552, 86 L. Ed. 796; Latvian State Cargo & Passenger S.S. Co. v. McGrath, 88 U.S.App.D.C. 226, 188 F.2d 1000, certiorari denied, 1951, 342 U.S. 816, 72 S. Ct. 30, 96 L. Ed. 617.

[320] *fn59 Ware v. Hylton, 1796, 3 Dall. 199, 260, 1 L. Ed. 568; Doe ex dem. Clark v. Braden. 1853, 16 How. 635, 657, 14 L. Ed. 1090; Terlinden v. Ames, 1902, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534; Ivancevic vic v. Artukovic, 9 Cir., 1954, 211 F.2d 565, 573.

[321] *fn60 Foster v. Neilson, 1829, 2 Pet. 253, 307-309, 7 L. Ed. 415; Williams v. Suffolk Ins. Co., 1839, 13 Pet. 415, 10 L. Ed. 226; In re Cooper, 1892, 143 U.S. 472, 12 S. Ct. 453, 36 L. Ed. 232; The Kodiak, D.C.Alaska 1892, 53 F. 126.

[322] *fn61 Wilson v. Shaw, 1907, 204 U.S. 24, 27 S. Ct. 233, 51 L. Ed. 351; Mr. Justice Frankfurter, dissenting in United States v. California, 1947, 332 U.S. 19, 45, 67 S. Ct. 1658, 91 L. Ed. 1889.

[323] *fn62 United States ex rel. Knauff v. Shaughnessy, 1950, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L. Ed. 317.

[324] *fn63 Carlson v. Landon, 1952, 342 U.S. 524, 534, 72 S. Ct. 525, 96 L. Ed. 547; Harisiades v. Shaughnessy, 1952, 342 U.S. 580, 587-590, 72 S. Ct. 512, 96 L. Ed. 586.

[325] *fn64 United States v. Von Clemm, 2 Cir., 1943, 136 F.2d 968, 970.

[326] *fn65 Mr. Justice Douglas, concurring in Koki Hirota v. McArthur, 1949, 338 U.S. 197, 208, 69 S. Ct. 1238, 93 L. Ed. 1902.

[327] *fn66 Chicago & Southern Air Lines v. Waterman Steamship Corp., 1948, 333 U.S.

103, 68 S. Ct. 431, 92 L. Ed. 568.

[328] *fn67 Z & F Assets Realization Corp. v. Hull, 1940, 72 App.D.C. 234, 114 F.2d 464, 466, affirmed, 1941, 311 U.S. 740, 61 S. Ct. 351, 85 L. Ed. 288.

[329] *fn68 Comment, 61 Yale L.J. at 187. The Chicago & Southern Air Lines case, supra note 66, is not an exception. The Court there held that the President's selection of one applicant over another for an international air route was not to be interfered with, because "both as Commander-in-Chief and as the Nation's organ for foreign affairs, [he] has available intelligence services whose reports are not and ought not to be published to the world." 333 U.S. at page 111, 68 S. Ct. at page 436. "The Court evidently was assuming that any secret information the President may have relied upon was in the nature of legislative facts and not adjudicative facts - that the information pertained to international relations and not to qualifications of the particular applicants. . . . Thus an applicant for a license is entitled to a trial type of hearing on issues of fact concerning his qualifications but not necessarily on issues of fact concerning need for the service or conditions in the territory to be served." Davis, The Requirement of a Trial-Type Hearing, 70 Harv.L.Rev. 193 at pages 264, 275 (1956).

[330] *fn69 That the executive power with respect to passports is not of this conclusive character was settled in Perkins v. Elg, 1939, 307 U.S. 325, 349-350, 59 S. Ct. 884, 83 L. Ed. 1320.

[331] *fn70 See also the Chicago & Southern Air Lines case, supra note 66, 333 U.S. at page 111, 68 S. Ct. 431.

[332] *fn71 "The validity of restrictions on the freedom of movement of particular individuals, both substantively and procedurally, is precisely the sort of matter that is the peculiar domain of the courts." Comment, 61 Yale L.J. at page 187. The Secretary's position that "the issuance and denial of passports is within the field of conducting foreign policy" has been described by one commentator as "[a] strange, and to this writer's knowledge, unique position among the countries with democratic and constitutional background." Doman, op. cit. supra note 17, at page 309.

[333] *fn72 Madison wrote to Jefferson in 1798:

[334] "The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." Padover, The Complete Madison (1953) 257-58.

[335] Mr. Justice Jackson, concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at page 642, 72 S. Ct. at page 873, declared:

[336] ". . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

[337] *fn73 Patterson, In re the United States v. The Curtiss-Wright Corporation, 22 Texas L.Rev. 286 (1944).

[338] *fn74 Goebel, Constitutional History and Constitutional Law, 38 Col.L.Rev. 555, 571-72 (1938). In token that his fears are not fanciful, Professor Goebel cites Den. ex dem. Murray v. Hoboken Land & Improvement Co., 1855, 18 How. 272, 276-277, 15 L. Ed. 372, where Mr. Justice Curtis, in upholding the right of the Solicitor of the Treasury Department to proceed by distraint, without judicial process, against the property of a defalcating customs collector, reasoned that the taking was not without due process of law because at common law the Exchequer could use the writ of extendi facias to seize the "goods of the King's debtor . . . without requiring any previous inquisition . . .."

[339] *fn75 1 Willoughby, The Constitution of the United States 92 (2d ed. 1929); see also Leviton, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 Yale L.J. 467, 493 (1946). See the concurring opinion of Mr. Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at page 641, 72 S. Ct. at page 873, replying to the Government's argument that the vesting of "The Executive Power" in the President is a grant of all possible executive power: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." One of the evils denounced in the Declaration may have been the King's attempt to prevent emigration to the colonies. Note, 41 Geo.L.J., supra note 28, at 70. Even in the earliest colonial period, Charles I, in the exercise of the royal prerogative to confine the subject to the realm, issued a proclamation against taking passage to America, because some who were going were "'idle and refractory persons' who wished to live out of reach of authority." 10 Holdsworth, History of English Law 390 (1938).

[340] *fn76 Our Foreign Policy, Department of State Publication 3972, General Foreign Policy Series 26, Sept. 1950, p. 4.

[341] *fn77 Supra notes 58-67. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at page 587, 72 S. Ct. at page 867, the Court said, dealing with the analogous question of the extent of the President's military power: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." See also text at notes 95-97 (infra).

[342] *fn78 A specific royal prerogative, in its devolution upon our national government, may be divided between the executive and legislative branches. See, e.g., 1863, 10 Ops. Att'y Gen. 452.

[343] *fn79 See Note, 41 Geo.L.J. at 64-70.

[344] *fn80 From the struggles of Henry II with Thomas a Becket emerged, in 1164, the fourth article of the Constitutions of Clarendon prohibiting ecclesiastics from leaving the realm without the king's permission.

[345] *fn81 John's struggle with the barons culminated, in 1215, in Magna Carta which provided in c. 42:

[346] "It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as [otherwise] provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy - reserving always the allegiance due to us."

[347] This provision did not survive John. It was omitted from the confirmation of the Charter in 1217 and the definitive proclamation by Henry III in 1225 which is the Charter's present statutory form. Supra note 79 at 67-68; Goebel, op. cit. supra note 74, at 573-74 n. 51.

[348] *fn82 Largely affecting children sought to be sent abroad for Catholic education. Supra note 79, at 69.

[349] *fn83 Goebel, op. cit. supra note 74, at 573-74 n. 51; 10 Holdsworth, op. cit. supra note 75, at 391-92.

[350] *fn84 1 Blackstone, Commentaries (Wendell's ed. 1854) 266 n. 22.

[351] *fn85 Id. at 265-66.

[352] *fn86 Ordinances, No. 89, quoted in Beames, Ne Exeat Regno (1st Amer. ed., 1821) 17. In form, the writ commanded the subject "that he go not beyond the seas or out of the realm without a license" upon the stated ground that "we are given to understand that you design to go privately into foreign parts and intend to prosecute there many things prejudicial to us . . .." Provision was made whereby the subject could apply to Chancery for a license. Parker, op. cit. supra note 28, at 867.

[353] *fn87 The writ ne exeat has continued to be employed only as a private equitable remedy to prevent flight of creditors. Supra note 85; Parker, op. cit. supra note 28 at 867-68. In its aspect as a private equitable remedy, it was imported into our law. 1 Stat. 334 (1793); Judicial Code § 261, 36 Stat. 1162 (1911), 28 U.S.C. § 376 (1940); now covered by Rule 64, Fed.R.Civ.P., 28 U.S.C., see Notes of Advisory Committee. The royal prerogative still exists in England, but whether it may be exercised in time of peace is doubtful. Note, 41 Geo.L.J. at 70.

[354] *fn88 Rutland, The Birth of the Bill of Rights 11 (1955). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." Schick v. United States, 1904, 195 U.S. 65, 69, 24 S. Ct. 826, 827, 49 L. Ed. 99. Professor Crosskey refers to the Commentaries as "that great 'best-seller' of the eighteenth century" and points out that some of the members of the Constitutional Convention were on the subscription list of the original American edition in 1772. Politics and the Constitution, Vol. 1, p. 411, and Vol. 2, p. 1326, n. 3 (1953).

[355] *fn89 Cf. John Marshall, in an address to the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Congress, 6th Cong., 1st Sess., col. 613 (1800).

[356] *fn90 The "passports" referred to in this part of the prerogative are merely "safe

conducts" which were issued to visiting strangers "under the king's sign-manual," rather than by one of "his embassadors abroad." Id at 259. This part of the foreign affairs prerogative has been carried over to our Government. See United States ex rel. Knauff v. Shaughnessy, 1950, 338 U.S. 537, 542, 70 S. Ct. 309, 312, 94 L. Ed. 317: "The exclusion of aliens is a fundamental act of sovereignty . . . [which] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." See also Carlson v. Landon, 1952, 342 U.S. 524, 534, 72 S. Ct. 525, 96 L. Ed. 547; Harisiades v. Shaughnessy, 1952, 342 U.S. 580, 587-589, 72 S. Ct. 512, 96 L. Ed. 586; and Galvan v. Press, 1954, 347 U.S. 522, 530, 74 S. Ct. 737, 98 L. Ed. 911. The majority's reliance upon Galvan to support a power to control the movements of citizens is thus misplaced. See text at note 36 supra.

[357] So far as the rest of the royal prerogative over foreign affairs is concerned, the power to make war and to issue letters of marque and reprisal were confined by our Constitution to the legislative branch, and the sending of ambassadors to and making of treaties with other nations were given to the President, but with a role preserved for the Senate.

[358] *fn91 E.g., "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," the various militia powers, and the authority to legislate with respect to places "for the Erection of Forts, Magazines, Arsenals, Dock-Yards and other needful Building." Constitution, Art. I, § 8.

[359] *fn92 Professor Crosskey points out that St. George Tucker, a Jeffersonian, in his 1803 edition of Blackstone, noted that "the student [could] not fail to have remarked how many of the most important prerogatives of the British Crown [had been] transferred from the executive authority, in the United States, to the supreme national council in Congress." Op. cit. supra note 88 at 415. Crosskey concludes as to the military prerogative: "So, in this whole field in which the powers of the King were so very great - the field of authority from which, if from any, the Convention may have feared a future American monarchy might conceivably arise - the 'supremacy' of Congress was most carefully and amply provided: apart from the bare 'command' in actual action and administration, all the foregoing authorities of the English King, as 'generalissimo,' were specifically transferred to Congress or subjected, in the plainest terms, to Senatorial or Congressional control." Id. at 427.

[360] *fn93 A cognate of the writ ne exeat is the writ available to the king to recall a subject to the realm from abroad. Supra note 84 at 266. To the extent that this prerogative power passed to our Government, it is lodged not in the President but in Congress. See Blackmer v. United States, 1932, 284 U.S. 421, 437-438, 52 S. Ct. 252, 76 L. Ed. 375.

[361] *fn94 The executive absolutism implicit in the royal prerogative has its counterpart in modern systems of government which, though formally representative, differ from ours in basic philosophy. Thus, under the Venezuelan theory of "cesarismo democratico," the president is "democracy personified, the nation made man" and his "influence and power . . . extend to all levels of government. . . ." Lott, Executive Power in Venezuela, 50 The American Political Science Review 422, 425, 440 (1956).

[362] *fn95 Winthrop, Military Law and Precedents (2d ed. 1920) 103.

[363] *fn96 Morgan, Court Martial Jurisdiction Over Non-Military Persons Under the Articles of War, 4 Minn.L.Rev. 79, 106 (1920).

[364] *fn97 Rankin, When the Civil Law Fails (1939) 138-39.

[365] *fn98 Cf. 18 U.S.C. § 1073.

[366] *fn99 Act of June 24, 1948, 62 Stat. 604, 50 U.S.C.A.Appendix, § 451 et seq.

[367] 1a Peters v. Hobby, 349 U.S. 331, 338, 75 S. Ct. 790, 99 L. Ed. 1129.

[368] 1b 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952), 22 U.S.C.A.§ 212, which amended 14 Stat. 54 (1866). Under the earlier law only citizens were eligible for passports.

[369] 2a It seems manifest that control was attempted. No longer was there to be merely the ascertainment of the obligation or not of allegiance. Before 8 U.S.C. § 1185(b), 8 U.S.C.A. § 1185(b), was enacted this qualification was the sole essential. The enactment, therefore, was a definite authorization by Congress of control of the travel of some who had that qualification.

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IN THE CONGRESS OF THE UNITED STATES

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Gordon W. Epperly, Petitioner

v.

United States, Respondent

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U.S. Const., 14th Amendment

Dyett v. Turner, 439 P2d 266 @ 269, 20 U2d 403

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IN THE SUPREME COURT FOR THE STATE OF UTAH

(**Dyett v. Turner**, 439 P2d 266 @ 269, 20 U2d 403 [1968])

THE NON-RATIFICATION OF THE 14TH AMENDMENT

"....

"In regard to the Fourteenth Amendment, which the present Supreme Court of the United States has by decision chosen as the basis for invading the rights and prerogatives of the sovereign States and its Citizens, it is appropriate to look at the means and methods by which that Amendment was foisted upon the Nation in times of emotional stress.

"It is common knowledge that any assumption of power will always attract a certain following, and if no resistance is offered to this show of strength, then the asserted powers are accepted without question. It is therefore my purpose to try to give a ray of hope to all those who believe that the States are capable of deciding for themselves whether prayer shall be permitted in schools, whether their bicameral legislatures may be composed of members elected pursuant to their own State constitutional standards.

"The method of amending the **U.S. Constitution** is provided for in **Article V** of the original document. No other method will accomplish this purpose. That article provides as follows:

> "`The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention

> for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;'

"The Civil war had to be fought to determine whether the Union indissoluble and whether any State could secede or withdraw there from. The issue was settled first on the field of battle by force of arms, and second by the pronouncement of the highest court of the land. In the case of **State of Texas v. White,** *7 Wall. 700, 19 L.Ed. 227,* it was claimed that Texas having seceded from the Union and severed her relationship with a majority of the States of the Union, and having by her Ordinance of Secession attempted to throw off her allegiance to the Constitution of the United States, had thus disabled herself from prosecuting a suit in the Federal Courts. In speaking on this point the Court at page 726, **19 L.Ed. 227** held:

> `When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.
>
> `Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest of subjugation.
>
> `Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first out break of the rebellion.'

"It is necessary to review the historical background to understand how the **Fourteenth Amendment** came to be a part of our **U.S. Constitution**.

"**General Lee** had surrendered his army on April 9, 1865, and **General Johnston** surrendered his 17 days later. Within a period of less than six weeks thereafter, not one Confederate soldier was bearing arms. By June 30, 1865, the Confederate States were all restored by *Presidential Proclamation* to their proper positions as States in an indissoluble Union, (**13 Stat. 760, 763, 764, 765, 767, 768, 769, 771** [1865]) and practically all Citizens thereof.
(**13 Stat. 758** [1865])

"A few Citizens were excepted from the amnesty proclamation, such, for example, as Civil or Diplomatic Officers of the late Confederate government and all of the seceding States; United States Judges, members of Congress and commissioned Officers of the United States Army and Navy who left their posts to aid the rebellion: Officers in the Confederate military forces above the rank of Colonel in the Army and Lieutenant in the Navy; all who resigned commissions in the Army or Navy of the United States to assist the rebellion; and all Officers of the military forces of the Confederacy who had been educated at the military or naval academy of the United States, etc., etc., had been granted amnesty. Immediately thereafter each of the seceding States functioned as regular States in the Union with both State and Federal Courts in full operation.

"President Lincoln had declared the freedom of the slaves as a war measure, but when the war ended, the effect of the proclamation was ended, and so it was necessary to propose and to ratify the **Thirteenth Amendment** in order to

insure the freedom of the slaves.

"The 11 southern States, having taken their rightful and necessary place in the indestructible Union, proceeded to determine whether to ratify or reject the proposed **Thirteenth Amendment**.

"In order for the **Thirteenth Amendment** to become a part of the Constitution, it was necessary that the proposed Amendment be ratified by 27 of the 36 States. Among those 27 States ratifying the **Thirteenth Amendment** were 10 from the South, to wit, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, Georgia, Mississippi, Florida, and Texas.

"When the 39th Congress assembled on December 5, 1865, the Senators and Representatives from the 25 northern States voted to deny seats in both Houses of Congress to anyone elected from the 11 southern States. The full complement of Senators from the 36 States of the Union was 72, and the full membership in the House was 240. Since it requires only a majority vote (see **Article I, Section 5, Constitution of the United States**) to refuse a seat in Congress, only the 50 Senators and 182 Congressmen from the North were seated. All of the 22 Senators and 58 Representatives from the southern States were denied seats.

"**Joint Resolution No. 48**, proposing the **Fourteenth Amendment**, was a matter of great concern to the Congress and to the people of the Nation. In order to have this proposed Amendment submitted to the 36 States for ratification, it was necessary that two thirds of each house concur. A count of noses showed that only 33 Senators were favorable to the measure, and 33 was a far cry from two thirds of 72 and lacked one of being two thirds of the 50 seated Senators.

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"One **John P. Stockton** was seated on December 5, 1865, as one of the Senators from New Jersey. He was outspoken in his opposition to **Joint Resolution No. 48** proposing the **Fourteenth Amendment**. The leadership in the Senate, not having control of two thirds of the seated Senators, voted to refuse to seat **Mr. Stockton** upon the ground that he had received only a plurality and not a majority of the votes of the New Jersey legislature. It was the law of New Jersey, and several other States, that a plurality vote was sufficient for election. Besides, the Senator had already been seated. Nevertheless, his seat was -refused- and the 33 favorable votes thus became the required two thirds of the 49 members of the Senate.

"In the House of Representatives it would require 122 votes to be two thirds of the 182 members seated. Only 120 voted for the proposed Amendment, but because there were 30 abstentions it was declared to have been passed by a two thirds vote of the House.

"Whether it requires two thirds of the full membership of both Houses to propose an Amendment to the Constitution or only two thirds of those seated or two thirds of those voting is a question which it would seem could only be determined by the United States Supreme Court. However, it is perhaps not so important for the reason that the amendment is only -proposed- by Congress. It must be -ratified- by three fourths of the States in the Union before it becomes a part of the Constitution. The method of securing the passage through Congress is set out above, as it throws some light on the means used to obtain ratification by the States thereafter.

"Nebraska had been admitted to the Union and so the Secretary of State, in transmitting the proposed Amendment, announced that ratification by 28 States would be needed before the Amendment would become part of the Constitution since there were at the time 37 States in the Union. A rejection by 10 States would thus defeat the proposal.

"By March 17, 1867; the proposed Amendment had been ratified by 17 States and rejected by 10 with California voting to take no action thereon which was equivalent to rejection, thus the proposal was defeated.

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to be duly elected, and after the contest, the duly elected members of the legislature of Oregon rejected the proposed Amendment. However, this rejection came after the Amendment was declared passed.

"Despite the fact that the southern States had been functioning peacefully for two years and had been counted to secure ratification of the **Thirteenth Amendment**, Congress passed the ***Reconstruction Act***, which provided for the military occupation of 10 of the 11 southern States. It excluded Tennessee from military occupation and one must suspect it was because Tennessee had ratified the **Fourteenth Amendment** on July 7, 1866.

"The `***Act***' further disfranchised practically all white voters and provided that no Senator or Congressman from the occupied States could be seated in Congress until a new Constitution was adopted by each State which would be approved by Congress. The `***Act***' further provided that each of the 10 States was required to ratify the proposed **Fourteenth Amendment** and the **Fourteenth Amendment** must become a part of the **Constitution of the United States** before the military occupancy would cease and the States be allowed to have seats in Congress.

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> `And whereas the whole number of States in the United States is thirty-seven, to wit: [naming them];
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> `And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next there after named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three fourths of the whole number of States in the United States;

> `Now, therefore, be it known that I, **WILLIAM H. SEWARD**, Secretary of State of the United States, by virtue and in pursuant of the second section of the act of Congress, approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment had been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States." *** (**15 Stat. 707** (1868))'

"Congress was not satisfied with the proclamation as issued and on the next day passed a Concurrent Resolution wherein it was resolved:

> `That said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.'

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> `As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.'

"The duty of the Secretary of State was ministerial, to wit, to count and determine when three fourths of the States had ratified the proposed Amendment. He could not determine that a State, once having rejected a proposed Amendment, could thereafter approve it; nor could he determine that a State, once having ratified that proposal, could thereafter reject it. The Supreme Court, and not Congress, should determine whether the Amendment process be final or would not be final, whether the first vote was for ratification or rejection.

"In order to have 27 States ratify the **Fourteenth Amendment**, it was necessary to count those States which had first rejected and then under the duress of military occupation had ratified, and then also to count those States which initially ratified but subsequently rejected the proposal.

"To leave such dishonest counting to a fractional part of Congress is dangerous in the extreme. What is to prevent any political party having control of both Houses of Congress from refusing to seat the opposition and then passing a Joint Resolution to the effect that the Constitution is amended and that it is the duty of the Administrator of the General Services Administration/7 to proclaim the adoption? Would the Supreme Court of the United States still say the problem was political and refuse to determine whether constitutional standards had been met?

"How can it be conceived in the minds of anyone that a combination of powerful States can by force of arms deny another State a right to have representation in Congress until it has ratified an Amendment which its people oppose? The Fourteenth Amendment was adopted by means almost as bad as that suggested above./8

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IN THE CONGRESS OF THE UNITED STATES

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Gordon W. Epperly, Petitioner

v.

United States, Respondent

==========

U.S. Const., 14th Amendment

Dyett v. Turner, 439 P2d 266 @ 269, 20 U2d 403

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IN THE SUPREME COURT FOR THE STATE OF UTAH

(**Dyett v. Turner**, 439 P2d 266 @ 269, 20 U2d 403 [1968])

THE NON-RATIFICATION OF THE 14TH AMENDMENT

".....

"In regard to the Fourteenth Amendment, which the present Supreme Court of the United States has by decision chosen as the basis for invading the rights and prerogatives of the sovereign States and its Citizens, it is appropriate to look at the means and methods by which that Amendment was foisted upon the Nation in times of emotional stress.

"It is common knowledge that any assumption of power will always attract a certain following, and if no resistance is offered to this show of strength, then the asserted powers are accepted without question. It is therefore my purpose to try to give a ray of hope to all those who believe that the States are capable of deciding for themselves whether prayer shall be permitted in schools, whether their bicameral legislatures may be composed of members elected pursuant to their own State constitutional standards.

"The method of amending the **U.S. Constitution** is provided for in **Article V** of the original document. No other method will accomplish this purpose. That article provides as follows:

> "`The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;'

"The Civil war had to be fought to determine whether the Union indissoluble and whether any State could secede or withdraw there from. The issue was settled first on the field of battle by force of arms, and second by the pronouncement of the highest court of the land. In the case of **State of Texas v. White,** *7 Wall. 700, 19 L.Ed. 227,* it was claimed that Texas having seceded from the Union and severed her relationship with a majority of the States of the Union, and having by her Ordinance of Secession attempted to throw off her allegiance to the Constitution of the United States, had thus disabled herself from prosecuting a suit in the Federal Courts. In speaking on this point the Court at page 726, **19 L. Ed. 227** held:

> `When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.
>
> `Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a

> war for conquest of subjugation.
>
> `Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first out break of the rebellion.'

"It is necessary to review the historical background to understand how the **Fourteenth Amendment** came to be a part of our **U.S. Constitution**.

"**General Lee** had surrendered his army on April 9, 1865, and **General Johnston** surrendered his 17 days later. Within a period of less than six weeks thereafter, not one Confederate soldier was bearing arms. By June 30, 1865, the Confederate States were all restored by *Presidential Proclamation* to their proper positions as States in an indissoluble Union, (**13 Stat. 760, 763, 764, 765, 767, 768, 769, 771** [1865]) and practically all Citizens thereof. (**13 Stat. 758** [1865])

"A few Citizens were excepted from the amnesty proclamation, such, for example, as Civil or Diplomatic Officers of the late Confederate government and all of the seceding States; United States Judges, members of Congress and commissioned Officers of the United States Army and Navy who left their posts to aid the rebellion: Officers in the Confederate military forces above the rank of Colonel in the Army and Lieutenant in the Navy; all who resigned commissions in the Army or Navy of the United States to assist the rebellion; and all Officers of the military forces of the Confederacy who had been educated at the military or naval academy of the United States, etc., etc., had been granted amnesty. Immediately thereafter each of the seceding States functioned as regular States in the Union with both State and Federal Courts in full operation.

"President Lincoln had declared the freedom of the slaves as a war measure, but when the war ended, the effect of the proclamation was ended, and so it was necessary to propose and to ratify the **Thirteenth Amendment** in order to insure the freedom of the slaves.

"The 11 southern States, having taken their rightful and necessary place in the indestructible Union, proceeded to determine whether to ratify or reject the proposed **Thirteenth Amendment**.

"In order for the **Thirteenth Amendment** to become a part of the Constitution, it was necessary that the proposed Amendment be ratified by 27 of the 36 States. Among those 27 States ratifying the **Thirteenth Amendment** were 10 from the South, to wit, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, Georgia, Mississippi, Florida, and Texas.

"When the 39th Congress assembled on December 5, 1865, the Senators and Representatives from the 25 northern States voted to deny seats in both Houses of Congress to anyone elected from the 11 southern States. The full complement of Senators from the 36 States of the Union was 72, and the full

membership in the House was 240. Since it requires only a majority vote (see **Article I, Section 5, Constitution of the United States**) to refuse a seat in Congress, only the 50 Senators and 182 Congressmen from the North were seated. All of the 22 Senators and 58 Representatives from the southern States were denied seats.

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"The `***Act***' further disfranchised practically all white voters and provided that no Senator or Congressman from the occupied States could be seated in Congress until a new Constitution was adopted by each State which would be approved by Congress. The `***Act***' further provided that each of the 10 States was required to ratify the proposed **Fourteenth Amendment** and the **Fourteenth Amendment** must become a part of the **Constitution of the United States** before the military occupancy would cease and the States be allowed to have seats in Congress.

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> `That said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.'

Resolution set forth in proclamation of Secretary of State, (**15 Stat. 709** [1868]).

See also **U.S.C.A., Amends. 1 to 5, Constitution, p. 11**.

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Rogers v. Bellei
No. 24
Argued January 15, 1970
Reargued November 12, 1970
Decided April 5, 1971
401 U.S. 815

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Syllabus

Appellee challenges the constitutionality of § 301(b) of the Immigration and Nationality Act of 1952, which provides that one who acquires United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, who has met certain residence requirements, shall lose his citizenship unless he resides in this country continuously for five years between the ages of 14 and 28. The three-judge District Court held the section unconstitutional, citing *Afroyim v. Rusk,* 387 U.S. 253, and *Schneider v. Rusk,* 377 U.S. 163.

Held: Congress has the power to impose the condition subsequent of residence in this country on appellee, who does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States," and its imposition is not unreasonable, arbitrary, or unlawful. *Afroyim v. Rusk, supra,* and *Schneider v. Rusk, supra,* distinguished. Pp. 820-836.

296 F.Supp. 1247, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and HARLAN, STEWART, and WHITE, JJ., joined. BLACK, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 836. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 845. [401 U.S. 816]

BLACKMUN, J., lead opinion

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Under constitutional challenge here, primarily on Fifth Amendment due process grounds, but also on Fourteenth Amendment grounds, is § 301(b) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 236, 8 U.S.C.§ 1401(b).

Section 301(a) of the Act, 8 U.S.C. § 1401(a), defines those persons who "shall be nationals and citizens of the United States at birth." Paragraph (7) of § 301(a) includes in that definition a person born abroad "of parents one of whom is an alien, and the other a citizen of the United States" who has met specified conditions of residence in this country. Section 301(b), however, provides that one who is a citizen at birth under § 301(a)(7) shall lose his citizenship unless, after age 14 and before age 28, he shall come to the United States and be physically present here continuously for at least five years. We quote the statute in the margin.{1} [401 U.S. 817]

The plan thus adopted by Congress with respect to a person of this classification was to bestow citizenship at birth, but to take it away upon the person's failure to comply with a post-age-14 and pre-age-28 residential requirement. It is this deprival of citizenship, once bestowed, that is under attack here.

I

The facts are stipulated:

1. The appellee, Aldo Mario Bellei (hereinafter the plaintiff), was born in Italy on December 22, 1939. He is now 31 years of age.

2. The plaintiff's father has always been a citizen of Italy, and never has acquired United States citizenship. The plaintiff's mother, however, was born in Philadelphia in 1915, and thus was a native-born United States citizen. She has retained that citizenship. Moreover, she has fulfilled the requirement of § 301(a)(7) for physical presence [401 U.S. 818] in the United States for 10 years, more than five of which were after she attained the age of 14 years. The mother and father were married in Philadelphia on the mother's 24th birthday, March 14, 1939. Nine days later, on March 23, the newlyweds departed for Italy. They have resided there ever since.

3. By Italian law, the plaintiff acquired Italian citizenship upon his birth in Italy. He retains that citizenship. He also acquired United States citizenship at his birth under Rev.Stat. § 1993, as amended by the Act of May 24, 1934, § 1, 48 Stat. 797, then in effect.{2} That version of the statute, as does the present one, contained a residence condition applicable to a child born abroad with one alien parent.

4. The plaintiff resided in Italy from the time of his birth until recently. He currently resides in England, where he has employment as an electronics engineer with an organization engaged in the NATO defense program.

5. The plaintiff has come to the United States five different times. He was physically present here during the following periods:

April 27 to July 31, 1948
July 10 to October 5, 1951
June to October 1955 [401 U.S. 819]
December 18, 1962 to February 13, 1963

May 26 to June 13, 1965.

On the first two occasions, when the plaintiff was a boy of eight and 11, he entered the country with his mother on her United States passport. On the next two occasions, when he was 15 and just under 23, he entered on his own United States passport, and was admitted as a citizen of this country. His passport was first issued on June 27, 1952. His last application approval, in August, 1961, contains the notation "Warned abt. 301(b)." The plaintiff's United States passport was periodically approved to and including December 22, 1962, his 23d birthday.

6. On his fifth visit to the United States, in 1965, the plaintiff entered with an Italian passport and as an alien visitor. He had just been married, and he came with his bride to visit his maternal grandparents.

7. The plaintiff was warned in writing by United States authorities of the impact of § 301(b) when he was in this country in January, 1963, and again in November of that year, when he was in Italy. Sometime after February 11, 1964, he was orally advised by the American Embassy at Rome that he had lost his United States citizenship pursuant to § 301(b). In November, 1966, he was so notified in writing by the American Consul in Rome when the plaintiff requested another American passport.

8. On March 28, 1960, plaintiff registered under the United States Selective Service laws with the American Consul in Rome. At that time, he already was 20 years of age. He took in Italy, and passed, a United States Army physical examination. On December 11, 1963, he was asked to report for induction in the District of Columbia. This induction, however, was then deferred because of his NATO defense program employment. At the time of deferment, he was warned of the danger of losing his United States citizenship if he did not comply [401 U.S. 820] with the residence requirement. After February 14, 1964, Selective Service advised him by letter that, due to the loss of his citizenship, he had no further obligation for United States military service.

Plaintiff thus concededly failed to comply with the conditions imposed by § 301(b) of the Act.

II

The plaintiff instituted the present action against the Secretary of State in the Southern District of New York. He asked that the Secretary be enjoined from carrying out and enforcing § 301(b), and also requested a declaratory judgment that § 301(b) is unconstitutional as violative of the Fifth Amendment's Due Process Clause, the Eighth Amendment's Punishment Clause, and the Ninth Amendment, and that he is, and always has been, a native-born United States citizen. Because, under 28 U.S.C. § 1391(e), the New York venue was improper, the case was transferred to the District of Columbia. 28 U.S.C. § 1406(a).

A three-judge District Court was convened. With the facts stipulated, cross-motions for summary judgment were filed. The District Court ruled that § 301(b) was unconstitutional, citing *Afroyim v. Rusk,* 387 U.S. 253 (1967), and *Schneider v. Rusk,* 377 U.S. 163 (1964), and sustained the plaintiff's summary judgment motion. *Bellei v. Rusk,* 296 F.Supp. 1247 (DC 1969). This Court noted probable jurisdiction, 396 U.S. 811 (1969), and, after argument at the 1969 Term, restored the case to the calendar for reargument. 397 U.S. 1060 (1970).

III

The two cases primarily relied upon by the three-judge District Court are, of course, of particular significance here. [401 U.S. 821]

Schneider v. Rusk, 377 U.S. 163 (1964). Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's naturalization in the United States. She came to this country as a small child with her parents and remained here until she finished college. She then went abroad for graduate work, was engaged to a German national, married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, a passport was denied by the State Department on the ground that she had lost her United States citizenship under the specific provisions of § 352(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1484(a)(1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens.

The dissent (Mr. Justice Clark, joined by JUSTICES HARLAN and WHITE) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

Afroyim v. Rusk, 387 U.S. 253 (1967). Mr. Afroyim, a Polish national by birth, immigrated to the United States at age 19, and, after 14 years here, acquired United States citizenship by naturalization. Twenty-four years later, he went to Israel and voted in a political election there. In 1960, a passport was denied him by the State Department on the ground that he had lost his United States citizenship under the specific provisions of § 349(a)(5) of the Act, 8 U.S.C. § 1481(a)(5), by [401 U.S. 822] his foreign voting. The Court, by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general power, express or implied, to take away an American citizen's citizenship without his assent," 387 U.S. at 257; that Congress' power is to provide a uniform rule of naturalization and, when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well known but not uncontroversial dictum in *Osborn v. Bank of the United States,* 9 Wheat. 738, 827 (1824); and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure," and "to put citizenship beyond the power of any governmental unit to destroy," 387 U.S. at 263. *Perez v. Brownell,* 356 U.S. 44 (1958), a five-to-four holding within the decade and precisely to the opposite effect, was overruled.

The dissent (MR. JUSTICE HARLAN, joined by JUSTICES Clark, STEWART, and WHITE) took issue with the Court's claim of support in the legislative history, would elucidate the Marshall dictum, and observed that the adoption

of the Fourteenth Amendment did not deprive Congress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. 387 U.S. at 292.

It is to be observed that both Mrs. Schneider and Mr. Afroyim had resided in this country for years. Each had acquired United States citizenship here by the naturalization process (in one case, derivative, and in the other, direct) prescribed by the National Legislature. Each, in short, was covered explicitly by the Fourteenth Amendment's very first sentence:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

This, of course, accounts [401 U.S. 823] for the Court's emphasis in *Afroyim* upon "Fourteenth Amendment citizenship." 387 U.S. at 262.

IV

The statutes culminating in § 301 merit review:

1. The very first Congress, at its Second Session, proceeded to implement its power, under the Constitution's Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization" by producing the Act of March 26, 1790, 1 Stat. 103. That statute, among other things, stated,

> And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. . . .

2. A like provision, with only minor changes in phrasing and with the same emphasis on paternal residence, was continuously in effect through three succeeding naturalization Acts. Act of January 29, 1795, § 3, 1 Stat. 415; Act of April 14, 1802, § 4, 2 Stat. 155; Act of February 10, 1855, c. 71, 1, 10 Stat. 604. The only significant difference is that the 1790, 1795, and 1802 Acts read retrospectively, while the 1855 Act reads prospectively as well. *See Weedin v. Chin Bow,* 274 U.S. 657, 664 (1927), and *Montana v. Kennedy,* 366 U.S. 308, 311 (1961).

3. Section 1 of the 1855 Act, with changes unimportant here, was embodied as § 1993 of the Revised Statutes of 1874.{3} [401 U.S. 824]

4. The Act of March 2, 1907, § 6, 34 Stat. 1229, provided that all children born abroad who were citizens under Rev.Stat. § 1993 and who continued to reside elsewhere, in order to receive governmental protection, were to record at age 18 their intention to become residents and remain citizens of the United States, and were to take the oath of allegiance upon attaining their majority.{4}

5. The change in § 1993 effected by the Act of May 24, 1934, is reflected in n. 2 *supra.* This eliminated the theretofore imposed restriction to the paternal parent and prospectively granted citizenship, subject to a five-year continuous residence requirement and an oath, to the foreign-born child of either a citizen father or a citizen mother. This was the form of the statute at the time of plaintiff's birth on December 22, 1939.

6. The Nationality Act of 1940, § 201, 54 Stat. 1138, contained a similar condition directed to a total of five years' residence in the United States between the ages of 13 and 21.{5} [401 U.S. 825]

7. The Immigration and Nationality Act, by its § 407, 66 Stat. 281, became law in December, 1952. Its § 301(b) contains a five years' continuous residence condition (alleviated, with the 1957 amendment, *see* n. 1, by an allowance for absences less than 12 months in the aggregate) directed to the period between 14 and 28 years of age.

The statutory pattern, therefore, developed and expanded from (a) one, established in 1790 and enduring through the Revised Statutes and until 1934, where citizenship was specifically denied to the child born abroad of a father who

never resided in the United States, to (b), in 1907, a governmental protection condition for the child born of an American citizen father and residing abroad, dependent upon a declaration of intent and the oath of allegiance at majority, to (c), in 1934, a condition, for the child born abroad of one United States citizen parent and one alien parent, of five years' continuous residence in the United States before age 18 and the oath of allegiance within six months after majority, to (d), in 1940, a condition, for that child, of five years' residence here, not necessarily continuous, between ages 13 and 21, to (e), in 1952, a condition, [401 U.S. 826] for that child, of five years' continuous residence here, with allowance, between ages 14 and 28.

The application of these respective statutes to a person in plaintiff Bellei's position produces the following results:

1. Not until 1934 would that person have had any conceivable claim to United States citizenship. For more than a century and a half, no statute was of assistance. Maternal citizenship afforded no benefit. One may observe, too, that, if Mr. Bellei had been born in 1933, instead of in 1939, he would have no claim even today. *Montana v. Kennedy, supra.*

2. Despite the recognition of the maternal root by the 1934 amendment, in effect at the time of plaintiff's birth, and despite the continuing liberalization of the succeeding statutes, the plaintiff still would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did fulfill the residential condition imposed for him by any of the statutes.

3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. *See* nn. 5 and 1, *supra.*

Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child. For plaintiff Bellei, the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff [401 U.S. 827] nevertheless failed to satisfy any form of the condition.

V

It is evident that Congress felt itself possessed of the power to grant citizenship to the foreign born, and, at the same time, to impose qualifications and conditions for that citizenship. Of course, Congress obviously felt that way, too, about the two expatriation provisions invalidated by the decisions in *Schneider* and *Afroyim.*

We look again, then, at the Constitution, and further indulge in history's assistance:

Of initial significance, because of its being the foundation stone of the Court's decisional structure in *Afroyim,* and, perhaps by a process of after-the-fact osmosis of the earlier *Schneider* as well, is the Fourteenth Amendment's opening sentence:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The central fact in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a "Fourteenth Amendment first sentence" citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here. [401 U.S. 828]

The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence.

The reach of congressional power in this area is readily apparent:

1. Over 70 years ago, the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who were British subjects. *United States v. Won Kim Ark,* 169 U.S. 649, 668-671 (1898). The Court concluded that "naturalization by descent" was not a common law concept, but was dependent, instead, upon statutory enactment. The statutes examined were 25 Edw. 3, Stat. 2 (1350); 29 Car. 2, c. 6 (1677); 7 Anne, c. 5, § 3 (1708); 4 Geo. 2, c. 21 (1731); and 13 Geo. 3, c. 21 (1773). Later, Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray," and observed

> that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute. . . .

Weedin v. Chin Bow, 274 U.S. at 660. He referred to the cited English statutes, and stated, "These statutes applied to the colonies before the War of Independence."

We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli,* that is, that the place of birth governs citizenship status except as modified by statute.

2. The Constitution as originally adopted contained no definition of United States citizenship. However, it referred to citizenship in general terms and in varying contexts: Art. I, § 2, cl. 2, qualifications for members of the House; Art. I, § 3, cl. 3, qualifications for Senators; [401 U.S. 829] Art. II, § 1, cl. 5, eligibility for the office of President; Art. III, § 2, cl. 1, citizenship as affecting judicial power of the United States. And, as has been noted, Art. I, § 8, cl. 4, vested Congress with the power to "establish an uniform Rule of Naturalization." The historical reviews in the *Afroyim* opinions provide an intimation that the Constitution's lack of definitional specificity may well have been attributable in part to the desire to avoid entanglement in the then-existing controversy between concepts of state and national citizenship and with the difficult question of the status of Negro slaves.

In any event, although one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document, or, indeed, in any of the amendments adopted prior to the War Between the States.

3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Art. II, § 1, cl. 5, we have, in the Civil Rights Act of April 9, 1866, 14 Stat. 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native born:

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . .

This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868, with expansion to "[a]ll persons born or naturalized in the United States. . . ." As has been noted above, the amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure," and not subject to change by mere statute. *Afroyim v. Rusk,* 387 U.S. at 263. *See* H. Flack, Adoption of the Fourteenth Amendment 88-94 (1908).

Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of existing [401 U.S. 830] rights, and affirmative of existing law," so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States v. Wong Kim Ark,* 169 U.S. at 688. Then follows a most significant sentence:

> But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution

> to establish an uniform rule of naturalization.

Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

4. The Court has recognized the existence of this power. It has observed, "No alien has the slightest right to naturalization unless all statutory requirements are complied with. . . ." *United States v. Ginsberg,* 243 U.S. 472, 475 (1917). *See United States v. Ness,* 245 U.S. 319 (1917); *Maney v. United States,* 278 U.S. 17 (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent. As hereinabove noted, persons born abroad, even of United States citizen fathers who, however, acquired American citizenship after the effective date of the 1802 Act, were aliens. Congress [401 U.S. 831] responded to that situation only by enacting the 1855 statute. *Montana v. Kennedy,* 366 U.S. at 311. But more than 50 years had expired during which, because of the withholding of that benefit by Congress, citizenship by such descent was not bestowed. *United States v. Wong Kim Ark,* 169 U.S. at 673-674. Then, too, the Court has recognized that, until the 1934 Act, the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father. *Montana v. Kennedy, supra.*

Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei{6} and may prescribe a period of residence in the United States as a condition *precedent* without constitutional question.{7}

Thus, we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

VI

This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge.

1. The Congress has an appropriate concern with problems attendant on dual nationality. *Savornan v.* [401 U.S. 832] *United States,* 338 U.S. 491, 500 (1950); N. Bar-Yaacov, Dual Nationality xi and 4 (1961). These problems are particularly acute when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality. The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary.

The duality also creates problems for the governments involved. MR. JUSTICE BRENNAN recognized this when, concurring in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 187 (1963), a case concerning native-born citizens, he observed: "We have recognized the entanglements which may stem from dual allegiance. . . ." In a famous case, MR. JUSTICE DOUGLAS wrote of the problem of dual citizenship. *Kawakita v. United States,* 343 U.S. 717, 723-736 (1952). He noted that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting," *id.* at 733; that one with dual nationality cannot turn that status "into a fair-weather citizenship," *id.* at 736; and that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship," *ibid.* The District Court in this very case conceded:

> It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.

296 F.Supp. at 1252.

2. There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In *Perkins v. Elg,* 307 U.S. 325, 329 (1939), the Court observed that a native-born citizen [401 U.S. 833] who had acquired dual nationality during minority through his parents' foreign naturalization abroad did not lose his United States citizenship "provided that, on attaining majority, he elects to retain that citizenship and to return to the United States to assume its duties." In *Kawakita v. United States,* 343 U.S. at 734, the Court noted that a dual national, "under certain circumstances," can be deprived of his American citizenship through an Act of Congress. In *Mandoli v. Acheson,* 344 U.S. 133, 138 (1952), the Court took pains to observe that there was no statute in existence imposing an election upon that dual nationality litigant.

These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate, however, that this is possible, and, in *Mandoli,* the holding was based on the very absence of a statute, and not on any theory of unconstitutionality. And all three of these cases concerned persons who were born here, that is, persons who possessed Fourteenth Amendment citizenship; they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.

3. The statutory development outlined in Part IV above, by itself and without reference to the underlying legislative history, committee reports, and other studies, reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful, and not accidental. It was legislation structured with care, and in the light of then apparent problems.

4. The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair. Congress first has imposed [401 U.S. 834] a condition precedent in that the citizen parent must have been in the United States or its possessions not less than 10 years, at least five of which are after attaining age 14. It then has imposed, as to the foreign-born child himself, the condition subsequent as to residence here. The Court already had emphasized the importance of residence in this country as the talisman of dedicated attachment, *Weedin v. Chin Bow,* 274 U.S. at 666-667, and said:

> It is not too much to say, therefore, that Congress at that time [when Rev.Stat. § 1993 was under consideration] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso,
>
> > the heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship.
>
> Foreign Relations of the United States, Pt. 1, 1873, p. 259.

274 U.S. at 665-666. The same policy is reflected in the required period of residence here for aliens seeking naturalization. 8 U.S.C. § 1427(a).

5. We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all, on the asserted "premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," *Schneider* [401 U.S. 835] *v. Rusk,* 377 U.S. at 165, and on the announcement that Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *Afroyim v. Rusk,* 387 U.S. at 257. But, as pointed out above, these were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to "persons born or naturalized in the United States." We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside. *Afroyim v. Rusk,* 387 U.S. at 267 n. 23.

6. A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious.

7. Neither are we persuaded that a condition subsequent in this area impresses one with "second-class citizenship." That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light [401 U.S. 836] of the conceded fact that citizenship to this plaintiff was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not "second-class."

8. The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision of the statute and of his need to take up residence in the United States prior to his 23d birthday.

We hold that § 301(b) has no constitutional infirmity in its application to plaintiff Bellei. The judgment of the District Court is reversed.

BLACK, J., dissenting

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Less than four years ago, this Court held that

> the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

The holding was clear. Congress could not, until today, consistently with the Fourteenth Amendment enact a [401 U.S. 837] law stripping an American of his citizenship which he has never voluntarily renounced or given up. Now this Court, by a vote of five to four through a simple change in its composition, overrules that decision.

The Court today holds that Congress can indeed rob a citizen of his citizenship just so long as five members of this Court can satisfy themselves that the congressional action was not "unreasonable, arbitrary," *ante* at 831; "misplaced or arbitrary," *ante* at 832; or "irrational or arbitrary or unfair," *ante* at 833. My first comment is that not one of these "tests" appears in the Constitution. Moreover, it seems a little strange to find such "tests" as these announced in an opinion which condemns the earlier decisions it overrules for their resort to cliches, which it describes as "too handy and too easy, and, like most cliches, can be misleading." *Ante* at 835. That description precisely fits those words and clauses which the majority uses, but which the Constitution does not.

The Constitution, written for the ages, cannot rise and fall with this Court's passing notions of what is "fair," or "reasonable," or "arbitrary." The Fourteenth Amendment commands:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Speaking of this very language, the Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court. I dissent.

Bellei became an American citizen under the terms of [401 U.S. 838] § 1993 of the Revised Statutes, as amended,{1} and he has neither renounced his American citizenship nor voluntarily assented to any governmental ac terminating it. He has never given any indication of wanting to expatriate himself, but, rather, has consistently maintained that he wants to keep his American citizenship. In my view, the decision in *Afroyim,* therefore, requires the Court to hold here that Bellei has been unconstitutionally deprived by § 301(b) of the Immigration and Nationality Act of 1952{2} of his right to be an American citizen. Since § 301(b) does not take into account in any way whether the citizen intends or desires to relinquish his citizenship, that section is inevitably inconsistent with the constitutional principles declared in *Afroyim.*

The Court today holds that the Citizenship Clause of the Fourteenth Amendment has no application to Bellei. The Court first notes that *Afroyim* was essentially a case construing the Citizenship Clause of the Fourteenth Amendment. Since the Citizenship Clause declares that: "All persons born or naturalized in the United States . . . are citizens of the United States. . . ," the Court reasons that the protections against involuntary expatriation declared in *Afroyim* do not protect *all* American citizens, but only those "born or naturalized in the United States." Afroyim, the argument runs, was naturalized in this country, so he was protected by the Citizenship Clause, but Bellei, since he acquired his American citizenship at birth in Italy as a foreign-born child of an American citizen, was neither born nor naturalized in the United States, and, hence, falls outside the scope of the Fourteenth Amendment guarantees declared in *Afroyim.* One could hardly call this a generous reading of the [401 U.S. 839] great purposes the Fourteenth Amendment was adopted to bring about.

While conceding that Bellei is an American citizen, the majority states: "He simply is not a `Fourteenth Amendment first sentence' citizen." Therefore, the majority reasons, the congressional revocation of his citizenship is not barred by the Constitution. I cannot accept the Court's conclusion that the Fourteenth Amendment protects the citizenship of some Americans, and not others.

Indeed, the concept of a hierarchy of citizenship, suggested by the majority opinion, was flatly rejected in *Schneider v. Rusk,* 377 U.S. 163 (1964):

> We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive.

Id. at 165. The Court there held that Congress could not deprive Mrs. Schneider of her citizenship, which she, like Mr. Bellei in the present case, acquired derivatively through her citizen mother. Consequently, the majority, in its rush to overrule *Afroyim,* must also, in effect, overrule *Schneider* as well.

Under the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause, and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress. The Court rejected such narrow, restrictive, and super-technical interpretations of the Citizenship Clause when it held in *Afroyim* that that Clause "was designed to, and does, protect every citizen of this Nation. . . ." 387 U.S. at 268.

Afroyim's broad interpretation of the scope of the Citizenship Clause finds ample support in the language and history of the Fourteenth Amendment. Bellei was not "born . . . in the United States," but he was, constitutionally speaking, "naturalized in the United States." Although those Americans who acquire their citizenship [401 U.S. 840] under statutes conferring citizenship on the foreign-born children of citizens are not popularly thought of as naturalized citizens, the use of the word "naturalize" in this way has a considerable constitutional history. Congress is empowered by the Constitution to "establish an uniform Rule of Naturalization," Art. I, § 8. Anyone acquiring citizenship solely under the exercise of this power is, constitutionally speaking, a naturalized citizen. The first congressional exercise of this power, entitled "An Act to establish an uniform Rule of Naturalization," was passed in 1790 at the Second Session

of the First Congress. It provided in part:

> And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.

1 Stat. 103, 104. This provision is the earliest form of the statute under which Bellei acquired his citizenship. Its enactment as part of a "Rule of Naturalization" shows, I think, that the First Congress conceived of this and most likely all other purely statutory grants of citizenship as forms or varieties of naturalization. However, the clearest expression of the idea that Bellei and others similarly situated should for constitutional purposes be considered as naturalized citizens is to be found in *United States v. Wong Kim Ark,* 169 U.S. 649 (1898):

> The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere [401 U.S. 841] fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

169 U.S. at 702-703. The Court in *Wong Kim Ark* thus stated a broad and comprehensive definition of naturalization. As shown in *Wong Kim Ark,* naturalization, when used in its constitutional sense, is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization. This inclusive definition has been adopted in several opinions of this Court besides *United States v. Wong Kim Ark, supra.* Thus, in *Minor v. Happersett,* 21 Wall. 162, 167 (1875), the Court said:

> Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. . . . [N]ew citizens may be born, or they may be created by naturalization.

And in *Elk v. Wilkins,* 112 U.S. 94 (1884), the Court took the position that the Fourteenth Amendment

> contemplates two sources of citizenship, and two sources only: birth and naturalization. . . . Persons [401 U.S. 842] not . . . subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

112 U.S. at 101-102. Moreover, this concept of naturalization is the only one permitted by this Court's consistent adoption of the view that the Fourteenth Amendment was intended to supply a comprehensive definition of American citizenship. In an opinion written shortly after the Fourteenth Amendment was ratified, the Court stated that one of the primary purposes of the Citizenship Clause was

> to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State.

Slaughter-House Cases, 16 Wall. 36, 73 (1873). In his study, The Adoption of the Fourteenth Amendment, Professor Flack similarly concluded that the Citizenship Clause "put beyond doubt and cavil in the original law, who were citizens of the United States." H. Flack, The Adoption of the Fourteenth Amendment 89 (1908). And in *Afroyim,* both majority and dissenting Justices appear to have agreed on the basic proposition that the scope of the Citizenship Clause, whatever its effect, did reach all citizens. The opinion of the Court in *Afroyim* described the Citizenship Clause as "calculated completely to control the status of citizenship." 387 U.S. at 262. And the dissenting Justices agreed with this proposition to the extent of holding that the Citizenship Clause was a "declaration of the classes of individuals to whom citizenship initially attaches." *Id.* at 292.

The majority opinion appears at times to rely on the argument that Bellei, while he concededly might [401 U.S. 843] have been a naturalized citizen, was not naturalized "in the United States." This interpretation obviously imposes a limitation on the scope of the Citizenship Clause which is inconsistent with the conclusion expressed above that the

Fourteenth Amendment provides a comprehensive definition of American citizenship, for the majority's view would exclude from the protection of that Clause all those who acquired American citizenship while abroad. I cannot accept the narrow and extraordinarily technical reading of the Fourteenth Amendment employed by the Court today. If, for example, Congress should decide to vest the authority to naturalize aliens in American embassy officials abroad, rather than having the ceremony performed in this country, I have no doubt that those so naturalized would be just as fully protected by the Fourteenth Amendment as are those who go through our present naturalization procedures. Rather than the technical reading adopted by the majority, it is my view that the word "in," as it appears in the phrase "in the United States," was surely meant to be understood in two somewhat different senses: one can become a citizen of this country by being born *within* it or by being naturalized *into* it. This interpretation is supported by the legislative history of the Citizenship Clause. That clause was added in the Senate rather late in the debates on the Fourteenth Amendment, and, as originally introduced, its reference was to all those "born in the United States or *naturalized by the laws thereof.*" Cong.Globe, 39th Cong., 1st Sess., 2768. (Emphasis added.) The final version of the Citizenship Clause was undoubtedly intended to have this same scope. *See* Flack, *supra,* at 88-89.

The majority takes the position that Bellei, although admittedly a citizen of this country, was not entitled to the protections of the Citizenship Clause. I would not depart from the holding in *Afroyim* that every American [401 U.S. 844] citizen has Fourteenth Amendment citizenship. Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his citizenship until he voluntarily renounces or relinquishes it.

The Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of "fairness." The majority takes a new step with the recurring theme that the test of constitutionality is the Court's own view of what is "fair, reasonable, and right." Despite the concession that Bellei was admittedly an American citizen, and despite the holding in *Afroyim* that the Fourteenth Amendment has put citizenship, once conferred, beyond the power of Congress to revoke, the majority today upholds the revocation of Bellei's citizenship on the ground that the congressional action was not "irrational or arbitrary or unfair." The majority applies the "shock the conscience" test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is "irrational or arbitrary or unfair," the statute must be constitutional.

Of course the Court's construction of the Constitution is not a "strict" one. On the contrary, it proceeds on the premise that a majority of this Court can change the Constitution day by day, month by month, and year by year, according to its shifting notions of what is fair, reasonable, and right. There was little need for the founders to draft a written constitution if this Court can say it is only binding when a majority finds it fair, reasonable, and right to make it so. That is the loosest construction that could be employed. It is true that England has moved along very well in the world without a written constitution. But with complete familiarity [401 U.S. 845] with the English experience, our ancestors determined to draft a written constitution which the members of this Court are sworn to obey. While I remain on the Court, I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is "fair" and "reasonable." I would decide this case not by my views of what is "arbitrary," or what is "fair," but rather by what the Constitution commands.

I dissent.

BRENNAN, J., dissenting

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Since the Court this Term has already downgraded citizens receiving public welfare, *Wyman v. James,* 400 U.S. 309 (1971), and citizens having the misfortune to be illegitimate, *Labine v. Vincent, ante,* p. 532, I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James* and *Labine,* the Court's opinion makes evident that its holding is contrary to earlier decisions. Concededly, petitioner was a citizen at birth, not by constitutional right, but only through operation of a federal statute. In the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds

of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" includes those naturalized through operation of an Act of Congress, wherever they may be at the time. Congress was therefore powerless to strip Bellei of his citizenship; he could lose it only if he voluntarily renounced or relinquished it. *Afroyim v. Rusk,* 387 U.S. 253 (1967). I dissent.

Footnotes

BLACKMUN, J., lead opinion (Footnotes)

1.

> SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> * * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided* . . .
>
> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.
>
> (c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934. . . .

Section 301(a)(7) was amended November 6, 1966, by Pub.L. 89-770, 80 Stat. 1322, by way of additions to the proviso, omitted above; these have no relevancy here. Pub.L. 85-316, § 16, 71 Stat. 644, 8 U.S.C. § 1401b, enacted in September, 1957, provides that absences of less than 12 months in the aggregate "shall not be considered to break the continuity of [the] physical presence" required by § 301(b).

2.

> Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

3.

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

4.

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

5.

SEC. 201. The following shall be nationals and citizens of the United States at birth:

* * * *

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

* * * *

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

6. At oral argument, plaintiff's counsel conceded that "Congress need not vest a person in his position with citizenship if it chooses not to do so." Tr. of Oral Rearg. 27. Counsel for the *amici* sympathetic with the plaintiff's cause made a like concession. *Id.* at 36.

7. *Id.* at 26.

BLACK, J., dissenting (Footnotes)

1. Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797.

2. 8 U.S.C. § 1401(b).

U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Amendment Text | Annotations

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Annotations

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U.S. Constitution: Thirteenth Amendment

Thirteenth Amendment - Slavery And Involuntary Servitude

Amendment Text | Annotations

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Annotations

- **Abolition of Slavery**
- **Origin and Purpose**
- **Peonage**
- **Situations in Which the Amendment Is Inapplicable**

21ST Amendment

Federal Constitution

Bill of Rights

Law Practice Management

American Spying

'); } //

Downes v. Bidwell
No. 507
Argued January 8-11, 1901
Decided May 27, 1901 *
182 U.S. 244

Editor's note: this case begins in mid-page. It therefore shares a citation with the last page of the previous case. If you are attempting to follow a link to the last page of 182 U.S. 243, click here.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Syllabus

By MR. JUSTICE BROWN, in announcing the conclusion and judgment of the Court.

The circuit courts have jurisdiction, regardless of amount, of actions against a collector of customs for duties exacted and paid under protest upon merchandise alleged not to have been imported.

The Island of Porto Rico is not a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." [182 U.S. 245]

There is a clear distinction between such prohibitions of the Constitution as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only throughout the United States, or among the several states.

A long continued and uniform interpretation, put by the executive and legislative departments of the government upon a clause in the Constitution should be followed by the judicial department unless such interpretation be manifestly contrary to its letter or spirit.

By MR. JUSTICE WHITE, with whom MR. JUSTICE SHIRAS and MR. JUSTICE McKENNA concurred.

The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Ever then, when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, whilst confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere.

Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential insofar as its provisions are applicable.

Hence it is that wherever a power is given by the Constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.

Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may, of course, deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitutions which may not have been previously

applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public wellbeing, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion.

As Congress, in governing the territories, is subject to the Constitution, it [182 U.S. 246] results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr.

Chief Justice Taney in *Scott v. Sandford,* 19 How. 393, is unwarranted. Whatever may be the view entertained of the correctness of the opinion of the Court in that case insofar as it interpreted a particular provision of the Constitution concerning slavery and decided that, as so construed, it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative.

In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

As Congress derives its authority to levy local taxes for local purposes within the territories not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "To lay and collect Taxes, Duties, Imposts, and Excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty besides would be repugnant to the requirement of uniformity throughout the United States.

By MR. JUSTICE GRAY.

The civil government of the United States cannot extend immediately and of its own force over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander in chief. Civil government cannot take effect at once as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government at such time and in such degree as that department may determine.

In a conquered territory, civil government must take effect either by the action of the treatymaking power or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, [182 U.S. 247] elected by the states, and the House of Representatives, chosen by and immediately representing the people of the United States.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory in the sense of the revenue laws. But those laws

concerning "foreign countries" remain applicable to the conquered territory until changed by Congress.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

This was an action begun in the Circuit Court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the Island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the Island of Porto Rico, known as the Foraker Act.

The District Attorney demurred to the complaint for the want of jurisdiction in the court, and for insufficiency of its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiff sued out this writ or error.

BROWN, J., lead opinion

MR. JUSTICE BROWN, after making the above statement, announced the conclusion and judgment of the Court.

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker Act is exempt from duty, notwithstanding the third section of that act, which requires the payment of

> fifteen [182 U.S. 248] percentum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.

1. The exception to the jurisdiction of the court is not well taken. By Rev.Stat. sec. 629, subd. 4, the circuit courts are vested with jurisdiction "of all suits at law or in equity arising under any act providing for revenue from imports or tonnage," irrespective of the amount involved. This section should be construed in connection with sec. 643, which provides for the removal from state courts to circuit courts of the United States of suits against revenue officers

> on account of any act done under color of his office, or of any such [revenue] law, or on account of any right, title, or authority claimed by such officer or other person under any such law.

Both these sections are taken from the Act of March 2, 1833, 4 Stat. 632, c. 57, commonly known as the Force Bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in *De Lima v. Bidwell,* actions against the collector to recover back duties assessed upon nonimportable property are not "customs cases" in the sense of the Administrative Act, they are nevertheless actions arising under an act to provide for a revenue from imports, in the sense of sec. 629, since they are for acts done by a collector under color of his office. This subdivision of sec. 629 was not repealed by the Jurisdictional Act of 1875 or the subsequent Act of August 13, 1888, since these acts were

> not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects.

United States v. Mooney, 116 U.S. 104, 107. *See also Ins. Co. v. Ritchie,* 5 Wall. 541; *Philadelphia v. The Collector,* 5 Wall. 720; *Hornthall v. The Collector,* 9 Wall. 560. As the case "involves the construction or application of the Constitution" as well as the constitutionality of a law of the United States, the writ of error was properly sued out from this Court.

2. In the case of *De Lima v. Bidwell,* just decided, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory [182 U.S. 249] of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, sec. 8. If Porto Rico be a part of the United States, the Foraker

Act imposing duties upon its products is unconstitutional not only by reason of a violation of the uniformity clause, but because, by section 9, "vessels bound to or from one state" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this Court.

The federal government was created in 1777 by the union of thirteen colonies of Great Britain in "certain articles of confederation and perpetual union," the first one of which declared that "the stile of this confederacy shall be the United States of America." Each member of the confederacy was denominated a *state.* Provision was made for the representation of each state by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in Art. XI, which authorized the admission of Canada, upon its "acceding to this confederation," and of other colonies if such admission were agreed to by nine states. At this time, several states made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy before it was fairly put in operation. Several of the states refused to ratify the articles because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781. Most of these states in the [182 U.S. 250] meantime having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government northwest of the Ohio River, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat "with a right of debating, but not of voting," and for the ultimate formation of states therefrom, and their admission into the Union on an equal footing with the original states.

The confederacy, owing to well known historical reasons, having proven a failure, a new Constitution was formed in 1787 by "the people of the United States" "for the United States of America," as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union except that Congress was empowered "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." At this time, all of the states had ceded their unappropriated lands except North Carolina and Georgia. It was thought by Chief Justice Taney in the *Dred Scott Case,* 19 How. 393, 436, that the sole object of the territorial clause was

> to transfer to the new government the property then held in common by the states, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the states before their league was dissolved;

that the power "to make needful rules and regulations" was not intended to give the powers of sovereignty, or to authorize the establishment of territorial governments -- in short, that these words were used in a proprietary, and not in a political, sense. But, as we observed in *De Lima v. Bidwell,* the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this Court to be deemed an unsettled question. Indeed, in the *Dred Scott* case it was admitted to be the inevitable consequence of the right to acquire territory.

It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the [182 U.S. 251] territories were considered a part of the United States. The Constitution was created by the people of the United States as a union of states, to be governed solely by representatives of the states, and even the provision relied upon here that all duties, imposts, and excises shall be uniform "throughout the United States" is explained by subsequent provisions of the Constitution that "no tax or duty shall be laid on articles exported from any state," and

> no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

In short, the Constitution deals with states, their people, and their representatives.

The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United

States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these states were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that

> all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place "subject to their jurisdiction."

The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern states to settle in the fertile valley [182 U.S. 252] of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the Treaty of October 27, 1795, by which the Mississippi River was opened to the commerce of the United States. 8 Stat. 138, 140, Art. IV. In October, 1800, by the secret Treaty of San Ildefonso, Spain retroceded to France the Territory of Louisiana. This treaty created such a ferment in this country that James Monroe was sent as minister extraordinary with discretionary powers to cooperate with Livingston, then minister to France, in the purchase of New Orleans, for which Congress appropriated $2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at $15,000,000. It is well known that Mr. Jefferson entertained grave doubts as to his power to make the purchase -- or, rather, as to his right to annex the territory and make it part of the United States -- and had instructed Mr. Livingston to make no agreement to that effect in the treaty, as he believed it could not be legally done. Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the third article of the treaty, which provided that

> the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress. In regard to this, Mr. Jefferson, in a letter to Senator Breckinridge of Kentucky, of August 12, 1803, used the following language:

> This treaty must, of course, be laid before both Houses, because [182 U.S. 253] both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the Constitution.

To cover the questions raised by this purchase, Mr. Jefferson prepared two amendments to the Constitution, the first of which declared that "the province of Louisiana is incorporated with the United States and made part thereof," and the second of which was couched in a little different language, *viz.:*

> Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations.

But by the time Congress assembled, October 17, 1803, either the argument of his friends or the pressing necessity of the situation seems to have dispelled his doubts regarding his power under the Constitution, since, in his message to

Congress, he referred the whole matter to that body, saying that

> with the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country, for its incorporation into the Union.

Jefferson's Writings, vol. 8, p. 269.

The raising of money to provide for the purchase of this territory, and the act providing a civil government, gave rise to an animated debate in Congress, in which two questions were prominently presented: first, whether the provision for the ultimate incorporation of Louisiana into the Union was constitutional; and, second, whether the seventh article of the treaty admitting the ships of Spain and France for the next twelve years

> into the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of [182 U.S. 254] the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise or other or greater tonnage than that paid by the citizens of the United States

was an unlawful discrimination in favor of those ports and an infringement upon Art. I, sec. 9, of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." This article of the treaty contained the further stipulation that

> during the space of time above mentioned to other nation shall have a right to the same privileges in the ports of the ceded territory; . . . and it is well understood that the object of the above article is to favor the manufactures, commerce, freight, and navigation of France and Spain.

It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts. *United States v. Union Pac. Railroad,* 91 U.S. 72. Suffice it to say that the administration party took the ground that, under the constitutional power to make treaties, there was ample power to acquire territory, and to hold and govern it under laws to be passed by Congress, and that as Louisiana was incorporated into the Union as a territory, and not as a state, a stipulation for citizenship became necessary; that as a state they would not have needed a stipulation for the safety of their liberty, property, and religion, but as territory this stipulation would govern and restrain the undefined powers of Congress to "make rules and regulations" for territories. The federalists admitted the power of Congress to acquire and hold territory, but denied its power to incorporate it into the Union under the Constitution as it then stood.

They also attacked the seventh article of the treaty, discriminating in favor of French and Spanish ships, as a distinct violation of the Constitution against preference being given to the [182 U.S. 255] ports of one state over those of another. The administration party, through Mr. Elliott of Vermont, replied to this that

> the states, as such, were equal and intended to preserve that equality, and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between particular states. It was not contemplated that this provision would have application to colonial or territorial acquisitions.

Said Mr. Nicholson of Maryland, speaking for the administration:

> It [Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution. Had it been the island of Cuba which was ceded to us under a similar condition of admitting French and Spanish vessels for a limited time into Havana, could it possibly have been contended that this would be giving a preference to the ports of one state over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory, is it to be viewed in a different light?

As a sequence to this debate, two bills were passed, one October 31, 1803, 2 Stat. 245, authorizing the President to take possession of the territory and to continue the existing government, and the other November 10, 1803, 2 Stat. 245, making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed providing for a temporary government, 2 Stat. 283, c. 38, and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the views

of Congress first that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union, and second that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution, Art. I, sec. 9, that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of state within the meaning of the Constitution. [182 U.S. 256]

The same construction was adhered to in the treaty with Spain for the purchase of Florida, 8 Stat. 252, the sixth article of which provided that the inhabitants should "be incorporated into the Union of the United States, as soon as may be consistent with the principles of the federal Constitution," and the fifteenth article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine "without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States," and that, "during the said term, no other nation shall enjoy the same privileges within the ceded territories."

So too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution if that instrument be held to extend to these islands immediately upon their cession to the United States. By article IV, the United States agree,

> for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine islands on the same terms as ships and merchandise of the United States

-- a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine islands be ports of the United States.

So, too, by Art. XIII,

> Spanish scientific, literary, and artistic works . . . shall be continued to be admitted free of [182 U.S. 257] duty in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.

This is also a clear discrimination in favor of Spanish literary productions into particular ports.

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the Territory of Louisiana by Act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev.Stat. sec. 1891, a general provision was enacted that

> the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States.

So, too, on March 6, 1820, 3 Stat. 545, c. 22, in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the Territory of Louisiana north of 36°30' slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in *Scott v. Sandford,* 19 How. 393, but it is nonetheless a distinct annunciation by Congress of power over property in the territories, which it obviously did not possess in the several states.

The researches of counsel have collated a large number of other instances in which Congress has in its enactments recognized the fact that provisions intended for the states did not embrace the territories, unless specially mentioned. These are found in the laws prohibiting the slave trade with "the United States or territories thereof" or equipping ships "in any port or place within the jurisdiction of the United States;" in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing states, and others of which extended them expressly to the territories, or "within [182 U.S. 258] the exterior boundaries of the United States;" and in the acts extending the internal revenue laws to the territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories as the circumstances of each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the states. Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this Court has not been exempt from them), Congress has been consistent in recognizing the difference between the states and territories under the Constitution.

The decisions of this Court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor, upon the other hand, to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated, not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land.

> It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually [182 U.S. 259] before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohen v. Virginia, 6 Wheat. 264, 399.

The earliest case is that of *Hepburn v. Ellzey,* 2 Cranch 445, in which this Court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different *states,* a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word "state," in that connection, was used simply to denote a distinct political society. "But," said the Chief Justice,

> as the act of Congress obviously used the word "state" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution, . . . and excludes from the term the signification attached to it by writers on the law of nations.

This case was followed in *Barney v. Baltimore,* 6 Wall. 280, and quite recently in *Hooe v. Jamieson,* 166 U.S. 395. The same rule was applied to citizens of territories in *New Orleans v. Winter,* 1 Wheat. 91, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that "neither of them is a *state* in the sense in which that term is used in the Constitution." In *Scott v. Jones,* 5 How. 343, and in *Miners' Bank v. Iowa,* 12 How. 1, it was held that, under the Judiciary Act, permitting writs of error to the Supreme Court of a state in cases where the validity of a *state statute* is drawn in question, an act of a territorial legislature was not within the contemplation of Congress.

Loughborough v. Blake, 5 Wheat. 317, was an action of trespass or, as appears by the original record, *replevin,* brought in the Circuit Court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. 216, c. 60, Feb. 17, 1815. It was insisted that Congress could act in a double capacity:

in one as legislating [182 U.S. 260] for the states; in the other as a local legislature for the District of Columbia. In the latter character, it was admitted that the power of levying direct taxes might be exercised, but for District purposes only, as a state legislature might tax for state purposes, but that it could not legislate for the District under Art. 1, sec. 8, giving to Congress the power "to lay and collect taxes, imposts, and excises," which "shall be uniform throughout the United States," inasmuch as the District was no part of the United States. It was held that the grant of this power was a general one without limitation as to place, and consequently extended to all places over which the government extends, and that it extended to the District of Columbia as a constituent part of the United States. The fact that Art. 1, sec. 2, declares that "representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers" furnished a standard by which taxes were apportioned, but not to exempt any part of the country from their operation.

> The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers.

That Art. I, sec. 9, ¶ 4, declaring that direct taxes shall be laid in proportion to the census, was applicable to the District of Columbia,

> and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

It was further held that the words of the ninth section did not

> in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the second section require that it shall be extended to all the states. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them.

There could be no doubt as to the correctness of this conclusion, so far at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and [182 U.S. 261] Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government.

In delivering the opinion, however, the Chief Justice made certain observations which have occasioned some embarrassment in other cases. "The power," said he,

> to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout [182 U.S. 262] the United States.

So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

In line with *Loughborough v. Blake* is the case of *Callan v. Wilson,* 127 U.S. 540, in which the provisions of the Constitution relating to trial by jury were held to be in force in the District of Columbia. Upon the other hand, in *De Geofroy v. Riggs,* 133 U.S. 258, the District of Columbia, as a political community, was held to be one of "the states of

the Union" within the meaning of that term as used in a consular convention of February 23, 1853, with France. The seventh article of that convention provided that in all the states of the Union whose existing laws permitted it, Frenchmen should enjoy the right of holding, disposing of, and inheriting property in the same manner as citizens of the United States, and as to the states of the Union by whose existing laws aliens were not permitted to hold real estate, the President engaged to recommend to them the passage of such laws as might be necessary for the purpose of conferring this right. The Court was of opinion that, if these terms "states of the Union" were held to exclude the District of Columbia and the territories, our government would be placed in the inconsistent position of stipulating that French citizens should enjoy the right of holding, disposing of, and inheriting property in like manner as citizens of the United States in states whose laws permitted it, and engaging that the President should recommend the passage of laws conferring that right in states whose laws did not permit aliens to hold real estate while at the same time refusing to citizens of France holding property in the District of Columbia and in some of the territories, where the power of the United States is in that respect unlimited, a like release from the disabilities of alienage,

> thus discriminating against them in favor of citizens of France holding property in states having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states it would hardly refuse to them in the district [182 U.S. 263] embracing its capital or in any of its own territorial dependencies.

This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations, this government is a unit. This is so not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. By Art. I, Sec. 10, of the Constitution,

> no state shall enter into any treaty, alliance, or confederation, . . . [or] enter into any agreement or compact with another state, or with a foreign power.

It would be absurd to hold that the territories, which are much less independent than the states and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the states.

It may be added in this connection that, to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress, by the Act of February 21, 1871, 16 Stat. 419, 426, c. 62, sec. 34, specifically extended the Constitution and laws of the United States to this District.

The case of *American Ins. Co. v. Canter*, 1 Pet. 511, originated in a libel filed in the District Court for South Carolina, for the possession of 356 bales of cotton which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as *bona fide* purchaser at a marshal's sale at Key West by virtue of a decree of a territorial court consisting of a notary and five jurors, proceeding under an act of the Governor and Legislative Council of Florida. The case turned upon the question whether the sale by that court was effectual to divest the interest of the underwriters. The district judge pronounced the proceedings a nullity, and rendered a decree from which both parties appealed to the circuit court. The circuit court [182 U.S. 264] reversed the decree of the district court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser.

The opinion of the circuit court was delivered by Mr. Justice Johnson, of the Supreme Court, and is published in full in a note in Peters' Reports. It was argued that the Constitution vested the admiralty jurisdiction exclusively in the general government; that the Legislature of Florida had exercised an illegal power in organizing this Court, and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and, as such, its acts were not to be reviewed in a foreign tribunal such as was the court of South Carolina;

> that the district of Florida was no part of the United States, but only an acquisition or dependency, and as such the Constitution *per se* had no binding effect in or over it.

"It becomes," said the court

> indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States. . . . And first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest) *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these, there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attached, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession. For in the Act of Congress of March 30, 1822, sec. 9, we have an enumeration of the acts of Congress which are to be held in force in the territory, and in the tenth section, an enumeration, in the nature of a bill [182 U.S. 265] of rights, of privileges and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession. . . . These states, this territory, and future *states* to be admitted into the Union are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

He further held that the right of acquiring territory was altogether incidental to the treatymaking power, that their government was left to Congress, that the Territory of Florida did "not stand in the relation of a state to the United States," that the acts establishing a territorial government were the Constitution of Florida, that, while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West.

From the decree of the circuit court, the underwriters appealed to this Court, and the question was argued whether the circuit court was correct in drawing a distinction between territories existing at the date of the Constitution and territories subsequently acquired. The main contention of the appellants was that the superior courts of Florida had been vested by Congress with exclusive jurisdiction in all admiralty and maritime cases, that salvage was such a case, and therefore any law of Florida giving jurisdiction in salvage cases to any other court was unconstitutional. On behalf of the purchaser, it was argued that the Constitution and laws of the United States were not *per se* in force in Florida, nor the inhabitants citizens of the United States; that the Constitution was established by the people of the United States *for* the United States; that if the Constitution were in force in Florida, it was unnecessary to pass an act extending the laws of the United States to Florida. "What is Florida?" said Mr. Webster.

> It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.

The opinion of Mr. Chief Justice Marshall in this case should be read in connection with Art. 3, secs. 1 and 2, of the Constitution, [182 U.S. 266] vesting "the judicial power of the United States" in

> one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior,

etc. He held that the Court "should take into view the relation in which Florida stands to the United States;" that territory ceded by treaty "becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." That Florida, upon the conclusion of the treaty, became a territory of the United States and subject to the power of Congress under the territorial clause of the Constitution. The acts providing a territorial government for Florida were examined in detail. He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of Florida held their office for four years; that

> these courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited;

that "they are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States, and that, in legislating for them, Congress exercises the combined powers of the general and of a state government. The act of the territorial legislature creating the court in

question was held not to be "inconsistent with the laws and Constitution of the United States," and the decree of the circuit court was affirmed.

As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution. In delivering his opinion in this [182 U.S. 267] case Mr. Chief Justice Marshall made no reference whatever to the prior case of *Loughborough v. Blake,* 5 Wheat. 317, in which he had intimated that the territories were part of the United States. But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a state except under the restrictions of the judicial clause. It is sufficient to say that this case has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that, with respect to them, Congress has a power wholly unrestricted by it. We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular.

This case was followed in *Benner v. Porter,* 9 How. 235, in which it was held that the jurisdiction of these territorial courts ceased upon the admission of Florida into the Union, Mr. Justice Nelson remarking of them (p. 242), that

> they are not organized under the Constitution nor subject to its complex distribution of the powers of government as the organic law, but are the creations exclusively of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between federal and state jurisdiction. . . . (p. 244). Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a state.

To the same effect are *Clinton v. Englebrecht,* 13 Wall. 434; *Good v. Martin,* 95 U.S. 90, 98, and *McAllister v. United States,* 141 U.S. 174.

That the power over the territories is vested in Congress [182 U.S. 268] without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 422, and in *United States v. Gratiot,* 14 Pet. 526. So, too, in *Mormon Church v. United States,* 136 U.S. 1, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language:

> The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treatymaking power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. . . . Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

See also, to the same [182 U.S. 269] effect, *National Bank v. County of Yankton,* 101 U.S. 129; *Murphy v. Ramsey,* 114 U.S. 15.

In *Webster v. Reid,* 11 How. 437, it was held that a law of the Territory of Iowa, which prohibited the trial by jury of certain actions at law founded on contract to recover payment for services, was void, but the case is of little value as

bearing upon the question of the extension of the Constitution to that territory inasmuch as the organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787 (which provided expressly for jury trials), so far as they were applicable, and the case was put upon this ground. 5 Stat. 235, 239, sec. 12.

In *Reynolds v. United States,* 98 U.S. 145, a law of the Territory of Utah providing for grand juries of fifteen persons was held to be constitutional, though Rev.Stat. sec. 808, required that a grand jury impaneled before any circuit or district court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the circuit and district courts. The territorial courts were free to act in obedience to their own laws.

In *Ross' Case,* 140 U.S. 453, petitioner had been convicted by the American consular tribunal in Japan of a murder committed upon an American vessel in the harbor of Yokohama, and sentenced to death. There was no indictment by a grand jury and no trial by a petit jury. This Court affirmed the conviction, holding that the Constitution had no application, since it was ordained and established "for the United States of America," and not for countries outside of their limits.

> The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.

In *Springville v. Thomas,* 166 U.S. 707, it was held that a verdict returned by less than the whole number of jurors was invalid because in contravention of the Seventh Amendment to the Constitution and the Act of Congress of April 7, 1874, [182 U.S. 270] 18 Stat. 27, c. 80, which provide "that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." It was also intimated that Congress "could not impart the power to change the constitutional rule," which was obviously true with respect to Utah, since the organic act of that territory had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision, once made, could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such and become of no greater authority than an ordinary act of Congress. In *American Pub. Co. v. Fisher,* 166 U.S. 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory. These rulings were repeated in *Thompson v. Utah,* 170 U.S. 343, and applied to felonies committed before the territory became a state, although the state constitution continued the same provision.

Eliminating, then, from the opinions of this Court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

2. That territories are not states within the meaning of Rev.Stat. sec. 709, permitting writs of error from this Court in cases where the validity of a *state* statute is drawn in question;

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully [182 U.S. 271] provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

The case of *Dred Scott v. Sandford,* 19 How. 393, remains to be considered. This was an action of trespass *vi et armis* brought in the Circuit Court for the District of Missouri by Scott, alleging himself to be a citizen of Missouri, against Sandford, a citizen of New York. Defendant pleaded to the jurisdiction that Scott was not a citizen of the State of Missouri, because a negro of African descent whose ancestors were imported as negro slaves. Plaintiff demurred to this plea, and the demurrer was sustained, whereupon, by stipulation of counsel and with leave of the court, defendant pleaded in bar the general issue, and specially that the plaintiff was a slave and the lawful property of defendant, and, as such, he had a right to restrain him. The wife and children of the plaintiff were also involved in the suit.

The facts, in brief, were that plaintiff had been a slave belonging to Dr. Emerson, a surgeon in the army; that, in 1834, Emerson took the plaintiff from the State of Missouri to Rock Island, Illinois, and subsequently to Fort Snelling, Minnesota (then known as Upper Louisiana), and held him there until 1838. Scott married his wife there, of whom the children were subsequently born. In 1838, they returned to Missouri.

Two questions were presented by the record: first, whether the circuit court had jurisdiction, and second, if it had jurisdiction, was the judgment erroneous or not? With regard to the first question, the Court stated that it was its duty

> to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States,

and that the question was whether

> a negro whose ancestors were imported into this country and sold as slaves became a member of the political community formed and brought into existence by the Constitution of the United States, and as such became entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court [182 U.S. 272] of the United States.

It was held that he was not, and was not included under the word "citizens" in the Constitution, and therefore could claim "none of the rights and privileges which that instrument provides for and secures to citizens of the United States;" that it did not follow, because he had all the rights and privileges of a citizen of a state, he must be a citizen of the United States; that no state could by any law of its own "introduce a new member into the political community created by the Constitution;" that the African race was not intended to be included, and formed no part of the people who framed and adopted the Declaration of Independence. The question of the status of negroes in England and the several states was considered at great length by the Chief Justice, and the conclusion reached that Scott was not a citizen of Missouri, and that the circuit court had no jurisdiction of the case.

This was sufficient to dispose of the case without reference to the question of slavery, but, as the plaintiff insisted upon his title to freedom and citizenship by the fact that he and his wife, though born slaves, were taken by their owner and kept four years in Illinois and Minnesota, they thereby became and upon their return to Missouri became citizens of that state, the Chief Justice proceeded to discuss the question whether Scott was still a slave. As the Court had decided against his citizenship upon the plea in abatement, it was insisted that further decision upon the question of his freedom or slavery was extrajudicial, and mere *obiter dicta.* But the Chief Justice held that the correction of one error in the court below did not deprive the appellate court of the power of examining further into the record and correcting any other material error which may have been committed; that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, can be looked into or corrected by this Court, even though it had decided a similar question presented in the pleadings.

Proceeding to decide the case upon the merits, he held that the territorial clause of the Constitution was confined to the territory which belonged to the United States at the time the Constitution [182 U.S. 273] was adopted, and did not apply to territory subsequently acquired from a foreign government.

In further examining the question as to what provision of the Constitution authorizes the federal government to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the

person or property of a citizen of the United States, he made use of the following expressions, upon which great reliance is placed by the plaintiff in this case (p. 446):

> There is certainly no power given by the Constitution to the federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, . . . and if a new state is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the state, and the citizens of the state, and the federal government. But no power is given to acquire a territory to be held and governed permanently in that character.

He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States, and that this doctrine applied to slaves as well as to other property. Hence it followed that the act of Congress which prohibited a citizen from holding and owning slaves in territories north of 36°30' (known as the Missouri Compromise) was unconstitutional and void, and the fact that Scott was carried into such territory, referring to what is now known as Minnesota, did not entitle him to his freedom.

He further held that whether he was made free by being taken into the free State of Illinois and being kept there two years depended upon the laws of Missouri, and not those of Illinois, and that, by the decisions of the highest court of that state, his status as a slave continued notwithstanding his residence of two years in Illinois.

It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be [182 U.S. 274] taken at its full value, it is decisive in his favor. We are not, however, bound to overlook the fact that, before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an act of Congress which had been acquiesced in for thirty years was declared unconstitutional. It would appear from the opinion of Mr. Justice Wayne that the real reason for discussing these constitutional questions was that "there had become such a difference of opinion" about them "that the peace and harmony of the country required the settlement of them by judicial decision." P. 455. The attempt was not successful. It is sufficient to say that the country did not acquiesce in the opinion, and that the Civil War, which shortly thereafter followed, produced such changes in judicial as well as public sentiment as to seriously impair the authority of this case.

While there is much in the opinion of the Chief Justice which tends to prove that he thought all the provisions of the Constitution extended of their own force to the territories west of the Mississippi, the question actually decided is readily distinguishable from the one involved in the cause under consideration. The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the states -- a claim quite inconsistent with the position of the Court in the *Canter* case. If the assumption be true that slaves are indistinguishable from other property, the inference from the *Dred Scott* case is irresistible that Congress had no power to prohibit their introduction into a territory. It would scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two [182 U.S. 275] are so inseparable from each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the underlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the Fourteenth Amendment. The difficulty with the *Dred Scott* case was that the Court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the Virginian might carry his slaves into the territories, but he could not carry with him the Virginian law which made him a slave.

In his history of the *Dred Scott* case, Mr. Benton states that the doctrine that the Constitution extended to territories as well as to states first made its appearance in the Senate in the session of 1848-1849, by an attempt to amend a bill giving territorial government to California, New Mexico, and Utah (itself "hitched on" to a general appropriation bill), by adding the words

> that the Constitution of the United States and all and singular the several acts of Congress [describing them] be, and the same hereby are, extended and given full force and efficacy in said territories.

Says Mr. Benton:

> The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the territories, declaring that instrument to have been made for states, not territories; that Congress governed the territories independently of the Constitution and incompatibly with it; that no part of it went to a territory but what Congress chose to send; that it could not act of itself anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere. Mr. Clay was of the same opinion, and added:
>
> Now, really, I must say the idea that, *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension or any reason I possess that I hardly know how to meet it.

Upon the other hand, Mr. Calhoun [182 U.S. 276] boldly avowed his intent to carry slavery into them under the wing of the Constitution, and denounced as enemies of the south all who opposed it.

The amendment was rejected by the House, and a contest brought on which threatened the loss of the general appropriation bill in which this amendment was incorporated, and the Senate finally receded from its amendment. "Such," said Mr. Benton,

> were the portentous circumstances under which this new doctrine first revealed itself in the American Senate, and then as needing legislative sanction requiring an act of Congress to carry the Constitution into the territories and to give it force and efficacy there.

Of the *Dred Scott* case, he says:

> I conclude this introductory note with recurring to the great fundamental error of the court (father of all the political errors) – that of assuming the extension of the Constitution to the territories. I call it "assuming," for it seems to be a naked assumption without a reason to support it, or a leg to stand upon, condemned by the Constitution itself and the whole history of its formation and administration. Who were the parties to it? The states alone. Their delegates framed it in the federal convention; their citizens adopted it in the state conventions. The Northwest Territory was then in existence, and it had been for three years, yet it had no voice either in the framing or adopting of the instrument, no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it made by states. Territories are not alluded to in it.

Finally, in summing up the results of the decisions holding the invalidity of the Missouri Compromise and the self-extension of the Constitution to the territories, he declares

> that the decisions conflict with the uniform action of all the departments of the federal government from its foundation to the present time, and cannot be received as rules governing Congress and the people without reversing that action, and admitting the political supremacy of the court, and accepting an altered Constitution from its hands and taking a new and portentous point of departure in the working of the government.

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles [182 U.S. 277] of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only "throughout the United States" or among the several states.

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the First Amendment, that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.

We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States,"

it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the states whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the Act of March 27, 1804, 2 Stat. 298, c. 56, providing for the proof of public records, applied the provisions of the act not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several states. This classification, adopted by the Eighth Congress, is carried into the Revised Statutes as follows:

> SEC. 905. The acts of the legislature of any state or territory, [182 U.S. 278] or of any country subject to the jurisdiction of the United States, shall be authenticated,

etc.

> SEC. 906. All records and exemplifications of books which may be kept in any public office of and state or territory, or of any country subject to the jurisdiction of the United States,

etc.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States which are not *of* the United States.

In determining the meaning of the words of Article I, sec. 8, "uniform throughout the United States," we are bound to consider not only the provisions forbidding preference being given to the ports of one state over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress which would operate unfairly or injuriously upon some states and not equally upon others. The opinion of MR. JUSTICE WHITE in *Knowlton v. Moore*, 178 U.S. 41, contains an elaborate historical review of the proceedings in the convention which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105) that,

> although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption,

they were originally placed together, and "became separated only in arranging the Constitution for the purpose of style." Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several states," and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect [182 U.S. 279] that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. Notwithstanding its duty to "guarantee to every state in this Union a republican form of government" Art. IV, sec. 4, by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the Territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend to Constitution and laws of the United States over them, or

to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that, if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes [182 U.S. 280] of life, shall become at once citizens of the United States. In all its treaties hitherto, the treatymaking power has made special provision for this subject -- in the cases of Louisiana and Florida, by stipulating that

> the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;

in the case of Mexico, that they should

> be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States,

in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc, and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants . . . shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Grave apprehensions of danger are felt by many eminent men -- a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These fears, however, find no justification in the action of Congress in the past century nor in the conduct of the British Parliament towards its outlying possessions since the American Revolution. Indeed, in the only instance in which this Court has declared an act of Congress unconstitutional as trespassing upon the rights of territories (the Missouri Compromise), such action was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the Thirteenth Amendment to the Constitution. There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. Even in the Foraker Act itself, the constitutionality of which is so vigorously assailed, power [182 U.S. 281] was given to the legislative assembly of Porto Rico to repeal the very tariff in question in this case, a power it has not seen fit to exercise. The words of Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1, with respect to the power of Congress to regulate commerce, are pertinent in this connection: "This power," said he,

> like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are in this, as in many other instances – as that, for example, of declaring war – the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

So too, in *Johnson v. McIntosh,* 8 Wheat. 543, 583, it was said by him:

> The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other, the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to

strangers.

> When the conquest is complete and the conquered inhabitants can be blended with the conquerors *or safely governed as a distinct people,* public opinion, which not even the conqueror can disregard, imposes these restraints upon him, and he cannot [182 U.S. 282] neglect them without injury to his fame and hazard to his power.

The following remarks of MR. JUSTICE WHITE in the case of *Knowlton v. Moore,* 178 U.S. 109, in which the Court upheld the progressive features of the legacy tax, are also pertinent:

> The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so.

It is obvious that, in the annexation of outlying and distant possessions, grave questions will arise from differences of race, habits, laws, and customs of the people and from differences of soil, climate, and production which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments, and to such other immunities as are indispensable [182 U.S. 283] to a free government. Of the latter class are the rights to citizenship, to suffrage, *Minor v. Happersett,* 21 Wall. 162, and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants -- whether they shall be introduced into the sisterhood of states or be permitted to form independent governments -- it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this Court in respect to the Chinese, even when aliens not possessed of the political rights of citizens of the United States. *Yick Wo v. Hopkins,* 118 U.S. 356; *Fong Yue Ting v. United States,* 149 U.S. 698; *Lem Moon Sing,* 158 U.S. 538, 547; *Wong Wing v. United States,* 163 U.S. 228. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Large powers must necessarily be entrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised. That these powers may be abused is possible. But the same may be said of its powers under the Constitution as well as outside of it. Human wisdom has never devised a form of government so perfect that it may not be perverted to bad purposes. It is never conclusive to argue against the possession of certain powers from possible abuses of them. It is safe to say that, if Congress should venture upon legislation manifestly dictated by selfish interests, it would receive quick rebuke at the hands of the people. Indeed, it is scarcely possible that Congress could do a greater injustice [182 U.S. 284] to these islands than would be involved in holding that it could not impose upon the states taxes and excises without extending the same taxes to them. Such requirement would bring them at once within our internal revenue system, including stamps, licenses, excises, and all the paraphernalia of that system, and apply it to territories which have had no experience of this kind, and where it would prove an intolerable

burden.

This subject was carefully considered by the Senate committee in charge of the Foraker bill, which found, after an examination of the facts, that property in Porto Rico was already burdened with a private debt amounting probably to $30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and goodwill of that people for the United States.

In passing upon the questions involved in this and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the states which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The states had but recently emerged from a war with one of the most powerful nations of Europe, were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghenies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession [182 U.S. 285] under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation and the owner of a great part of the Western Hemisphere. Under these circumstances, it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the states were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them.

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that, if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume [182 U.S. 286] that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

There is a provision that "new states may be admitted by the Congress into this Union." These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments

of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley, Const.Lim. secs. 81-85. *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53, 57; *Field v. Clark,* 143 U.S. 649, 691.

Patriotic and intelligent men may differ widely as to the desireableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions [182 U.S. 287] desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice according to Anglo-Saxon principles may for a time be impossible, and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore

Affirmed.

WHITE, J., concurring

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE SHIRAS and MR. JUSTICE McKENNA, uniting in the judgment of affirmance:

MR. JUSTICE BROWN, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me.

The recovery sought is the amount of duty paid on merchandise which came into the United States from Porto Rico after July 1, 1900. The exaction was made in virtue of the act of Congress approved April 12, 1900, entitled "An Act Temporarily to Provide Revenue and a Civil government for Porto Rico, and for Other Purposes." 31 Stat. 77. The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the [182 U.S. 288] United States, and therefore the act of Congress which imposed the duty in question is repugnant to Article 1, sec. 8, clause 1, of the Constitution, providing that

> the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Subsidiarily, it is contended that the duty collected was also repugnant to the export and preference clauses of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that this latter contention is involved in the previous one, and need not be separately considered.

The arguments at bar embrace many propositions which seem to me to be irrelevant, or, if relevant, to be so contrary to reason and so in conflict with previous decisions of this Court as to cause them to require but a passing notice. To eliminate all controversies of this character, and thus to come to the pivotal contentions which the case involves, let me state and concede the soundness of some principles, referring, in doing so, in the margin to the authorities by which they are sustained, and making such comment on some of them as may to me appear necessary.

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Ever then, when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred, or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, while confined to its constitutional [182 U.S. 289] orbit, the government of the United States is supreme within its lawful sphere.{1}

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential insofar as its provisions are applicable.{2}

Third. Hence it is that, wherever a power is given by the Constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.{3}

Fourth. Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

Fifth. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public wellbeing, to deprive such [182 U.S. 290] territory of representative government if it is considered just to do so, and to change such local governments at discretion.{4}

The plenitude of the power of Congress as just stated is conceded by both sides to this controversy. It has been manifest from the earliest days, and so many examples are afforded of it that to refer to them seems superfluous. However, there is an instance which exemplifies the exercise of the power substantially in all its forms, in such an apt way that reference is made to it. The instance referred to is the District of Columbia, which has had from the beginning different forms of government conferred upon it by Congress, some largely representative, others only partially so, until, at the present time, the people of the District live under a local government totally devoid of local representation, in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative in effect, acting as the local legislature.

In some adjudged cases, the power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory. In others, it has been rested upon the clause of sec. 3, Article IV, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.{5} But this divergence, if not conflict of opinion, does not imply that the authority of Congress to govern the territories is outside of the Constitution, since in either case the right is founded on the Constitution, although referred to different provisions of that instrument.

While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for [182 U.S. 291] any and all of the territories, by which that body is restrained from the widest latitude of

discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended.{6} But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that, even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed although not expressed in so many words in the Constitution.

Sixth. As Congress, in governing the territories, is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr. Chief Justice Taney in *Scott v. Sandford,* 19 How. 393, appears to me to be unwarranted. Whatever may be the view entertained of the correctness of the opinion of the Court in that case, insofar as it interpreted a particular provision of the Constitution concerning slavery, and decided that, as so construed, it was in force in the territories, this in no way affects the principle which that decision announced -- that the applicable provisions of the Constitution were operative. That doctrine was concurred in by the dissenting judges, as the following excerpts demonstrate. Thus, Mr. Justice McLean, in the course of his dissenting opinion, said (19 How. 542):

> In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit. [182 U.S. 292]

Mr. Justice Curtis also, in the dissent expressed by him, said (p. 614):

> If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
>
> To this I answer that, in common with all other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder, and so in respect to each of the other prohibitions contained in the Constitution.

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

Eighth. As Congress derives its authority to levy local taxes for local purposes within the territories not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "to lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States.{7}

To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere *dicta* seems to me to be entirely inadmissible. And besides, if such view was justified, [182 U.S. 293] the principle would still find support in the decision in *Woodruff v. Parham,* and that decision in this regard was affirmed by this Court in *Brown v. Houston,* and *Fairbank v. United States, supra.*

From these conceded propositions it follows that Congress, in legislating for Porto Rico, was only empowered to act within the Constitution, and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico.

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this Court which are cited in the margin.{8} Some of these decisions hold, on the one hand,

that, growing out of the presumably ephemeral nature of a territorial government, the provisions of the Constitution relating to the life tenure of judges is inapplicable to courts created by Congress, even in territories which are incorporated into the United States, and some, on the other hand, decide that the provisions as to common law juries found in the Constitution are applicable under like conditions -- that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution. And the application of the provision of the Constitution relating to juries has been also considered in a different aspect, the case being noted in the margin.{9}

The question involved was the constitutionality of the statutes of the United States conferring power on ministers and consuls [182 U.S. 294] to try American citizens for crimes committed in certain foreign countries. Rev.Stat. secs. 4083-4086. The Court held the provisions in question not to be repugnant to the Constitution, and that a conviction for a felony without a previous indictment by a grand jury, or the summoning of a petty jury, was valid.

It was decided that the provisions of the Constitution relating to grand and petty juries were inapplicable to consular courts exercising their jurisdiction in certain countries foreign to the United States. But this did not import that the government of the United States, in creating and conferring jurisdiction on consuls and ministers, acted outside of the Constitution, since it was expressly held that the power to call such courts into being and to confer upon them the right to try, in the foreign countries in question, American citizens was deducible from the treatymaking power as conferred by the Constitution. The Court said (p. 463):

> The treatymaking power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

In other words, the case concerned not the question of a power outside the Constitution, but simply whether certain provisions of the Constitution were applicable to the authority exercised under the circumstances which the case presented.

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character [182 U.S. 295] cannot be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions -- those which regulate a granted power and those which withdraw all authority on a particular subject -- has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country. No one had more broadly asserted this principle than Mr. Webster. Indeed, the support which that proposition receives from expressions of that illustrious man have been mainly relied upon to sustain it, and yet there can be no doubt that, even while insisting upon such principle, it was conceded by Mr. Webster that those positive prohibitions of the Constitution which withhold all power on a particular subject were always applicable. His views of the principal proposition and his concession as to the existence of the qualification are clearly shown by a debate which took place in the Senate on February 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States over California and New Mexico. Mr. Webster, in support of his conception that the Constitution did not, generally speaking, control Congress in legislating for the territories or operate in such districts, said as follows (20 Cong.Globe, App. p. 272):

> Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us, and especially that we should seek to get some conception of what is meant by the proposition in a law to "extend the Constitution of the United States to the territories." Why sir – the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a matter as that. The Constitution, what is it – we extend the Constitution of the United States by law to a territory? What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall [182 U.S. 296] be represented in the legislature which it

> establishes, with not only the right of debate and the right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice President? And can we by law extend these rights, or any of them, to a territory of the United States? Everybody will see that it is altogether impracticable.

Thereupon, the following colloquy ensued between Mr. Underwood and Mr. Webster:

> Mr. Underwood: The learned Senator from Massachusetts says, and says most appropriately and forcibly, that the principles of the Constitution are obligatory upon us even while legislating for the territories. That is true, I admit, in its fullest force, but if it is obligatory upon us while legislating for the territories, is it possible that it will not be equally obligatory upon the officers who are appointed to administer the laws in these territories?
>
> Mr. Webster: I never said it was not obligatory upon them. What I said was that, in making laws for these territories, it was the high duty of Congress to regard those great principles in the Constitution intended for the security of personal liberty and for the security of property.
>
> Mr. Underwood: . . . Suppose we provide by our legislation that nobody shall be appointed to an office there who professes the Catholic religion. What do we do by an act of this sort?
>
> Mr. Webster: We violate the Constitution, which says that no religious test shall be required as qualification for office.

And this was the state of opinion generally prevailing in the Free Soil and Republican parties, since the resistance of those parties to the extension of slavery into the territories, while in a broad sense predicated on the proposition that the Constitution was not generally controlling in the territories, was sustained by express reliance upon the Fifth Amendment to the Constitution forbidding Congress from depriving any person of life, liberty, or property without due process of law. Every platform adopted by those parties down to and including 1860, while propounding the general doctrine, also in effect declared [182 U.S. 297] the rule just stated. I append in the margin an excerpt from the platform of the Free Soil party adopted in 1842.{10}

The conceptions embodied in these resolutions were in almost identical language reiterated in the platform of the Liberty Party in 1843, in that of the Free Soil Party in 1852, and in the platform of the Republican Party in 1856. Stanwood, Hist. of Presidency, pp. 218, 253, 254, and 271. In effect, the same thought was repeated in the declaration of principles made by the Republican Party convention in 1860, when Mr. Lincoln was nominated, as will be seen from an excerpt therefrom set out in the margin.{11}

The doctrine that those absolute withdrawals of power which [182 U.S. 298] the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this Court in *Chicago, Rock Island &c. Railway v. McGlinn,* (1885) 114 U.S. 542, where, speaking through Mr. Justice Field, the Court said (p. 546):

> It is a general rule of public law, recognized and acted upon by the United States, that, whenever political jurisdiction and legislative power over any territory are transferred from one nation of sovereign to another, the municipal laws of the country – that is, laws which are intended for the protection of private rights – continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power – and the latter is involved in the former – to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like would at once cease to be of obligatory force without any declaration to that effect, and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community and promote its health and prosperity which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American Ins. Co. v. Canter,* 1 Pet. 511, 542; Halleck, Int.Law, chap. 34, § 14.

There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can [182 U.S. 299] also be no controversy as to the right of Congress to locally govern the Island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But, as the duty in question was not a local tax, since it was levied in the

United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And besides, if Porto Rico was a part of the United States, the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation -- for whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress -- but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States at least temporarily and until Congress had so determined. On the other hand, it is insisted that, by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without [182 U.S. 300] complete incorporation's following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since, if there were any which were intended to prevent incorporation, they were repugnant to the Constitution and void. The result of the argument is that the government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. These conflicting contentions are asserted to be sanctioned by many adjudications of this Court and by various acts of the executive and legislative branches of the government, both sides in many instances referring to the same decisions and to the like acts but deducing contrary conclusions from them. From this it comes to pass that it will be impossible to weigh the authorities relied upon without ascertaining the subject matter to which they refer in order to determine their proper influence. For this reason, in the orderly discussion of the controversy, I propose to consider the subject from the Constitution itself, as a matter of first impression, from that instrument as illustrated by the history of the government and as construed by the previous decisions of this Court. By this process, if accurately carried out, it will follow that the true solution of the question will be ascertained both deductively and inductively, and the result, besides, will be adequately proved.

It may not be doubted that, by the general principles of the law of nations, every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power in the absence of stipulations upon the subject. These general principles of the law of nations are thus stated by Halleck in his treatise on International Law, page 126:

> A state may acquire property or domain in various ways – its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time, [182 U.S. 301] or by discovery and lawful possession, or by conquest, confirmed by treaty or tacit consent, or by grant, cession, purchase, or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence. Wheaton, Elm.Int.Law, pt. 2, c. 4, secs. 1, 4, 5; Phillimore on Int.Law, vol. 1, secs. 221-227; Grotius, de Jur.Bel. ac. Pac., lib. 2, c. 4; Vattel, Droit des Gens, liv. 2, chs. 7 and 11; Rutherford, Institutes, b. 1, c. 3, b. 2, c. 9; Puffendorf, de Jur.Nat. et. Gent., lib. 4, chs. 4-6; Moser, Versuch, etc., b. 5, c. 9; Martens, Precis du Droit des Gens. secs. 35 *et seq.;* Schmaltz, Droit des Gens, liv. 4, c. 1; Kluber, Droit des Gens, secs. 125, 126; Heffter, Droit International, sec. 76; Ortolan, Domaine International, secs. 53 *et seq.;* Bowyer, Universal Public Law, c. 28; Bello, Derecho Internacional, pt. 1, c. 4; Riquelme, Derecho, Pub.Int., lib. 1, title 1, c. 2; Burlamaqui, Droit de la Nat. et des Gens, tome 4, pt. 3, c. 5.

Speaking of a change of sovereignty, Halleck says (pp. 76, 814):

> Ch. III, Sec. 23. The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power, and become incorporated into the conquering state as a province or as one of its component parts, or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease.
>
> * * * *

> Ch. XXXIII, Sec. 3. If the hostile nation be subdued and the entire state conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the state, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges, and immunities of his own subjects, he does for them all that is due [182 U.S. 302] from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein so as to curb their "impetuosity, and to keep them under subjection." Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the war or as a punishment for the injustice he has suffered from them. . . . Vattel, Droit des Gens, liv. 3, ch. 13, § 201; 2 Curtis, History, etc., liv. 7, cap. 8; Grotius, de Bel. ac P.lib. 3, caps. 8, 15; Puffendorf, de Jur. Nat. et Gent. lib. 8, cap. 6, § 24; Real, Science du Gouvernement, tome 5, ch. 2, § 5; Heffter, Droit International, § 124; Abegg, Untersuchungen, etc., p. 86.

In *American Ins. Co. v. Canter,* 1 Pet. 511, the general doctrine was thus summarized in the opinion delivered by Mr Chief Justice Marshall (p. 542):

> If it [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed either on the terms stipulated in the treaty of cession or *on such as its new master shall impose.*

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

> As free and independent states, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

That under the Confederation it was considered that the government of the United States had authority to acquire territory like any other sovereignty is clearly established by the eleventh of the Articles of Confederation.

The decisions of this Court leave no room for question that, under the Constitution, the government of the United States, [182 U.S. 303] in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation.

In *American Insurance Co. v. Canter,* 1 Pet. 511, the Court, by Mr. Chief Justice Marshall, said (p. 542):

> The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

In *United States v. Huckabee,* (1872) 16 Wall. 414, the Court, speaking through Mr. Justice Clifford, said (p. 434):

> Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. *American Ins. Co. v. Canter,* 1 Pet. 511; *Shanks v. Dupont,* 3 Pet. 246; *United States v. Rice,* 4 Wheat. 254; *The Amy Warwick,* 2 Sprague 143; *Johnson v. McIntosh,* 8 Wheat. 588. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government – or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy nation or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts, as well as personal and real property. Halleck, International Law 839; *Elphinstone v. Bedreechund,* 1 Knapp's Privy Council Cases 329; Vattel 365; 3 Phillimore, International Law 505.

In *Mormon Church v. United States,* (1889) 136 U.S. 1, Mr. Justice Bradley, announcing the opinion of the Court, declared (p. 42, L. ed. p. 491):

> The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treatymaking power and the power to declare and carry [182 U.S. 304] on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories.

Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various states subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. Thus, in part at least,

> the title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States.

Shively v. Bowlby, 152 U.S. 50. The province of Louisiana was ceded by France in 1803; the Floridas were transferred by Spain in 1819; Texas was admitted into the Union by compact with Congress in 1845; California and New Mexico were acquired by the treaty with Mexico of 1848, and other western territory from Mexico by the treaty of 1853; numerous islands have been brought within the dominion of the United States under the authority of the Act of August 18, 1856, c. 164, usually designated as the Guano Islands Act, reenacted in Revised Statutes, sections 5570-5578; Alaska was ceded by Russia in 1867; Medway Island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and $50,000 was expended in efforts to make it a naval station; on the renewal of a treaty with Hawaii November 9, 1887, Pearl harbor was leased for a permanent naval station; by joint resolution of Congress, the Hawaiian Islands came under [182 U.S. 305] the sovereignty of the United States in 1898, and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian islands were given the status of an incorporated territory; on May 21, 1890, there was proclaimed by the President an agreement, concluded and signed with Germany and Great Britain, for the joint administration of the Samoan Islands, 26 Stat. 1497, and on February 16, 1900, 31 Stat. 67, there was proclaimed a convention between the United States, Germany, and Great Britain by which Germany and Great Britain renounced in favor of the United States all their rights and claims over and in respect to the Island of Tutuilla and all other islands of the Samoan group east of longitude 171° west of Greenwich. And finally, the treaty with Spain which terminated the recent war was ratified.

It is worthy of remark that, beginning in the administration of President Jefferson, the acquisition of foreign territory above referred to were largely made while that political party was in power which announced as its fundamental tenet the duty of strictly construing the Constitution, and it is true to say that all shades of political opinion have admitted the power to acquire, and lent their aid to its accomplishment. And the power has been asserted in instances where it has not been exercised. Thus, during the administration of President Pierce, in 1854, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian islands, was not executed. The second article of the proposed treaty provided as follows (Ex.Doc. Senate, 55th Congress, 2d sess., Report No. 681, Calendar No. 747, p. 91):

> Article II
>
> The Kingdom of the Hawaiian Islands shall be incorporated into the American Union as a state, enjoying the same degree of sovereignty as other states, and admitted as such as soon as it can be done in consistency with the principles and requirements of the federal Constitution, to all the rights, privileges, and immunities of a state as aforesaid, on a perfect equality with the other states of the Union.
>
> It is insisted, however, conceding the right of the government [182 U.S. 306] of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire and immediately to deny its beneficial existence.

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the wellbeing of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire. Let me illustrate the accuracy of this statement. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. *Johnson v. McIntosh,* 8 Wheat. 543, 595; *Martin v. Waddell,* 16 Pet. 367, 409; *Jones v. United*

States, 137 U.S. 202, 212; *Shively v. Bowlby,* 152 U.S. 1, 50. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them, not only to local, but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?

The practice of the government has been otherwise. As early as 1856, Congress enacted the Guano Islands Act, heretofore referred to, which, by section 1, provided that when any [182 U.S. 307] citizen of the United States shall

> discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered *as appertaining* to the United States.

11 Stat. 119, c. 164; Rev.Stat. § 5570. Under the act referred to, it was stated in argument that the government now holds and protects American citizens in the occupation of some seventy islands. The statute came under consideration in *Jones v. United States,* 137 U.S. 202, where the question was whether or not the act was valid, and it was decided that the act was a lawful exercise of power, and that islands thus acquired were "appurtenant" to the United States. The court, in the course of the opinion, speaking through MR. JUSTICE Gray, said (p. 212):

> By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest, and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government of its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton, International Law, 8th ed. secs. 161, 165, 176, note 104; Halleck, International Law, c. 6, secs. 7, 15; 1 Phillimore, International Law, 3d ed. §§ 227, 229-230, 232, 242; 1 Calvo, Droit International, 4th ed. §§ 266, 277, 300; *Whiton v. Albany County Ins. Co.,* 109 Mass. 24, 31.

And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and, in its prosecution, the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was [182 U.S. 308] to necessarily incorporate an alien and hostile people into the United States? Take another illustration. Suppose, at the termination of a war, the hostile government had been overthrown, and the entire territory or a portion thereof was occupied by the United States, and there was no government to treat with or none willing to cede by treaty, and thus it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States. If holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?

Yet again. Suppose the United States, in consequence of outrages perpetrated upon its citizens, was obliged to move its armies or send its fleets to obtain redress, and it came to pass that an expensive war resulted and culminated in the occupation of a portion of the territory of the enemy, and that the retention of such territory -- an event illustrated by examples in history -- could alone enable the United States to recover the pecuniary loss it had suffered. And suppose further that to do so would require occupation for an indefinite period, dependent upon whether or not payment was made of the required indemnity. It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and hence the whole burden would be entailed upon the people of the United States. This would be a necessary consequence because, if the United States did not hold the territory as security for the needed indemnity, it could not collect such indemnity, and on the other hand, if incorporation must follow from holding the territory, the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country. In this as in the case of discovery, the traditions and practices of the government demonstrate the unsoundness of the contention. Congress, on May 13, 1846, declared that [182 U.S. 309] war existed with Mexico. In the summer of that year, New Mexico and California were subdued by the American arms, and the military occupation which followed continued until after the treaty of peace was ratified in May, 1848. Tampico, a Mexican port, was occupied by our forces on November 15, 1846, and possession was not surrendered until after the ratification. In the spring of 1847, President Polk, through the Secretary of the Treasury, prepared a tariff of duties on imports and tonnage

which was put in force in the conquered country. 1 Senate Documents, First Session, 30th Congress, pp. 562, 569. By this tariff, *duties were laid as well on merchandise exported from the United States* as from other countries, except as to supplies for our army, and on May 10, 1847, an exemption from tonnage duties was accorded to "all vessels chartered by the United States to convey supplies of any and all descriptions to our army and navy, and actually laden with supplies." *Ib.,* 583. An interesting debate respecting the constitutionality of this action of the President is contained in 18 Cong.Globe, First Session, 30th Congress at pp. 478, 479, 484-489, 495, 498, etc.

In *Fleming v. Page,* 9 How. 603, it was held that the revenue officials properly treated Tampico as a port of a foreign country during the occupation by the military forces of the United States, and that duties on imports into the United States from Tampico were lawfully levied under the general tariff act of 1846. Thus, although Tampico was in the possession of the United States, and the Court expressly held that, in an international sense, the port was a part of the territory of the United States, yet it was decided that, in the sense of the revenue laws, Tampico was a foreign country. The special tariff act promulgated by President Polk was in force in New Mexico and California until after notice was received of the ratification of the treaty of peace. In *Cross v. Harrison,* 16 How. 164, certain collections of impost duties on goods brought from foreign countries into California prior to the time when official notification had been received in California that the treaty of cession had been ratified, as well as impost duties levied after the receipt of such notice, were called in question. The duties collected prior to the receipt of notice were laid at the rate fixed by the tariff promulgated by the President; [182 U.S. 310] those laid after the notification conformed to the general tariff laws of the United States. The Court decided that all the duties collected were valid. The Court undoubtedly, in the course of its opinion, said that, immediately upon the ratification of the treaty, California became a part of the United States and subject to its revenue laws. However, the opinion pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States, upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides, the decision was expressly placed upon the conditions of the treaty, and it was stated in so many words that a different rule would have been applied had the stipulations in the treaty been of a different character.

But, it is argued, all the instances previously referred to may be conceded, for they but illustrate the rule *inter arma sitent leges.* Hence, they do not apply to acts done after the cessation of hostilities when a treaty of peace has been concluded. This not only begs the question, but also embodies a fallacy. A case has been supposed in which it was impossible to make a treaty because of the unwillingness or disappearance of the hostile government, and therefore the occupation necessarily continued although actual war had ceased. The fallacy lies in admitting the right to exercise the power, if only it is exerted by the military arm of the government, but denying it wherever the civil power comes in to regulate and make the conditions more in accord with the spirit of our free institutions. Why it can be thought, although under the Constitution the military arm of the government is in effect the creature of Congress, that such arm may exercise a power without violating the Constitution, and yet Congress -- the creator -- may not regulate, I fail to comprehend.

This further argument, however, is advanced. Granting that Congress may regulate without incorporating where the military arm has taken possession of foreign territory and where there has been or can be no treaty, this does not concern the decision of this case, since there is here involved no regulation, but an actual cession to the United States of territory by treaty. The general rule of the law of nations, by which the acquiring [182 U.S. 311] government fixes the status of acquired territory, it is urged, does not apply to the government of the United States, because it is incompatible with the Constitution that that government should hold territory under a cession and administer it as a dependency without its becoming incorporated. This claim, I have previously said, rests on the erroneous assumption that the United States, under the Constitution, is stripped of those powers which are absolutely inherent in and essential to national existence. The certainty of this is illustrated by the examples already made use of in the supposed cases of discovery and conquest.

If the authority by treaty is limited as is suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty without immediately incorporating such territory into the United States. Let me, however, eliminate the case of war, and consider the treatymaking power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the

national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an inter-oceanic canal where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?

While no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory therefore can be acquired which does not contemplate statehood, and excludes the acquisition of [182 U.S. 312] any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial, considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations.

Let me come, however, to a consideration of the express powers which are conferred by the Constitution to show how unwarranted is the principle of immediate incorporation which is here so strenuously insisted on. In doing so, it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded -- that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution -- it seems to me impossible to conceive that the treatymaking power, by a mere cession, can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treatymaking power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treatymaking power can absolutely, without the consent of Congress, incorporate territory, and if that power may [182 U.S. 313] not insert conditions against incorporation, it must follow that the treatymaking power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution -- that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treatymaking power on the one hand, the construction at the same time minimizes it, on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treatymaking power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted -- vested with the right to destroy, upon the one hand, and deprived of all power to protect the government, on the other.

And, looked at from another point of view, the effect of the principle asserted is equally antagonistic not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treatymaking power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue -- bills for which, by the Constitution, must originate in the House of Representatives -- and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treatymaking power. And the consequent result -- incorporation -- would be beyond all future control of or remedy by the American people, since at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. [182

U.S. 314] The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

All the confusion and dangers above indicated, however, it is argued, are more imaginary than real, since, although it be conceded that the treatymaking power has the right by cession to incorporate without the consent of Congress, that body may correct the evil by availing itself of the provision of the Constitution giving to Congress the right to dispose of the territory and other property of the United States. This assumes that there has been absolute incorporation by the treatymaking power, on the one hand, and yet asserts that Congress may deal with the territory as if it had not been incorporated into the United States. In other words, the argument adopts conflicting theories of the Constitution, and applies them both at the same time. I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories. In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property is altogether erroneous.

Observe again the inconsistency of this argument. It considers, on the one hand, that so vital is the question of incorporation that no alien territory may be acquired by a cession without absolutely endowing the territory with incorporation and [182 U.S. 315] the inhabitants with resulting citizenship, because, under our system of government, the assumption that a territory and its inhabitants may be held by any other title than one incorporating is impossible to be thought of. And yet, to avoid the evil consequences which must follow from accepting this proposition, the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment like any other property. That is to say, to protect a newly acquired people in their presumed rights, it is essential to degrade the whole body of American citizenship.

The reasoning which has sometimes been indulged in by those who asserted that the Constitution was not at all operative in the territories is that, as they were acquired by purchase, the right to buy included the right to sell. This has been met by the proposition that, if the country purchased and its inhabitants became incorporated into the United States, it came under the shelter of the Constitution, and no power existed to sell American citizens. In conformity to the principles which I have admitted, it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that, by a mere act of sale, they may be destroyed. And, applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that, if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country.

Undoubtedly, the thought that, under the Constitution, power to dispose of people and territory, and thus to annihilate the rights of American citizens, was contrary to the conceptions of the Constitution entertained by Washington and Jefferson. In the written suggestions of Mr. Jefferson, when Secretary of State, reported to President Washington in March, 1792, on the subject of proposed negotiations between the United States and Spain which were intended to be communicated by way of instruction [182 U.S. 316] to the commissioners of the United States appointed to manage such negotiations, it was observed, in discussing the possibility as to compensation being demanded by Spain "for the ascertainment of our right" to navigate the lower part of the Mississippi, as follows:

> We have nothing else [than a relinquishment of certain claims on Spain] to give in exchange. For, as to territory, we have neither the right nor the disposition to alienate an inch of what belongs to any member of our Union. Such a proposition, therefore, is totally inadmissible, and not to be treated for a moment.

Ford's Writings of Jefferson, vol. v, p. 476.

The rough draft of these observations was submitted to Mr. Hamilton, then Secretary of the Treasury, for suggestions previously to sending it to the President sometime before March 5, and Hamilton made the following (among other) notes upon it:

> Page 25. Is it true that the United States have no right to *alienate an inch* of the territory in question except in the case of necessity intimated in another place? Or will it be useful to avow the denial of such a right? It is apprehended that the doctrine which restricts the alienation of territory to cases of *extreme necessity* is applicable rather to *peopled* territory than to waste and uninhabited districts. Positions restraining the right of the United States to accommodate to exigencies which may arise ought ever to be advanced with great caution.

Ford's Writings of Jefferson, vol. 5, p. 443.

Respecting this note, Mr. Jefferson commented as follows:

> The power to alienate the unpeopled territories of any state is not among the enumerated powers given by the Constitution to the general government, and if we may go out of that instrument and *accommodate to exigencies which may arise* by alienating the *unpeopled* territory of a state, we may accommodate ourselves a little more by alienating that which is *peopled,* and still a little more by selling the *people* themselves. A shade or two more in the degree of exigency is all that will be requisite, and of that degree we shall ourselves be the judges. However, may it not be hoped that these questions are forever laid to rest by the Twelfth Amendment, once made a part of the Constitution, declaring expressly that "the powers not delegated to the [182 U.S. 317] United States by the Constitution are reserved to the states respectively?" And if the general government has no power to alienate the territory of a state, it is too irresistible an argument to deny ourselves the use of it on the present occasion.

Ib.

The opinions of Mr. Jefferson, however, met the approval of President Washington. On March 18, 1792, in enclosing to the commissioners to Spain their commission, he said, among other things:

> You will herewith receive your commission, as also observations on these several subjects reported to the President and approved by him, which will therefore serve as instructions for you. These expressing minutely the sense of our government, and what they wish to have done, it is unnecessary for me to do more here than desire you to pursue these objects unremittingly,

etc. Ford's Writings of Jefferson, vol. v, p. 456.

When the subject matter to which the negotiations related is considered, it becomes evident that the word "state," as above used, related merely to territory which was either claimed by some of the states, as Mississippi Territory was by Georgia, or to the Northwest Territory, embraced within the Ordinance of 1787, or the territory south of the Ohio (Tennessee), which had also been endowed with all the rights and privileges conferred by that ordinance, and all which territory had originally been ceded by states to the United States under express stipulations that such ceded territory should be ultimately formed into states of the Union. And this meaning of the word "state" is absolutely in accord with what I shall hereafter have occasion to demonstrate was the conception entertained by Mr. Jefferson of what constituted the United States.

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treatymaking power, impliedly or expressly ratified by Congress.

But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose of an incorporated American territory and citizens by the mere exertion of the power to sell [182 U.S. 318] be conceded, *arguendo,* it would not relieve the dilemma. It is ever true that, where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow, then, that any conditions annexed to a disposition which looked to the protection of the people of the United States, or to enable them to safeguard the disposal of territory, would be void, and thus it would be that either the United States must hold on absolutely or must dispose of unconditionally.

A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial, and not a legislative, one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary.

The theory as to the treatymaking power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States, through Congress, [182 U.S. 319] would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi Territory, now the states of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treatymaking power now insisted upon would presuppose that every one of these conditions thus sedulously provided for were superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treatymaking power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted. To appreciate this, it is essential to bear in mind what the words "United States" signified at the time of the adoption of the Constitution. When, by the treaty of peace with Great Britain, the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular states. The entire territory was part of the United States, and all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. When, as has already been said, the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard should be respected. The ordinance of 1787, providing for the government of the Northwest Territory, fulfilled [182 U.S. 320] this promise on behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that it contained a bill of rights, a promise of ultimate statehood, and it provided (italics mine) that

> The said territory and the states which may be formed therein *shall ever remain a part of this Confederacy of the United States of America,* subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled conformably thereto.

It submitted the inhabitants to a liability for a tax to pay their proportional part of the public debt and the expenses of the government, to be assessed by the rule of apportionment which governed the states of the Confederation. It forbade slavery within the territory, and contained a stipulation that the provisions of the ordinance should ever remain unalterable unless by common consent.

Thus it was, at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of states, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of

the general government.

The opinion has been expressed that the Ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution (Taney, C.J., in *Scott v. Sandford,* 19 How. 438), while, on the other hand, it has been said that the Ordinance of 1787 was "the most solemn of all engagements," and became a part of the Constitution of the United States by reason of the sixth article, which provided that

> all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

Per Baldwin, J., concurring opinion in *Pollard v. Kibbe,* 14 Pet. 417, and per Catron, J., in dissenting opinion in *Strader* [182 U.S. 321] *v. Graham,* 10 How. 98. Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that, under the Constitution, the provision of the Northwest Territory Ordinance making such territory forever a part of the Confederation was not binding on the government of the United States when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the Continental soldiers, it is impossible for me to believe that it was ever considered that the result of the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their suffering and valor had secured the liberty of their united country. Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the general government the territory south of the Ohio River, intending thereby to expatriate those dauntless mountaineers of North Carolina who had shed lustre upon the Revolutionary arms by the victory of King's Mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory.

Beyond question, in one of the early laws enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform the ordinance to the new Constitution. 1 Stat. 50.

In view of this, it cannot, it seems to me, be doubted that the United States continued to be composed of states and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution. Subsequently, the territory now embraced in the State of Tennessee was ceded to the United States by the State of North Carolina. In order to insure the rights of the native inhabitants, it was expressly stipulated that the inhabitants of the ceded territory should enjoy all the rights, privileges, benefits, and advantages set forth in the ordinance "of the late Congress for the government of the western territory of the United [182 U.S. 322] States." A condition was, however, inserted in the cession that no regulation should be made by Congress tending to emancipate slaves. By Act of April 2, 1790, 1 Stat. 106, c. 6, this cession was accepted. And at the same session, on May 26, 1790, an act was passed for the government of this territory, under the designation of "the territory of the United States south of the Ohio River." 1 Stat. 123, c. 14. This act, except as to the prohibition which was found in the Northwest Territory Ordinance as to slavery, in express terms declared that the inhabitants of the territory should enjoy all the rights conferred by that ordinance.

A government for the Mississippi Territory was organized on April 7, 1798. 1 Stat. 549, c. 28. The land embraced was claimed by the State of Georgia, and her rights were saved by the act. The sixth section thereof provided as follows:

> SEC. 6. *And be it further enacted* that from and after the establishment of the said government, the people of the aforesaid territory shall be entitled to and enjoy, all and singular, the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the River Ohio in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned territory.

Thus, clearly defined by boundaries, by common citizenship, by like guaranties, stood the United States when the plan of acquiring by purchase from France the province of Louisiana was conceived by President Jefferson. Naturally, the suggestion which arose was the power on the part of the government of the United States, under the Constitution, to incorporate into the United States -- a Union then composed, as I have stated, of states and territories -- a foreign province inhabited by an alien people, and thus make them partakers in the American commonwealth. Mr. Jefferson,

not doubting the power of the United States to acquire, consulted Attorney General Lincoln as to the right by treaty to stipulate for incorporation. By that officer Mr. Jefferson was in effect advised that the power to incorporate -- that is, to share the privileges and immunities [182 U.S. 323] of the people of the United States with a foreign population -- required the consent of the people of the United States, and it was suggested, therefore, that, if a treaty of cession were made containing such agreements, it should be put in the form of a change of boundaries, instead of a cession, so as thereby to bring the territory within the United States. The letter of Mr. Lincoln was sent by President Jefferson to Mr. Gallatin, the Secretary of the Treasury. Mr. Gallatin did not agree as to the propriety of the expedient suggested by Mr. Lincoln. In a letter to President Jefferson in effect so stating, he said:

> But does any constitutional objection really exist? To me it would appear (1) that the United States as a nation have an inherent right to acquire territory; (2) that, whenever that acquisition is by treaty, the same constituted authorities in which the treatymaking power is vested have a constitutional right to sanction the acquisition; (3) that, whenever the territory has been acquired, Congress have the power either of admitting into the Union as a new state or of annexing to a state, with the consent of that state, or of making regulations for the government of such territory.

Gallatin's Writings, vol. 1, p. 11, etc.

To this letter President Jefferson replied in January, 1803, clearly showing that he thought there was no question whatever of the right of the United States to acquire, but that he did not believe incorporation could be stipulated for and carried into effect without the consent of the people of the United States. He said (italics mine):

> You are right, in my opinion, as to Mr. L.'s proposition: *there is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands* will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution.

Gallatin's Writings, vol. 1, p. 115.

And the views of Mr. Madison, then Secretary of State, exactly conformed to those of President Jefferson, for, on March 2, 1803, in a letter to the commissioners who were negotiating the treaty, he said:

> To incorporate the inhabitants of the hereby ceded territory [182 U.S. 324] with the citizens of the United States, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay.

State Papers II, 540.

Let us pause for a moment to accentuate the irreconcilable conflict which exists between the interpretation given to the Constitution at the time of the Louisiana treaty by Jefferson and Madison, and the import of that instrument as now insisted upon. You are to negotiate, said Madison to the commissioners, to obtain a cession of the territory, but you must not under any circumstances agree "*to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made.*" Under the theory now urged, Mr. Madison should have said: You are to negotiate for the cession of the Territory of Louisiana to the United States, and if deemed by you expedient in accomplishing this purpose, you may provide for the immediate incorporation of the inhabitants of the acquired territory into the United States. This you can freely do because the Constitution of the United States has conferred upon the treatymaking power the absolute right to bring all the alien people residing in acquired territory into the United States, and thus divide with them the rights which peculiarly belong to the citizens of the United States. Indeed, it is immaterial whether you make such agreements, since, by the effect of the Constitution, without reference to any agreements which you may make for that purpose, all the alien territory and its inhabitants will instantly become incorporated into the United States if the territory is acquired.

Without going into details, it suffices to say that a compliance with the instructions given them would have prevented the negotiators on behalf of the United States from inserting in the treaty any provision looking even to the ultimate incorporation of the acquired territory into the United States. In view of the emergency and exigencies of the negotiations, however, the commissioners were constrained to make such a stipulation, and the treaty provided as follows:

> Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted [182 U.S. 325] as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

8 Stat. 202.

Weighing the provisions just quoted, it is evident they refute the theory of incorporation arising at once from the mere force of a treaty, even although such result be directly contrary to any provisions which a treaty may contain. Mark the language. It expresses a promise: "The inhabitants of the ceded territory *shall be incorporated in the Union of the United States.* . . ." Observe how guardedly the fulfillment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only "*as soon as possible according to the principles of the federal Constitution.*" If the view now urged be true, this wise circumspection was unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise.

It is said, however, that the treaty for the purchase of Louisiana took for granted that the territory ceded would be immediately incorporated into the United States, and hence the guaranties contained in the treaty related not to such incorporation, but was a pledge that the ceded territory was to be made a part of the Union as a state. The minutest analysis, however, of the clauses of the treaty fails to disclose any reference to a promise of statehood, and hence it can only be that the pledges made referred to incorporation into the United States. This will further appear when the opinions of Jefferson and Madison and their acts on the subject are reviewed. The argument proceeds upon the theory that the words of the treaty "shall be incorporated into the Union of the United States" could only have referred to a promise of statehood, since the then existing and incorporated territories were not a part of the Union of the United States, as that Union consisted only of the states. But this has been shown to be unfounded, [182 U.S. 326] since the "Union of the United States" was composed of states and territories, both having been embraced within the boundaries fixed by the treaty of peace between Great Britain and the United States which terminated the Revolutionary War, the latter, the territories, embracing districts of country which were ceded by the states to the United States under the express pledge that they should forever remain a part thereof. That this conception of the Union composing the United States was the understanding of Jefferson and Madison, and indeed of all those who participated in the events which preceded and led up to the Louisiana treaty, results from what I have already said, and will be additionally demonstrated by statements to be hereafter made. Again, the inconsistency of the argument is evident. Thus, while the premise upon which it proceeds is that foreign territory, when acquired, becomes at once a part of the United States, despite conditions in the treaty expressly excluding such consequence, it yet endeavors to escape the refutation of such theory which arises from the history of the government by the contention that the territories which were a part of the United States were not component constituents of the Union which composed the United States. I do not understand how foreign territory which has been acquired by treaty can be asserted to have been absolutely incorporated into the United States as a part thereof despite conditions to the contrary inserted in the treaty, and yet the assertion be made that the territories which, as I have said, were in the United States originally as a part of the states, and which were ceded by them upon express condition that they should forever so remain a part of the United States, were not a part of the Union composing the United States. The argument, indeed, reduces itself to this -- that, for the purpose of incorporating foreign territory into the United States, domestic territory must be disincorporated. In other words, that the Union must be, at least in theory, dismembered for the purpose of maintaining the doctrine of the immediate incorporation of alien territory.

That Mr. Jefferson deemed the provision of the treaty relating to incorporation to be repugnant to the Constitution is unquestioned. While he conceded, as has been seen, the right [182 U.S. 327] to acquire, he doubted the power to incorporate the territory into the United States without the consent of the people by a constitutional amendment. In July, 1803, he proposed two drafts of a proposed amendment, which he thought ought to be submitted to the people of the United States to enable them to ratify the terms of the treaty. The first of these, which is dated July, 1803, is printed in the margin.{12}

The second and revised amendment was as follows:

> Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations. Save only that, as to the portion thereof lying north of the latitude of the mouth of Arcana River, no new state shall be established nor any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for those purposes.
>
> Florida also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon become citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations.

Ford's Writings of Jefferson, vol. 8, p. 241.

It is strenuously insisted that Mr. Jefferson's conviction on the subject of the repugnancy of the treaty to the Constitution was [182 U.S. 328] based alone upon the fact that he thought the treaty exceeded the limits of the Constitution because he deemed that it provided for the admission, according to the Constitution, of the acquired territory as a new state or states into the Union, and hence, for the purpose of conferring this power, he drafted the amendment. The contention is refuted by two considerations -- the first because the two forms of amendment which Mr. Jefferson prepared did not purport to confer any power upon Congress to admit new states, and second, they absolutely forbade Congress from admitting a new state out of a described part of the territory without a further amendment to the Constitution. It cannot be conceived that Mr. Jefferson would have drafted an amendment to cure a defect which he thought existed, and yet say nothing in the amendment on the subject of such defect. And, moreover, it cannot be conceived that he drafted an amendment to confer a power he supposed to be wanting under the Constitution, and thus ratify the treaty, and yet in the very amendment withhold in express terms, as to a part of the ceded territory, the authority which it was the purpose of the amendment to confer.

I excerpt in the margin {13} two letters from Mr. Jefferson, one [182 U.S. 329] written under date of July 7, 1803, to William Dunbar, and the other dated September 7, 1803, to Wilson Cary Nicholas, which show clearly the difficulties which were in the mind of Mr. Jefferson, and which remove all doubt concerning the meaning of the amendment which he wrote and the adoption of which he deemed necessary to cure any supposed want of power concerning the treaty would be provided for.

These letters show that Mr. Jefferson bore in mind the fact that the Constitution in express terms delegated to Congress the power to admit new states, and therefore no further authority on this subject was required. But he thought this power in Congress was confined to the area embraced within the limits of the United States, as existing at the adoption of the Constitution. To fulfill the stipulations of the treaty so as to cause the ceded territory to become a part of the United States, Mr. Jefferson deemed an amendment to the Constitution to be essential. For this reason, the amendment which he formulated declared that the territory ceded was to be

> *a part of the United States,* and its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations.

What these words meant is not open to doubt when it is observed that they were but the paraphrase of the following words, which were contained in the first proposed amendment which Mr. Jefferson wrote: "[v]esting the inhabitants thereof with all rights possessed *by other territorial citizens of the United States*" -- which clearly show that it was the want of power to incorporate the ceded country into the United States as a territory which was in Mr. Jefferson's mind, and to accomplish which result [182 U.S. 330] he thought an amendment to the Constitution was required. This provision of the amendment applied to all of the territory ceded, and therefore brought it all into the United States, and hence placed it in a position where the power of Congress to admit new states would have attached to it. As Mr. Jefferson deemed that every requirement of the treaty would be fulfilled by incorporation, and that it would be unwise to form a new state out of the upper part of the new territory, after thus providing for the complete execution of the treaty by incorporation of all the territory into the United States, he inserted a provision *forbidding Congress from admitting a new state out of a part of the territory.*

With the debates which took place on the subject of the treaty I need not particularly concern myself. Some shared Mr. Jefferson's doubts as to the right of the treatymaking power to incorporate the territory into the United States

without an amendment of the Constitution; others deemed that the provision of the treaty was but a promise that Congress would ultimately incorporate as a territory, and, until by the action of Congress this latter result was brought about, full power of legislation to govern as deemed best was vested in Congress. This latter view prevailed. Mr. Jefferson's proposed amendment to the Constitution therefore was never adopted by Congress, and hence was never submitted to the people.

An act was approved on October 31, 1803, 2 Stat. 245,

> to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof.

The provisions of this act were absolutely incompatible with the conception that the territory had been incorporated into the United States by virtue of the cession. On November 10, 1803, 2 Stat. 245, an act was passed providing for the issue of stock to raise the funds to pay for the territory. On February 24, 1804, 2 Stat. 251, an act was approved which expressly extended certain revenue and other laws over the ceded country. On March 26, 1804, 2 Stat. 283, an act was passed dividing the "province of Louisiana" into Orleans Territory on the south and the District of Louisiana to [182 U.S. 331] the north. This act extended over the Territory of Orleans a large number of the general laws of the United States, and provided a form of government. For the purposes of government, the District of Louisiana was attached to the Territory of Indiana, which had been carved out of the Northwest Territory. Although the area described as Orleans Territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with.

In a letter written to Mr. Madison on July 14, 1804, Mr. Jefferson, speaking of the treaty of cession, said (Ford's Writings of Jefferson, vol. 8, p. 313):

> The enclosed reclamations of Girod & Chote against the claims of Bapstroop to a monopoly of the Indian commerce supposed to be under the protection of the third article of the Louisiana convention, as well as some other claims to abusive grants, will probably force us to meet that question. The article has been worded with remarkable caution on the part of our negotiators. It is that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitution, to the enjoyment of all the rights of citizens, and, in the meantime, *en attendant,* shall be maintained in their liberty, property, and religion. That is, that they shall continue under the protection of the treaty until the principles of our Constitution can be extended to them, when the protection of the treaty is to cease, and that of our own principles to take its place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. Accordingly, Congress has begun by extending about twenty particular laws by their titles to Louisiana. Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights therefore are now taken from under the treaty and placed under the principles of our laws. I imagine it will be necessary to express an opinion to Governor Claiborne on this subject, after you shall have made up one. [182 U.S. 332]

In another letter to Mr. Madison, under date of August 15, 1804, Mr. Jefferson said (*Ib.* p. 315):

> I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress.

At the following session of Congress, on March 2, 1805, 2 Stat. 322, c. 23, an act was approved, which, among other purposes, doubtless was intended to fulfill the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the first section, provided that the inhabitants of the Territory of Orleans "*shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance* [that is, the ordinance of 1787] *and now enjoyed by the people of the Mississippi territory.*" As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat. 550, c. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the Territory of Orleans was incorporated into the United States to fulfill the requirements of the treaty by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that, even after the action of Congress above stated, this condition of the treaty continued to be enforced, thus demonstrating that even after the incorporation of the territory, the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.

The upper part of the province of Louisiana, designated by the Act of March 26, 1804, 2 Stat. 283, c. 38, as the District of Louisiana, and by the Act of March 3, 1805, 2 Stat. 331, c. 27, as the Territory of Louisiana, was created the Territory of Missouri [182 U.S. 333] on June 4, 1812. 2 Stat. 743, c. 95. By this latter act, though the Ordinance of 1787 was not in express terms extended over the territory -- probably owing to the slavery agitation -- the inhabitants of the territory were accorded substantially all the rights of the inhabitants of the Northwest Territory. Citizenship was in effect recognized in the ninth sec., while the fourteenth section contained an elaborate declaration of the rights secured to the people of the territory.

Pausing to analyze the practical construction which resulted from the acquisition of the vast domain covered by the Louisiana purchase, it indubitably results first, that it was conceded by every shade of opinion that the government of the United States had the undoubted right to acquire, hold, and govern the territory as a possession, and that incorporation into the United States could under no circumstances arise solely from a treaty of cession, even although it contained provisions for the accomplishment of such result; second, it was strenuously denied by many eminent men that, in acquiring territory, citizenship could be conferred upon the inhabitants within the acquired territory -- in other words, that the territory could be incorporated into the United States without an amendment to the Constitution; and, third, that the opinion which prevailed was that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treatymaking power were but promises depending for their fulfillment on the future action of Congress. In accordance with this view, the territory acquired by the Louisiana Purchase was governed as a mere dependency until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a territory into the United States, and the same rights were conferred in the same mode by which other territories had previously been incorporated -- that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

Florida was ceded by treaty signed on February 22, 1819. 8 Stat. 252. While drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view [182 U.S. 334] that, under the Constitution, Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. General Jackson was appointed governor under this act, and exercised a degree of authority entirely in conflict with the conception that the territory was a part of the United States in the sense of incorporation, and that those provisions of the Constitution which would have been applicable under that hypothesis were then in force. It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat. 654, c. 13), an act was passed as in the case of Missouri, and presumably for the same reason, which, while not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*

This treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the treaty, and they were enforced by the executive officers of the government.

The intensity of the political differences which existed at the outbreak of hostilities with Mexico and at the termination of the war with that country, and the subject around which such conflicts of opinion centered, probably explain why the treaty of peace with Mexico departed from the form adopted in the previous treaties concerning Florida and Louisiana. That treaty, instead of expressing a cession in the form previously adopted, whether intentionally or not I am unable, of course, to say, resorted to the expedient suggested by Attorney General Lincoln to President Jefferson, and accomplished the cession *by changing the boundaries of the two countries; in other words, by bringing the acquired territory within the described boundaries of the United States.* The treaty, besides, contained a stipulation for rights of citizenship -- in other words, a provision equivalent in terms to those used in the previous treaties to which I have referred. The controversy which was then flagrant on the subject of slavery prevented the passage of a [182 U.S. 335] bill giving California a territorial form of government, and California, after considerable delay, was therefore directly admitted into the Union as a state. After the ratification of the treaty, various laws were enacted by Congress which in effect treated the territory as acquired by the United States, and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus

become efficacious.

Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent -- that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed not that incorporation was brought about by the treatymaking power wholly without the consent of Congress, but only that, as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico, as just stated. However, the treaty ceding Alaska contained an express provision excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treatymaking authority to so provide, which must be the case if the limitation on the treatymaking power, which is here asserted, be well founded. The treaty concerning Alaska, therefore, adds [182 U.S. 336] cogency to the conception established by every act of the government from the foundation -- that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted.

The demonstration which it seems to me is afforded by the review which has preceded is, besides, sustained by various other acts of the government which to me are wholly inexplicable except upon the theory that it was admitted that the government of the United States had the power to acquire and hold territory without immediately incorporating it. Take, for instance, the simultaneous acquisition and admission of Texas, which was admitted into the Union as a state by joint resolution of Congress, instead of by treaty. To what grant of power under the Constitution can this action be referred unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new states, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence it must be that the action of Congress at one and the same time fulfilled the function of incorporation, and, this being so, the privilege of statehood was added. But I shall not prolong this opinion by occupying time in referring to the many other acts of the government which further refute the correctness of the propositions which are here insisted on and which I have previously shown to be without merit. In concluding my appreciation of the history of the government, attention is called to the Thirteenth Amendment to the Constitution, which to my mind seems to be conclusive. The first section of the amendment, the italics being mine, reads as follows:

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States *or any place subject to their jurisdiction.*

Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not [182 U.S. 337] incorporated into it, and hence are not within the United States in the completest sense of those words.

Let me now proceed to show that the decisions of this Court, without a single exception, are absolutely in accord with the true rule as evolved from a correct construction of the Constitution as a matter of first impression, and as shown by the history of the government which has been previously epitomized. As it is appropriate here, I repeat the quotation which has heretofore been made from the opinion, delivered by Mr. Chief Justice Marshall, in *American Insurance Co. v. Canter,* 1 Pet. 511, where, considering the Florida treaty, the Court said (p. 542):

> The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose.

In *Fleming v. Page,* the Court, speaking through Mr. Chief Justice Taney, discussing the acts of the military forces of the United States while holding possession of Mexican territory, said (9 How. 614):

> The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treatymaking power or the legislative authority.

In *Cross v. Harrison,* 16 How. 164, the question for decision, as I have previously observed, was as to the legality of certain duties collected both before and after the ratification of the treaty of peace, on foreign merchandise imported into California. Part of the duties collected were assessed upon importations made by local officials before notice had been received of the ratification of the treaty of peace, and when duties were laid under a tariff which had been promulgated by the President. Other duties were imposed subsequent to the receipt of notification of the ratification, and these latter duties were laid [182 U.S. 338] according to the tariff as provided in the laws of the United States. All the exactions were upheld. The Court decided that, prior to and up to the receipt of notice of the ratification of the treaty, the local government lawfully imposed the tariff then in force in California, although it differed from that provided by Congress, and that subsequent to the receipt of notice of the ratification of the treaty the duty prescribed by the act of Congress, which the President had ordered the local officials to enforce, could be lawfully collected. The opinion undoubtedly expressed the thought that, by the ratification of the treaty in question, which, as I have shown, not only included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation, the territory had become a part of the United States, and the body of the opinion quoted the letter of the Secretary of the Treasury, which referred to the enactment of laws of Congress by which the treaty had been impliedly ratified. The decision of the Court as to duties imposed subsequent to the receipt of notice of the ratification of the treaty of peace undoubtedly took the fact I have just stated into view, and in addition was unmistakably proceeded upon the nature of the rights which the treaty conferred. No comment can obscure or do away with the patent fact -- namely, that it was unequivocally decided that if different provisions had been found in the treaty, a contrary result would have followed. Thus, speaking through Mr. Justice Wayne, the Court said (16 How. 197):

> By the ratification of the treaty, California became a part of the United States. And *as there is nothing differently stipulated in the treaty with respect to commerce,* it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage.

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken lien of decisions of this Court, first announced by Marshall and followed and lucidly expounded [182 U.S. 339] by Taney, that the treatymaking power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that, on the other hand, when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that, where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until, in the wisdom of Congress, it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined? is then the only question remaining for consideration.

The provisions of the treaty with respect to the status of Porto Rico and its inhabitants are as follows:

> Article II
>
> Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam, in the Marianas or Ladrones.
>
> Article IX

> Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds, and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory, they may preserve [182 U.S. 340] their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance, in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

> Article X

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

It is to me obvious that the above-quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the "civil rights and political status of the native inhabitants of the territories hereby ceded" shall be determined by Congress. When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was brought about which the treaty itself -- giving effect to its provisions -- could not produce. And in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole, seem to me plainly to manifest the intention of Congress that, for the present, at least, Porto Rico is not to be incorporated into the United States.

The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force. A [182 U.S. 341] further analysis of the provisions of the act seems to me not to be required in view of the fact that as the act was reported from the committee it contained a provision conferring citizenship upon the inhabitants of Porto Rico, and this was stricken out in the Senate. The argument therefore can only be that rights were conferred which, after consideration, it was determined should not be granted. Moreover I fail to see how it is possible, on the one hand, to declare that Congress in passing the act had exceeded its powers by treating Porto Rico as not incorporated into the United States, and at the same time it be said that the provisions of the act itself amount to an incorporation of Porto Rico into the United States, although the treaty had not previously done so. It in reason cannot be that the act is void because it seeks to keep the island disincorporated, and at the same time, that material provisions are not to be enforced because the act does incorporate. Two irreconcilable views of that act cannot be taken at the same time, the consequence being to cause it to be unconstitutional.

In what has preceded, I have in effect considered every substantial proposition, and have either conceded or reviewed every authority referred to as establishing that immediate incorporation resulted from the treaty of cession which is under consideration. Indeed, the whole argument in favor of the view that immediate incorporation followed upon the ratification of the treaty in its last analysis necessarily comes to this: since it has been decided that incorporation flows from a treaty which provides for that result when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although the condition to that end has been approved by Congress. That is to say, the argument is this: because a provision for incorporation, when ratified, incorporates, therefore a provision against incorporation must also produce the very consequence which it expressly provides against.

The result of what has been said is that, while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, [182 U.S. 342] because the island had not been incorporated into the United States, but was merely

appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States -- in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the contrary, would only render them more dangerous. This must be the result since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military, instead of by the civil, power.

And to me it further seems apparent that another and more disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently, one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this Court. By the provision in question, Spain relinquished "all claim of sovereignty [182 U.S. 343] over and title to Cuba." It was further provided in the treaty as follows:

> And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property.

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it, of course, feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the conditions justify its accomplishment, this Court unanimously held in *Neely v. Henkel,* 180 U.S. 109, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not [182 U.S. 344] intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed -- which, of course, I do not think to be conceivable -- that the judiciary would be authorized to draw to itself by an act of usurpation purely political functions, upon the theory that, if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which

would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that, under the rule clearly settled in *Neely v. Henkel,* 180 U.S. 109, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treatymaking power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action -- a course which would be incompatible with the dignity and honor of the government.

I am authorized to say that MR. JUSTICE SHIRAS and MR. JUSTICE McKENNA concur in this opinion.

GRAY, J., concurring

MR. JUSTICE GRAY, concurring: [182 U.S. 345]

Concurring in the judgment of affirmance in this case, and in substance agreeing with the opinion of MR. JUSTICE WHITE, I will sum up the reasons for my concurrence in a few propositions which may also indicate my position in other cases now standing for judgment.

The cases now before the Court do not touch the authority of the United States over the territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii; but they relate to territory in the broader sense, acquired by the United States by war with a foreign state.

As Chief Justice Marshall said:

> The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.

American Insurance Co. v. Canter, (1828) 1 Pet. 511, 542.

The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government at such time and in such degree as that department may determine. There must of necessity be a transition period.

In a conquered territory, civil government must take effect either by the action of the treatymaking power, or by that of [182 U.S. 346] the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, elected by the states, and the House of Representatives, chosen by and immediately representing the people of the United States. Treaties by which territory is acquired from a foreign state usually recognize this.

It is clearly recognized in the recent treaty with Spain, especially in the ninth article, by which

> the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the

Congress.

By the fourth and thirteenth articles of the treaty, the United States agree that, for ten years, Spanish ships and merchandise shall be admitted to the ports of the Philippine islands on the same terms as ships and merchandise of the United States, and Spanish scientific, literary, and artistic works not subversive of public order shall continue to be admitted free of duty into all the ceded territories. Neither of these provisions could be carried out if the Constitution required the customs regulations of the United States to apply in those territories.

In the absence of congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning "foreign countries" remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this Court, as declared by Chief Justice Taney in *Fleming v. Page,* 9 How. 603, 617.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution. [182 U.S. 347]

Such was the effect of the Act of Congress of April 12, 1900, c. 191, entitled "An Act Temporarily to Provide Revenues and a Civil government for Porto Rico, and for Other Purposes." By the third section of that act, it was expressly declared that the duties thereby established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico, should cease, in any event, on March 1, 1902, and sooner if the Legislative Assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the government established by that act.

The system of duties temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States.

FULLER, J., dissenting

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE PECKHAM, dissenting:

This is an action brought to recover moneys exacted by the collector of customs at the port of New York as import duties on two shipments of fruit from ports in the Island of Porto Rico to the port of New York in November, 1900.

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899, and the ratifications were exchanged, and the treaty proclaimed April 11, 1899. Then followed the act approved April 12, 1900. 31 Stat. 77, c. 191.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER, MR. JUSTICE PECKHAM, and myself are unable to concur in the opinions and judgment of the Court in this case. The majority widely differ in the reasoning by which the conclusion is reached, although there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless, and notwithstanding the act of Congress, is not a part of the United States subject to the provisions of the Constitution in respect of the levy of taxes, duties, imposts, and excises. [182 U.S. 348]

The inquiry is whether the Act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the federal Constitution.

The act creates a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers,

appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, are constituted an executive council; local legislative powers are vested in a legislative assembly consisting of the executive council and a house of delegates to be elected; courts are provided for, and, among other things, Porto Rico is constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the President for the term of four years. The district court is to be called the District Court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States. The act also provides that

> writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied.

It was also provided that the inhabitants continuing to reside in Porto Rico, who were Spanish subjects on April 11, 1899, and their children born subsequent thereto (except such as should elect to preserve their allegiance to the Crown of Spain), together with citizens of the United States residing in Porto Rico, should

> constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such. [182 U.S. 349]

All officials authorized by the act are required to,

> before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico.

The second third, fourth, fifth and thirty-eighth sections of the act are printed in the margin.* [182 U.S. 350]

It will be seen that duties are imposed upon "merchandise coming into Porto Rico from the United States;" "merchandise [182 U.S. 351] coming into the United States from Porto Rico;" taxes upon "articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn from consumption or sale" "equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture;" and "on all articles of merchandise of United States manufacture coming into Porto Rico," "a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture."

And it is also provided that all duties collected in Porto Rico on imports from foreign countries and on "merchandise coming into Porto Rico from the United States," and "the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico," shall be held as a separate fund and placed "at the disposal of the President to be used for the government and benefit of Porto Rico" until the local government is organized, when

> all collections of taxes and duties under this act shall be paid into the treasury of Porto Rico, instead of being paid into the Treasury of the United States.

The first clause of sec. 8 of Article I of the Constitution [182 U.S. 352] provides:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Clauses four, five, and six of section nine are:

> No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
>
> No tax or duty shall be laid on articles exported from any state.
>
> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

This act on its face does not comply with the rule of uniformity, and that fact is admitted.

The uniformity required by the Constitution is a geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found. *Knowlton v. Moore,* 178 U.S. 41; *Head Money Cases,* 112 U.S. 594. But it is said that Congress, in attempting to levy these duties, was not exercising power derived from the first clause of sec. 8, or restricted by it, because, in dealing with the territories, Congress exercises unlimited powers of government, and, moreover, that these duties are merely local taxes.

This Court, in 1820, when Marshall was Chief Justice, and Washington, William Johnson, Livingston, Todd, Duvall, and Story were his associates, took a different view of the power of Congress in the matter of laying and collecting taxes, duties, imposts, and excises in the territories, and its ruling in *Loughborough v. Blake,* 5 Wheat. 317, has never been overruled.

It is said in one of the opinions of the majority that the Chief Justice "made certain observations which have occasioned some embarrassment in other cases." Manifestly this is so in this case, for it is necessary to overrule that decision in order to reach the result herein announced. [182 U.S. 353]

The question in *Loughborough v. Blake* was whether Congress had the right to impose a direct tax on the District of Columbia apart from the grant of exclusive legislation, which carried the power to levy local taxes. The Court held that Congress had such power under the clause in question. The reasoning of Chief Justice Marshall was directed to show that the grant of the power "to lay and collect taxes, duties, imposts, and excises," because it was general and without limitation as to place, consequently extended "to all places over which the government extends," and he declared that, if this could be doubted, the doubt was removed by the subsequent words, which modified the grant, "but all duties, imposts, and excises shall be uniform throughout the United States." He then said:

> It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

It is wholly inadmissible to reject the process of reasoning by which the Chief Justice reached and tested the soundness of his conclusion, as merely *obiter.*

Nor is there any intimation that the ruling turned on the theory that the Constitution irrevocably adhered to the soil of Maryland and Virginia, and therefore accompanied the parts which were ceded to form the District, or that "the tie" between [182 U.S. 354] those states and the Constitution "could not be dissolved without at least the consent of the federal and state governments to a formal separation," and that this was not given by the cession and its acceptance in accordance with the constitutional provision itself, and hence that Congress was restricted in the exercise of its powers in the District, while not so in the territories.

So far from that, the Chief Justice held the territories as well as the District to be part of the United States for the purposes of national taxation, and repeated in effect what he had already said in *McCulloch v. Maryland,* 4 Wheat. 408:

> Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported.

Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the states and their people as

well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the states can only exist if and as granted by the Constitution. And by the Constitution Congress is vested with power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The territories are indeed not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

It is evident that Congress cannot regulate commerce between a territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the states, the power to so legislate is apparently [182 U.S. 355] rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication. *Stoutenburgh v. Hennick,* 129 U.S. 141.

Accordingly, the Act of Congress of August 8, 1890, entitled "An Act to Limit the Effect of the Regulations of Commerce between the Several states, and with Foreign Countries in Certain Cases," applied in terms to the territories as well as to the states.

In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation, and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity.

The fact that the proceeds are devoted by the act to the use of the territory does not make national taxes local. Nobody disputes the source of the power to lay and collect duties geographically uniform and apply the proceeds by a proper appropriation act to the relief of a particular territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion certainly is not strengthened when based on the diversion of duties collected from all parts of the United States to a territorial treasury before reaching the Treasury of the United States. Clause 7 of sec. 9 of Article I provides that "no money shall be drawn from the Treasury but in consequence of appropriations made by law," and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

It is also urged that Chief Justice Marshall was entirely in fault because, while the grant was general and without limitation as to place, the words "throughout the United States" imposed a limitation as to place so far as the rule of uniformity was concerned -- namely, a limitation to the states as such.

Undoubtedly the view of the Chief Justice was utterly inconsistent with that contention, and, in addition to what has been quoted, he further remarked:

> If it be said that the principle of uniformity, established in the Constitution, secures the District from oppression in the imposition of indirect taxes, it is [182 U.S. 356] not less true that the principle of apportionment, also established in the Constitution, secures the District from any oppressive exercise of the power to lay and collect direct taxes.

It must be borne in mind that the grant was of the absolute power of taxation for national purposes, wholly unlimited as to place, and subject to only one exception and two qualifications. The exception was that exports could not be taxed at all. The qualifications were that direct taxes must be imposed by the rule of apportionment, and indirect taxes by the rule of uniformity. *License Tax Cases,* 5 Wall. 462. But, as the power necessarily could be exercised throughout every part of the national domain, state, territory, district, the exception and the qualifications attended its exercise. That is to say, the protection extended to the people of the states extended also to the people of the district and the territories.

In *Knowlton v. Moore,* 178 U.S. 41, it is shown that the words "throughout the United States" are but a qualification introduced for the purpose of rendering the uniformity prescribed geographical, and not intrinsic, as would have resulted if they had not been used.

As the grant of the power to lay taxes and duties was unqualified as to place, and the words were added for the sole

purpose of preventing the uniformity required from being intrinsic, the intention thereby to circumscribe the area within which the power could operate not only cannot be imputed, but the contrary presumption must prevail.

Taking the words in their natural meaning -- in the sense in which they are frequently and commonly used -- no reason is perceived for disagreeing with the Chief Justice in the view that they were used in this clause to designate the geographical unity known as "The United States," "our great republic, which is composed of states and territories."

Other parts of the Constitution furnish illustrations of the correctness of this view. Thus the Constitution vests Congress with the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States." [182 U.S. 357]

This applies to the territories as well as the states, and has always been recognized in legislation as binding.

Aliens in the territories are made citizens of the United States, and bankrupts residing in the territories are discharged from debts owing citizens of the states, pursuant to uniform rules and laws enacted by Congress in the exercise of this power.

The Fourteenth Amendment provides that

> all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,

and this Court naturally held, in the *Slaughter-House Cases,* 16 Wall. 36, that the United States included the District and the territories. Mr. Justice Miller observed:

> It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided.

And he said the question was put at rest by the amendment, and the distinction between citizenship of the United States and citizenship of a state was clearly recognized and established.

> Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

No person is eligible to the office of President unless he has "attained the age of thirty-five years, and been fourteen years a resident within the United States." Clause 5, sec. 1, Art. II.

Would a native-born citizen of Massachusetts be ineligible if he had taken up his residence and resided in one of the territories for so many years that he had not resided altogether fourteen years in the states? When voted for, he must be a citizen of one of the states (clause 3, sec. 1, Art. II; art. 12), but as to length of time must residence in the territories be counted against him? [182 U.S. 358]

The Fifteenth Amendment declares that

> the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Where does that prohibition on the United States especially apply if not in the territories?

The Thirteenth Amendment says that neither slavery nor involuntary servitude "shall exist within the United States or any place subject to their jurisdiction." Clearly this prohibition would have operated in the territories if the concluding words had not been added. The history of the times shows that the addition was made in view of the then condition of the country -- the amendment passed the house January 31, 1865 -- and it is, moreover, otherwise

applicable than to the territories. Besides, generally speaking, when words are used simply out of abundant caution, the fact carries little weight.

Other illustrations might be adduced, but it is unnecessary to prolong this opinion by giving them.

I repeat that no satisfactory ground has been suggested for restricting the words "throughout the United States," as qualifying the power to impose duties, to the states, and that conclusion is the more to be avoided when we reflect that it rests, in the last analysis, on the assertion of the possession by Congress of unlimited power over the territories.

The government of the United States is the government ordained by the Constitution and possesses the powers conferred by the Constitution.

> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?

Marbury v. Madison, 1 Cranch 176. The opinion of the Court, by Chief Justice Marshall, in that case was delivered at [182 U.S. 359] the February term, 1803, and at the October term, 1885, the Court, in *Yick Wo v. Hopkins,* 118 U.S. 356, speaking through Mr. Justice Matthews, said:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power.

From *Marbury v. Madison* to the present day, no utterance of this Court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are "not prohibited, but consist with the letter and spirit of the Constitution."

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.

To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the states, and not the people, created the government.

It is again to antagonize Chief Justice Marshall, when he said:

> The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers.

4 Wheat. 404.

The prohibitory clauses of the Constitution are many, and [182 U.S. 360] they have been repeatedly given effect by this Court in respect of the territories and the District of Columbia.

The underlying principle is indicated by Chief Justice Taney in *The Passenger Cases,* 7 How. 492, where he maintained the right of the American citizen to free transit in these words:

> Living, as we do, under a common government charged with the great concerns of the whole Union, every citizen of the United States, from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its

> judicial tribunals and public offices in every state and Territory of the Union. . . . For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States, and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.

In *Cross v. Harrison,* 16 How. 197, it was held that, by the ratification of the treaty with Mexico, "California became a part of the United States," and that

> the right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States.

In *Dred Scott v. Sandford,* 19 How. 393, the Court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution, or, as Mr. Justice Curtis put it, by "the express prohibitions on Congress not to do certain things."

Mr. Justice McLean said: "No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr. Justice Campbell:

> I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, [182 U.S. 361] whose subject comprehended an empire, and which had no restriction but the discretion of Congress.

Chief Justice Taney:

> The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the states, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by states. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the states, and guards them as firmly and plainly against any inroads which the general government might attempt under the plea of implied or incidental powers.

Many of the later cases were brought from territories over which Congress had professed to "extend the Constitution," or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body.

Capital Traction Co. v. Hof, 174 U.S. 1, is a fair illustration, for it was there ruled, citing *Webster v. Reid,* 11 How. 437; *Callan v. Wilson,* 127 U.S. 550; *Thompson v. Utah,* 170 U.S. 343, that

> it is beyond doubt at the present day that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.

No reference whatever was made to section 34 of the Act of February 21, 1871, 16 Stat. 419, c. 62, which, in providing for the election of a delegate for the District, closed with the words:

> The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly, and the Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States. [182 U.S. 362]

Nor did the Court, in *Bauman v. Ross,* 167 U.S. 548, attribute the application of the Fifth Amendment to the act of Congress, although it was cited to another point.

The truth is that, as Judge Edmunds wrote,

> the instances in which Congress has declared, in statutes organizing territories, that the Constitution and laws should be in force there are no evidence that they were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases, they declare a preexisting truth to ease the doubts of casuists.

Cong.Rec. 56th Cong. 1st Sess., p. 3507.

In *Callan v. Wilson,* 127 U.S. 540, which was a criminal prosecution in the District of Columbia, MR. JUSTICE HARLAN, speaking for the Court, said:

> There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property – especially of the privilege of trial by jury in criminal cases.

And further:

> We cannot think that the people of this District have in that regard less rights than those accorded to the people of the territories of the United States.

In *Thompson v. Utah,* 170 U.S. 343, it was held that a statute of the State of Utah providing for the trial of criminal cases other than capital by a jury of eight was invalid as applied on a trial for a crime committed before Utah was admitted; that it was not

> competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a territory,

and that an act of Congress providing for a trial by a jury of eight persons in the Territory of Utah would have been in conflict with the Constitution.

Article VI of the Constitution ordains:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

And, as Mr. Justice Curtis observed in *United States v. Morris,* [182 U.S. 363] 1 Curtis 50,

> nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places at all times.

But it is said that an opposite result will be reached if the opinion of Chief Justice Marshall in *American Insurance Company v. Canter,* 1 Pet. 511, be read

> in connection with Art. III, secs. 1 and 2 of the Constitution, vesting "the judicial power of the United States" in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior,"

etc. And it is argued:

> As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution.

And further that, if the territories

> be a part of the United States, it is difficult to see how Congress could create courts in such territories except under the judicial clause of the Constitution.

By the ninth clause of section 8 of Article I, Congress is vested with power "to constitute tribunals inferior to the Supreme Court," while by sec. 1 of Article III, the power is granted to it to establish inferior courts in which the judicial power of the government treated of in that article is vested.

That power was to be exerted over the controversies therein named, and did not relate to the general administration

of justice in the territories, which was committed to courts established as part of the territorial government.

What the Chief Justice said was:

> These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that [182 U.S. 364] clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States.

The Chief Justice was dealing with the subject in view of the nature of the judicial department of the government and the distinction between federal and state jurisdiction, and the conclusion was, to use the language of MR. JUSTICE HARLAN in *McAllister v. United States,* 141 U.S. 174,

> that courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that article.

But it did not therefore follow that the territories were not parts of the United States, and that the power of Congress in general over them was unlimited; nor was there in any of the discussions on this subject the least intimation to that effect.

And this may justly be said of expressions in some other cases supposed to give color to this doctrine of absolute dominion in dealing with civil rights.

In *Murphy v. Ramsey,* 114 U.S. 15, Mr. Justice Matthews said:

> The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national. Their political rights are franchises, which they hold as privileges in the legislative discretion of the Congress of the United States.

In the *Mormon Church Case,* 136 U.S. 44, Mr. Justice Bradley observed:

> Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. [182 U.S. 365]

That able judge was referring to the fact that the Constitution does not expressly declare that its prohibitions operate on the power to govern the territories, but, because of the implication that an express provision to that effect might be essential, three members of the Court were constrained to dissent, regarding it, as was said, "of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments."

What was ruled in *Murphy v. Ramsey* is that in places over which Congress has exclusive local jurisdiction, its power over the political status is plenary.

Much discussion was had at the bar in respect of the citizenship of the inhabitants of Porto Rico, but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream.

Yet although we are confined to the question of the validity of certain duties imposed after the organization of Porto Rico as a territory of the United States, a few observations and some references to adjudged cases may well enough be added in view of the line of argument pursued in the concurring opinion.

In *American Insurance Company v. Canter,* 1 Pet. 541 -- in which, by the way, the Court did not accept the views of Mr. Justice Johnson in the circuit court or of Mr. Webster in argument -- Chief Justice Marshall said:

The course which the argument has taken will require that, in deciding this question, the Court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose. [182 U.S. 366] On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state. On the second of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision:

> The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. [182 U.S. 367]

General Halleck (Int.Law, 1st ed., c. 33, § 14), after quoting from Chief Justice Marshall, observed:

> This is now a well settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple and easily understood, but it is not so easy to distinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the constitution and laws of the conqueror change or replace those of the conquered. And in case the government of the new state is a constitutional government of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases.

In *United States v. Percheman,* 7 Pet. 87, the Chief Justice said:

> The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.

Again, the court in *Pollard's Lessee v. Hagan,* 3 How. 225:

> Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.

And in *Chicago, Rock Island & Pacific Railway Co. v. McGlinn,* 114 U.S. 546:

> It is a general rule of public law, recognized and acted upon by the United States, that whenever [182 U.S. 368] political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country – that is, laws which are intended for the protection of private rights – continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power – and the latter is involved in the former – to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect, and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But, with respect to other laws affecting the possession, use, and transfer of property and designed to secure good order and peace in the community and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

When a cession of territory to the United States is completed by the ratification of a treaty, it was stated in *Cross v. Harrison,* 16 How. 198, that the land ceded becomes a part of the United States, and that, as soon as it becomes so, the territory is subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right, and the latter ceased after the ratification of the treaty. This statement was made by the justice delivering the opinion, as the result of the discussion and argument which he had already set forth. It was his summing up of what he supposed was decided on that subject in the case in which he was writing. [182 U.S. 369]

The new master was, in the instance of Porto Rico, the United States, a constitutional government with limited powers, and the terms which the Constitution itself imposed, or which might be imposed in accordance with the Constitution, were the terms on which the new master took possession.

The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation is not disputed, nor is the proposition that in all international relations, interests, and responsibilities, the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States, and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument and inconsistent with its letter and spirit.

Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. The ninth article of the treaty ceding Porto Rico to the United States provided that Spanish subjects, natives of the Peninsula, residing in the ceded territory might remain or remove, and in case they remained, might preserve their allegiance to the Crown of Spain by making a declaration of their decision to do so, "in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside."

The same article also contained this paragraph:

> The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

This was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it [182 U.S. 370] purport to secure from the United States a guaranty of civil or political privileges.

Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the federal jurisdiction, would be simply void.

> It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government.

The Cherokee Tobacco, 11 Wall. 616, 620.

So Mr. Justice Field, in *De Geofroy v. Riggs,* 133 U.S. 267:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent.

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two-thirds of a quorum of the Senate. *See* 2 Tucker on the Constitution §§ 354-356.

In the language of Judge Cooley:

> The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission, but while it stands, it is
>
> > a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances.
>
> Its principles cannot therefore be set aside in order to meet the supposed necessities of great crises.
>
> > No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

I am not intimating in the least degree that any reason exists for regarding this article to be unconstitutional, but even if it [182 U.S. 371] were, the fact of the cession is a fact accomplished, and this Court is concerned only with the question of the power of the government in laying duties in respect of commerce with the territory so ceded.

In the concurring opinion of MR. JUSTICE WHITE, we find certain important propositions conceded, some of which are denied or not admitted in the other. These are to the effect that

> when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication;

that, as every function of the government is derived from the Constitution, "that instrument is everywhere and at all times potential insofar as its provisions are applicable;" that

> wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits;

that where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence cannot be frustrated by the action of any or all of the departments of the government; that the Constitution has conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but every applicable express limitation of the Constitution is in force, and even where there is no express command which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed though not expressed in so many words; that every provision of the Constitution which is applicable to the territories is controlling therein, and all the limitations of the Constitution applicable to Congress in governing the territories necessarily limit its power; that in the case of the territories, when a provision of the Constitution is invoked, the question is whether the provision relied on is applicable, and that the power to lay and collect taxes, duties, imposts, and excises, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory [182 U.S. 372] which has been incorporated into and forms a part of the United States.

And it is said that the determination of whether a particular provision is applicable involves an inquiry into the situation of the territory and its relations to the United States, although it does not follow, when the Constitution has withheld all power over a given subject, that such an inquiry is necessary.

The inquiry is stated to be: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" And, the answer being given that it had not, it is held that the rule of uniformity was not applicable.

I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this Court, Congress can, in the same act and in the exercise of the power conferred by the first clause of section eight, impose duties on the commerce between Porto Rico and the states and other territories in contravention of the rule of uniformity qualifying the power. If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the

Constitution. This was the position taken by the Attorney General, with a candor and ability that did him great credit.

But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period, and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

The accuracy of this view is supposed to be sustained by the act of 1856 in relation to the protection of citizens of the United States removing guano from unoccupied islands, but I am unable to see why the discharge by the United States of its undoubted [182 U.S. 373] duty to protect its citizens on *terra nullius,* whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of Congress over the territories of the United States is unrestricted.

Great stress is thrown upon the word "incorporation," as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of section 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power -- a suggestion to which I do not assent -- the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the states and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

In our judgment, so much of the Porto Rican act as authorized [182 U.S. 374] the imposition of these duties is invalid, and plaintiffs were entitled to recover.

Some argument was made as to general consequences apprehended to flow from this result, but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing

> in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution

in giving it a construction not warranted by its words.

Briefs have been presented at this bar purporting to be on behalf of certain industries and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That however, furnishes no basis for judicial judgment, and if the producers of staples in the existing states of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished. The people of all the states are entitled to a voice in the settlement of that subject.

Again, it is objected on behalf of the government that the possession of absolute power is essential to the acquisition of vast and distant territories, and that we should regard the situation as it is today, rather than as it was a century ago.

> We must look at the situation as comprehending a possibility – I do not say a probability, but a possibility – that the question might be as to the powers of this government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire.

But it must be remembered that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close of the convention, they well knew, was that star of empire whose course Berkeley had sung sixty years before.

They may not, indeed, have deliberately considered a triumphal [182 U.S. 375] progress of the nation, as such, around the earth, but as Marshall wrote:

> It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.

This cannot be said, and, on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.

After all, these arguments are merely political, and "political reasons have not the requisite certainty to afford rules of judicial interpretation."

Congress has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. If the end be legitimate and within the scope of the Constitution, then, to accomplish it, Congress may use

> all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution.

The grave duty of determining whether an act of Congress does or does not comply with these requirements is only to be discharged by apply in the well settled rules which govern the interpretation of fundamental law, unaffected by the theoretical opinions of individuals.

Tested by those rules our conviction is that the imposition of these duties cannot be sustained.

HARLAN, J., dissenting

MR. JUSTICE HARLAN, dissenting:

I concur in the dissenting opinion of THE CHIEF JUSTICE. The grounds upon which he and MR. JUSTICE BREWER and MR. JUSTICE PECKHAM regard the Foraker Act as unconstitutional in the particulars involved in this action meet my entire approval. [182 U.S. 376] Those grounds need not be restated, nor is it necessary to reexamine the authorities cited by THE CHIEF JUSTICE. I agree in holding that Porto Rico -- at least after the ratification of the treaty with Spain -- became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress and providing that "*all* duties, imposts, and excises shall be uniform *throughout the United States*."

In view, however, of the importance of the questions in this case, and of the consequences that will follow any conclusion reached by the court, I deem it appropriate -- without rediscussing the principal questions presented -- to add some observations suggested by certain passages in opinions just delivered in support of the judgment.

In one of those opinions, it is said that "the Constitution was created by the people of the *United States,* as a union of *states,* to be governed solely by representatives of the *states;*" also that

> we find the Constitution speaking *only to states,* except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them.

I am not sure that I correctly interpret these words. But if it is meant, as I assume it is meant, that with the exception named, the Constitution was ordained by the states, and is addressed to and operates only on the states, I cannot accept that view.

In *Martin v. Hunter,* 1 Wheat. 304, 324-326, 331, this Court, speaking by Mr. Justice Story, said that

> the Constitution of the United States was ordained and established not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the People of the United States.

In *McCulloch v. Maryland,* 4 Wheat. 316, 403-406, Chief Justice Marshall, speaking for this Court, said:

> The government proceeds directly from the people; is "ordained and established" in the name of the people, and is declared to be ordained
>
> > in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.
>
> The assent of the states, in their sovereign capacity, is implied in calling a convention, [182 U.S. 377] and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negatived by, the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all.

Although the states are constituent parts of the United States, the government rests upon the authority of the people of the United States, and not on that of the states. Chief Justice Marshall, delivering the unanimous judgment of this Court in *Cohen v. Virginia,* 6 Wheat. 264, 413, said:

> That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war, we are one people. In making peace, we are one people. . . . In many other respects, the American people are one, and the government which is alone capable of controlling and managing their interests . . . is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; to all these objects it is competent. The people have declared that, in the exercise of all powers given for those objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.

In reference to the doctrine that the Constitution was established by and for the states as distinct political organizations, Mr. Webster said:

> The Constitution itself in its very front refutes that. It declares that it is ordained and established by [182 U.S. 378] the the United States. So far from saying that it is established by the governments of the several states, it does not even say that it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate. Doubtless the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution.

In view of the adjudications of this Court, I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government of or by the states in union, and that the prohibitions and limitations of the Constitution are addressed only to the states. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of states, held together by compact between themselves, whereas, as this Court has often declared, it is a government created by the the United States, with enumerated powers, and supreme over states and individuals with respect to certain objects throughout the entire territory over which its jurisdiction extends. If the national government is in any sense a compact, it is a compact between the the United States among themselves as constituting in the aggregate the political community by whom the national government was established. The Constitution speaks not simply to the states in their

organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States. *Martin v. Hunter,* 1 Wheat. 327.

In the opinion to which I am referring, it is also said that the

> practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct;

that, while all power of government may be abused, the same may be said of the power of the government "under the Constitution as well as outside of it;" that

> if it once be conceded that we are at liberty to acquire foreign territory, a presumption arises that [182 U.S. 379] our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;

that

> the liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression;

that, as the states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that "if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;" that if

> we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions;

and that

> the executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired.

These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this Court, a radical and mischievous change in our system of government will be the result. We will in that event pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the government this Court has held steadily to the view that the government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted, *Martin v. Hunter,* 1 Wheat. 326, 331, we are now informed that Congress possesses powers *outside of the Constitution,* and may deal with new territory, [182 U.S. 380] acquired by treaty or conquest, in the same manner *as other nations have been accustomed to act with respect to territories acquired by them.* In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character, it would never have been adopted by the people of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces -- the people inhabiting them to enjoy only such rights as Congress chooses to accord to them -- is wholly

inconsistent with the spirit and genius, as well as with the words, of the Constitution.

The idea prevails with some -- indeed, it found expression in arguments at the bar -- that we have in this country substantially or practically two national governments -- one to be maintained under the Constitution, with all its restrictions, the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. The glory of our American system [182 U.S. 381] of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. "To what purpose," Chief Justice Marshall said in *Marbury v. Madison,* 1 Cranch 137, 176,

> are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.

The wise men who framed the Constitution and the patriotic people who adopted it were unwilling to depend for their safety upon what, in the opinion referred to, is described as

> certain principles of natural justice inherent in Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.

They proceeded upon the theory -- the wisdom of which experience has vindicated -- that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty. They believed that the establishment here of a government that could administer public affairs according to its will, unrestrained by any fundamental law and without regard to the inherent rights of freemen, would be ruinous to the liberties of the people by exposing them to the oppressions of arbitrary power. Hence the Constitution enumerates the powers which Congress and the other departments may exercise -- leaving unimpaired, to the states or the People, the powers not delegated to the national government nor prohibited to the states. That instrument so expressly declares in [182 U.S. 382] the Tenth Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violation of the principles of the Constitution.

Again, it is said that Congress has assumed in its past history that the Constitution goes into territories acquired by purchase or conquest *only when and as it shall so direct,* and we are informed of the liberality of Congress in *legislating* the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can at its pleasure legislate or exclude its creator from territories which were acquired only by authority of the Constitution.

By the express words of the Constitution, every Senator and Representative is bound, by oath or affirmation, to regard it as the supreme law of the land. When the constitutional convention was in session, there was much discussion as to the phraseology of the clause defining the supremacy of the Constitution, laws, and treaties of the United States. At one stage of the proceedings, the convention adopted the following clause:

> This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants, and the judges of the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.

This clause was amended, on motion of Mr. Madison, by inserting after the words "all treaties made" the words "or which shall be made." If the clause, so amended had been inserted in the Constitution as finally adopted, perhaps [182 U.S. 383] there would have been some justification for saying that the Constitution, laws, and treaties of the United States constituted the supreme law only in the states, and that outside of the states, the will of Congress was supreme. But the framers of the Constitution saw the danger of such a provision, and put into that instrument in place of the above clause the following:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be *the supreme law of the land,* and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Meigs' Growth of the Constitution, 284, 287. That the convention struck out the words "the supreme law of the several states" and inserted "the supreme law of the land" is a fact of no little significance. The "land" referred to manifestly embraced all the peoples and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority.

Further, it is admitted that *some* of the provisions of the Constitution do apply to Porto Rico, and may be invoked as limiting or restricting the authority of Congress, or for the protection of the people of that island. And it is said that there is a clear distinction between such prohibitions

> as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several states.

In the enforcement of this suggestion, it is said in one of the opinions just delivered:

> Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of *that description.*

I cannot accept this reasoning as consistent with the Constitution or with sound rules of interpretation. The express prohibition upon the passage by Congress of bills of attainder, or of *ex post facto* laws, or the granting of titles of nobility goes no more directly to the root of the power of Congress than does the express prohibition against the imposition by Congress of any [182 U.S. 384] duty, impost, or excise that is not uniform throughout the United States. The opposite theory, I take leave to say, is quite as extraordinary as that which assumes that Congress may exercise powers outside of the Constitution and may, in its discretion, legislate that instrument into or out of a domestic territory of the United States.

In the opinion to which I have referred, it is suggested that conditions may arise when the annexation of distant possessions may be desirable. "If," says that opinion,

> those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible, and the question at once arises whether large *concessions* ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

In my judgment, the Constitution does not sustain any such theory of our governmental system. Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make "concessions" that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or [182 U.S. 385] embarrassing circumstances. No

such dispensing power exists in any branch of our government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve because the import duty is manyfold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this Court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its government, the validity or invalidity of that which is done must be determined by the Constitution.

In *De Lima v. Bidwell,* just decided, we have held that, upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country and became a domestic territory of the United States. We have said in that case that from 1803 to the present time, there was not a shred of authority, except a *dictum* in one case, "for holding that a district ceded to and in possession of the United States remains for any purpose a foreign territory," that territory so acquired cannot be "domestic for one purpose and foreign for another," and that any judgment to the contrary would be "pure judicial legislation," for which there was no warrant in the Constitution or in the powers conferred upon this Court. Although, as we have just decided, [182 U.S. 386] Porto Rico ceased, after the ratification of the treaty with Spain, to be a foreign country within the meaning of the tariff act, and became a domestic country -- "a territory of the United States" -- it is said that if Congress so wills, it may be controlled and governed outside of the Constitution and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts, and excises imposed by Congress "shall be uniform throughout the United States." How Porto Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell,* and yet, as is now held, not embraced by the words "throughout the United States," is more than I can understand.

We heard much in argument about the "expanding future of our country." It was said that the United States is to become what is called a "world power," and that, if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it *must* be allowed to exert all the power that other nations are accustomed to exercise. My answer is that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government [182 U.S. 387] by mere judicial interpretation. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words "throughout the United States," in the taxing clause of the Constitution, do not embrace a domestic "territory of the United States" having a civil government established by the authority of the United States. This is a distinction which I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

There are other matters to which I desire to refer. In one of the opinions just delivered, the case of *Neely v. Henkel,* 180 U.S. 119, is cited in support of the proposition that the provision of the Foraker Act here involved was consistent with the Constitution. If the contrary had not been asserted, I should have said that the judgment in that case did not have the slightest bearing on the question before us. The only inquiry there was whether Cuba was a foreign

country or territory within the meaning not of the tariff act, but of the Act of June 6, 1900, 31 Stat. 656, c. 793. We held that it was a foreign country. We could not have held otherwise, because the United States, when recognizing the existence of war between this country and Spain, disclaimed "any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof," and asserted "its determination, when that is accomplished, to leave the government and control of the island to its people." We said:

> While by the Act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, [182 U.S. 388] or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. Cuba is nonetheless foreign territory within the meaning of the act of Congress because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba. It is true that, as between Spain and the United States – indeed, as between the United States and all foreign nations – Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris, was to be treated as if it were conquered territory. But, as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In answer to the suggestion that, under the modes of trial there adopted, Neely, if taken to Cuba, would be denied the rights, privileges, and immunities accorded by our Constitution to persons charged with crime against the United States, we said that the constitutional provisions referred to "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United States acquired by treaty, except as Congress may provide, is more than I can perceive.

There is still another view taken of this case. Conceding [182 U.S. 389] that the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become *incorporated* into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government, for only Congress is given power by the Constitution to admit new states. But it is an entirely different question whether a domestic "territory of the United States," having an organized civil government established by Congress, is not, for all purposes of government by the nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into, the United States, subject to all the authority which the national government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty if, as soon as the admission is made -- as quickly as the words expressing the thought can be uttered -- the Constitution is so liberally interpreted as to produce the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct.

Can it for a moment be doubted that the addition of Porto Rico to the territory of the United States in virtue of the treaty with Spain has been recognized by direct action upon the part of Congress? Has it not legislated in recognition of that treaty, [182 U.S. 390] and appropriated the money which it required this country to pay?

If, by virtue of the ratification of the treaty with Spain and the appropriation of the amount which that treaty required this country to pay, Porto Rico could not become a part of the United States so as to be embraced by the words

"throughout the United States," did it not become "incorporated" into the United States when Congress passed the Foraker Act? 31 Stat. 77, c. 191. What did that act do? It provided a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a "governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education." §§ 17-25. It provided for an executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate. § 18. The governor was required to report all transactions of the government in Porto Rico to the President of the United States. § 17. Provision was made for the coins of the United States to take the place of Porto Rican coins. § 11. All laws enacted by the Porto Rican Legislative Assembly were required to be reported to the Congress of the United States, which reserved the power and authority to amend the same. § 31. But that was not all. Except as otherwise provided, and except also the internal revenue laws, the statutory laws of the United States, not locally inapplicable, are to have the same force and effect in Porto Rico as in the United States. § 14. A judicial department was established in Porto Rico, with a judge to be appointed by the President, by and with the advice and consent of the Senate. § 33. The court so established was to be known as the District Court of the United States for Porto Rico, from which writs of error and appeals were to be allowed to this Court. § 34. All judicial process, it was provided, "shall run in the name of the United States of America and the President of the United States." § 16. And yet it is said that Porto Rico was not "incorporated" by the Foraker Act into the United States so as to be part of the United States within the [182 U.S. 391] meaning of the constitutional requirement that all duties, imposts, and excises imposed by Congress shall be uniform "throughout the United States."

It would seem according to the theories of some that, even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the "United States." And this result comes from the failure of Congress to use the word "incorporate" in the Foraker Act, although, by the same act, all power exercised by the civil government in Porto Rico is by authority of the United States, and although this Court has been given jurisdiction by writ of error or appeal to reexamine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act:

> *Be it enacted by the Senate and House of Representatives in Congress assembled,* That Porto Rico be and is hereby incorporated into the United States as a territory,

would such a statute have enlarged the scope or effect of the Foraker Act? Would such a statute have accomplished more than the Foraker Act has done? Indeed, would not such legislation have been regarded as most extraordinary, as well as unnecessary?

I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion, Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution.

Footnotes

BROWN, J., lead opinion (Footnotes)

* In announcing the conclusion and judgment of the Court in this case, MR. JUSTICE BROWN delivered an opinion. MR. JUSTICE WHITE delivered a concurring opinion which was also concurred in by MR. JUSTICE SHIRAS and MR. JUSTICE McKENNA. MR. JUSTICE GRAY also delivered a concurring opinion. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE PECKHAM dissented. Thus it is seen that there is no opinion in which a majority of the Court concurred. Under these circumstances, I have, after consultation with MR. JUSTICE BROWN, who announced the judgment, made headnotes of each of the sustaining opinions, and placed before each the names of the justices or justice who concurred in it.

WHITE, J., concurring (Footnotes)

1. *Marbury v. Madison,* 1 Cranch 176; *Martin v. Hunter,* 1 Wheat. 326; *New Orleans v. United States,* 10 Pet. 662, 736; *De Geofroy v. Riggs,* 133 U.S. 258, 266; *United States v. Gettysburg Electric Railway,* 160 U.S. 668, 679, and cases cited.

2. *The City of Panama,* 101 U.S. 453, 460; *Fong Yue Ting v. United States,* 149 U.S. 716, 738.

3. *Monongahela Navigation Company v. United States,* 148 U.S. 312, 336; *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 479; *United States v. Joint Traffic Association,* 171 U.S. 571.

4. *United States v. Kagama,* 118 U.S. 375, 378; *Shively v. Bowlby,* 152 U.S. 1, 48.

5. *Sere v. Pitot,* 6 Cranch 332, 336; *McCulloch v. Maryland,* 4 Wheat. 316, 421; *American Ins. Co. v. Canter,* 1 Pet. 511, 542; *United States v. Gratiot,* 14 Pet. 526, 537; *Dred Scott v. Sandford,* 19 How. 448; *Clinton v. Englebrecht,* 13 Wall. 434, 447; *Hamilton v. Dillin,* 21 Wall. 73, 93; *National Bank v. County of Yankton,* 101 U.S. 129, 132; *The City of Panama,* 101 U.S. 453, 457; *Murphy v. Ramsey,* 114 U.S. 15; *United States v. Kagama,* 118 U.S. 375, 380; *Mormon Church v. United States,* 136 U.S. 1, 42; *Boyd v. Thayer,* 143 U.S. 135, 169.

6. *Mormon Church v. United States,* 136 U.S. 1, 44.

7. *Loughborough v. Blake,* 5 Wheat. 317, 322; *Woodruff v. Parham,* 8 Wall. 123, 133; *Brown v. Houston,* 114 U.S. 622, 628; *Fairbank v. United States,* 181 U.S. 283.

8. *American Insurance Co. v. Canter,* 1 Pet. 51; *Benner v. Porter,* 9 How. 235; *Webster v. Reid,* 11 How. 437, 460; *Clinton v. Englebrecht,* 13 Wall. 434; *Reynolds v. United States,* 98 U.S. 145; *Callan v. Wilson,* 127 U.S. 540; *McAllister v. United States,* 141 U.S. 174; *Springville v. Thomas,* 166 U.S. 707; *Bauman v. Ross,* 167 U.S. 548; *Thompson v. Utah,* 170 U.S. 343; *Capital Traction Co. v. Hof,* 174 U.S. 1; *Black v. Jackson,* 177 U.S. 363.

9. *In re Ross,* 140 U.S. 453, 461-463.

10. Extract from the Free Soil Party Platform of 1842 (Standwood, Hist. of Presidency, p. 240):

> *Resolved,* That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the federal government which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.
>
> *Resolved,* That, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution or derived by any just implication from them.
>
> *Resolved,* That it is the duty of the federal government to relieve itself from all responsibility for the existence or continuance of slavery wherever the government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.
>
> *Resolved,* That the true, and in the judgment of this convention the only safe, means of preventing the extension of slavery into territory now free is to prohibit its existence in all such territory by an act of Congress.

11. Excerpt from Declarations Made in the Platform of the Republican Party in 1860 (Stanwood, Hist. of Presidency, p. 293):

> 8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it, and we deny the authority of Congress, of a territorial legislature, or of any individual to give legal existence to slavery in any territory of the United States.

12. First draft of Mr. Jefferson's proposed amendment to the Constitution:

> The province of Louisiana is incorporated with the United States and made part thereof. The rights of occupancy in the soil and of self-government are confirmed to Indian inhabitants as they now exist.

It then proceeded with other provisions relative to Indian rights and possession and exchange of lands, and forbidding Congress to dispose of the lands otherwise than is therein provided without further amendment to the Constitution. This draft closes thus:

> Except as to that portion thereof which lies south of the latitude of 31°, which, whenever they deem expedient, they may enact into a territorial government, either separate or as making part with one on the eastern side of the river, vesting the inhabitants thereof with all rights possessed by other territorial citizens of the United States.

Writings of Jefferson, edited by Ford, vol. 8, p. 241.

13. Letter to William Dunbar of July 7, 1803:

> Before you receive this, you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they make the best arrangements practicable for its good government. It is most necessary because they will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province into the Union and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority.

Jefferson's Writings, vol. 8, p. 254.

Letter to Wilson Cary Nicholas of September 7, 1803:

> I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new states into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new states which should be formed out of the territory for which and under whose authority alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary than to assume it by a construction which would make our powers boundless.

Writings of Jefferson, vol. 8, p. 247.

FULLER, J., dissenting (Footnotes)

*

> SEC. 2. That on and after the passage of this act, the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided,* That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: *And provided further,* That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: *And provided further,* That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States.
>
> SEC. 3. That on and after the passage of this act, all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen percentum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries, and in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue, and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and on all articles of merchandise of United States manufacture coming into Porto Rico, in addition to the duty above provided, upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture: *Provided,* That on and after the date when this act shall take effect, all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the Secretary of War, shall be admitted into the

several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding, and whenever the Legislative Assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty, and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

SEC. 4. That the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury shall designate the several ports and sub-ports of entry into Porto Rico, and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: *Provided, however,* That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the Treasury of the United States.

SEC. 5. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof: *Provided,* That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

* * * *

SEC. 38. That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly, and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: *Provided, however,* That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven percentum of the aggregate tax valuation of its property.

Hooven & Allison Co. v. Evatt
No 38
Argued November 7, 8, 1944
Decided April 9, 1945
324 U.S. 652

CERTIORARI TO THE SUPREME COURT OF OHIO

Syllabus

1. Where, upon review here of state court decisions, the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, this Court is free to reexamine the facts as well as the law in order to determine for itself whether the asserted right or immunity is to be sustained. P. 659.

2. Since it appears on consideration of petitioner's course of business and of the circumstances attending the importation that petitioner was the inducing and efficient cause of bringing the fibers into the country, which is importation, petitioner, not the foreign sellers or the agents, was the importer of fibers brought from the Philippine Islands and other places outside the United States, and the constitutional immunity from state taxation of the imported fibers survived their delivery to petitioner. Pp. 659, 664.

3. For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether title to the merchandise vested in the petitioner at the time of shipment or only after its arrival in this country. P. 662.

4. When merchandise is brought here from another country, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. P. 663.

5. The purpose of the constitutional prohibition of state taxes on imports is to protect the exclusive power of the national government to tax imports and to prevent what, in matter of substance, would amount to the imposition of additional import duties by States in which the property might be found or stored before its sale or use. P. 664.

6. The constitutional immunity of the imports from state taxation was not lost by their storage (in the original packages) in warehouses [324 U.S. 653] at petitioner's factory pending their use in petitioner's manufacturing operations for which they were imported. Pp. 664, 668.

7. For the purpose of the constitutional immunity, it is immaterial whether the imported merchandise is stored (in the original packages) in the importer's warehouse at the port of entry or in an interior State. P. 664.

8. Upon the record in this case, there is no reason to consider whether, for purposes of the constitutional immunity, the mere presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported. P. 667.

9. Such discriminations as there may be against domestic and in favor of foreign producers of goods in this situation are implicit in the constitutional provision and in its purpose to protect imports from state taxation. P. 667.

10. The difficulty of ascertaining in particular cases when an original package is broken arises out of the original package rule itself. P. 668.

11. Reconciliation of the competing demands of the constitutional immunity of imports and of the state's power to tax is an extremely practical matter. P. 668.

12. In view of the constitutional authority of Congress to consent to state taxation of imports, and hence to lay down its own test for determining when the immunity ends, there is no convincing practical reason for abandoning the original package rule, or, if it is to be retained in the case of imports for sale, for rejecting it in the case of imports for manufacture. P. 668.

13. Articles brought from the Philippine Islands into the United States are imports subject to the constitutional provisions relating to imports -- both because they are brought into the United States and because the place whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable. Pp. 668, 679.

142 Ohio St. 235, 51 N.E.2d 723, reversed.

Certiorari, 321 U.S. 762, to review a judgment sustaining an assessment of state taxes. [324 U.S. 654]

STONE, J., lead opinion

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Respondent, a tax official of the state of Ohio, has assessed for state *ad valorem* taxes certain bales of hemp and other fibers belonging to petitioner. The fibers had been brought from the Philippine Islands or from other places outside the United States. When assessed for the tax, they were stored in the original packages in which they had been imported, in petitioner's warehouse at its factory at Xenia, Ohio, preliminary to their use by petitioner in the manufacture of cordage and similar products.

The State Board of Tax Appeals sustained the assessment for the three years in question, 1938, 1939, and 1940. Petitioner then brought the present proceeding in the Supreme Court of Ohio to review the Board's determination. That court rejected petitioner's contention that the fibers are imports, immune from state taxation under Article, I, § 10, cl. 2, of the Constitution, which prohibits state taxation of imports or exports, and it sustained the tax. 142 Ohio St. 235, 51 N.E.2d 723.

The State Court recognized that *Brown v. Maryland,* 12 Wheat. 419, established the rule that imports in their original packages may not be taxed by a state. But it thought that the present case fell within the qualification upon that rule laid down in *Waring v. The Mayor,* 8 Wall. 110. The *Waring* case held that, since a purpose of importation is sale, imports are immune from state taxation only so long as they are in the hands of the importer, and lose their immunity upon being sold by him. The Supreme Court of Ohio held that petitioner acquired title to the merchandise here taxed after its arrival in this country. It concluded from this that the foreign [324 U.S. 655] sellers or their agents, and not petitioner, were the importers, and that the merchandise, after the sale to petitioner, had ceased to be an import constitutionally immune from state taxation.

In any case, the Ohio court thought that, even if petitioner were the importer and the merchandise were immune from taxation on its receipt by petitioner, it nevertheless ceased to be an import, and lost its immunity as such, upon its storage at petitioner's warehouse awaiting its use in manufacturing. The Court thought that *Brown v. Maryland, supra,* laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original package, so intermingled with the common mass of property within the state as to be subject to the state power of taxation.{1} The Court found it unnecessary to decide whether the fibers brought from the Philippine Islands, which are not a foreign country, could be imports within the meaning of the constitutional immunity, since they would be taxable in any event upon the two grounds already stated.

We granted certiorari, 321 U.S. 762, because of the novelty and importance of the constitutional questions raised.

The questions for decision are (1) whether, with respect to the fibers brought from foreign countries, petitioner was their importer; if so, (2) whether, as stored in petitioner's warehouse, they continued to be imports at the time of the tax assessment, and (3) whether the fibers brought from the Philippine Islands, despite the place of their origin, are likewise imports rendered immune from taxation by the constitutional provision.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, § 8, and provides that

> no [324 U.S. 656] State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . .

Art. I, § 10, Cl. 2. These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in *Brown v. Maryland, supra.* We do not understand anyone to challenge that rule in this case.

It is obvious that, if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard at the expense of the interior states, would be realized as effectively as though the states had been authorized to lay import duties.{2} It is evident, too, that, if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, "there must be a point of time when the prohibition ceases, and the power of the state to tax commences." *Brown v. Maryland, supra,* 441.

In *Brown v. Maryland, supra,* the state sought to impose a license tax on the sale by the importer of goods stored in his warehouse in the original packages in which they [324 U.S. 657] were imported. In holding the levy to be a prohibited tax on imports, Chief Justice Marshall said (pp. 441-442):

> It is sufficient for the present to say generally that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution.

Although one Justice dissented in *Brown v. Maryland, supra,* from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. *Waring v. The Mayor, supra,* 122-123; *Low v. Austin,* 13 Wall. 29, 32-33; *Cook v. Pennsylvania,* 97 U.S. 566, 573; *May v. New Orleans,* 178 U.S. 496, 501, 507-508; *Burke v. Wells,* 208 U.S. 14, 21-22, 24; *Gulf Fisheries Co. v. MacInerney,* 276 U.S. 124, 126-127; *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414, 423.

All the taxed fibers, with the exception of those brought from the Philippine Islands, which will presently be separately considered, were brought to this country from foreign lands and were undoubtedly imports, clothed as such with a tax immunity which survived their importation, until the happening of some event sufficient to alter their character as imports. As we have said, the Supreme Court of Ohio found such events in what it deemed to be a sale of the merchandise to petitioner after it had been landed in the United States, and in the further circumstance [324 U.S. 658] that, by storing the merchandise in the warehouse at petitioner's factory, it had become a part of the common mass of property subject to state taxation, and so could no longer be regarded as an import.

Resolution of either point in favor of respondent is decisive of the case. Hence, we must first consider whether petitioner, rather than the foreign producers or shippers acting through their American agents, was the importer. If so, the tax immunity of the imported merchandise survived its receipt by petitioner and we must determine the further question whether petitioner's subsequent treatment of the merchandise deprived it of its character, and hence its

immunity, as an import.

I

Petitioner's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether, as the state court has found, the relationship was so altered after importation that it can be said that the purpose of the importation had been fulfilled. If it had, there was no longer either occasion or reason for the further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending the importation, particularly as shown by the long established course of business by which petitioner's supply of fibers has been brought into the country for use in manufacturing its finished product.

The state introduced no evidence, and there is no dispute in point of substance as to petitioner's evidence. The latter consists of the oral testimony of petitioner's general manager, some examples of the contracts by which petitioner procured the merchandise to be brought to this country, and two stipulations containing statements, admitted to be true, which were made by the American agents of the producers and shippers of the merchandise. [324 U.S. 659]

Both the Board of Tax Appeals and the state court, without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating the facts generally. They inferred from these facts that petitioner technically was but a purchaser of the merchandise after it had been imported into this country. They concluded that petitioner was not the importer, and the fibers had ceased to be imports after the sale to petitioner.

In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right of immunity as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City Southern R. Co. v. Albers Commission Co.,* 223 U.S. 573, 591; *Truax v. Corrigan,* 257 U.S. 312, 325; *First National Bank v. Hartford,* 273 U.S. 548, 552, and cases cited; *Fiske v. Kansas,* 274 U.S. 380, 385-386; *Norris v. Alabama,* 294 U.S. 587, 589-590.

In this case, it appears without contradiction that petitioner, in the regular course of its business, contracts for its manufacturing requirements of hemp, jute, sisal and other fibers, before their shipment to this country, and sometimes even before they are produced in the various foreign countries of their origin. Petitioner's negotiations for the purchase are carried on with brokers located in New York City, who represent the foreign producers. After an agreement as to price, petitioner enters into a firm contract to purchase the fibers. A standard form of contract is executed in duplicate or triplicate by petitioner and the broker who signs as agent for or "for account of" his named principal. The contract specifies [324 U.S. 660] the kind and amount of fibers purchased, the time of shipment, the American port to which the shipment is to be made, and frequently the steamship company, designated by petitioner, upon whose vessel the merchandise is to be shipped. While the contract gave the seller the option to make deliveries from merchandise warehoused in the United States, no such deliveries were made of any of the merchandise here in question.

The price is a "landed price," which includes as its components the contract cost of the goods at point of origin, the normal charges for ocean freight, marine and war risk insurance, and United States customs clearance (including customs duties in the case of hemp, which alone of the purchased merchandise is subject to import duties), and the expense of arranging for transshipment from the port of entry to petitioner at Xenia, Ohio. Any variation from the normal rates for these components (other than the contract cost of the goods at point of origin) is for account of petitioner. "Extra value" insurance covering any increase in value of the merchandise over the contract price during the voyage is effected, if petitioner requests, at its expense.

Upon shipment, the merchandise is consigned to the broker in this country or to a banker, either on an order or a straight bill of lading, in either case with directions to "Notify The Hooven & Allison Co." When the bales of purchased merchandise are loaded for shipment on board vessel at the point of origin, they are given distinctive markings referable to petitioner's contract. A declaration is then cabled to the New York broker referring to the contract upon which the shipment is made, stating the name of the vessel, the approximate number of bales shipped, their

identification marks, and the approximate date of arrival in the United States. The broker communicates this information to petitioner, and sometimes follows it, before arrival of the shipment at the port of entry, with [324 U.S. 661] a *pro forma* invoice which states the approximate tonnage and value of the shipment. Petitioner then gives instructions to the broker for the shipment from the port to Xenia.

The broker enters the shipment at the custom house in its own name as an accommodation to the petitioner, which has no facilities for clearance of the goods through the customs. The broker then ships the merchandise upon a straight bill of lading to Xenia, where it is delivered by the carrier to petitioner. At that time, petitioner pays the freight and, ten to fifteen days after the receipt of the final invoice, it pays the purchase price to the broker. It is stipulated that the sale is upon the unsecured credit of petitioner, and it does not appear that there is any retention of a security title either by the foreign seller, the broker, or any intervening banker to secure payment by petitioner of the purchase price.

From all this, it is clear that, from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise on credit, to ship it to an American port, and to deliver it to petitioner, which is obligated to accept and pay for it. Performance of the contract calls for, and necessarily results in, importation of the merchandise from its country of origin to the United States. Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation, but that the purpose and necessary consequence of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio.

From the moment of shipment, the taxed merchandise was identified and appropriated to the purchase contract and to that ultimate purpose by both the seller and the buyer. Petitioner could resell the merchandise while it [324 U.S. 662] was in transit. The risk of loss from change in market value was on petitioner, save as it might insure against such loss at its own expense. The right to demand, receive, and use the merchandise, subject only to the payment of the contract "landed price," was in petitioner. And obviously, if the possibility of the seller's right of stoppage *in transitu,* the carrier's lien, or the necessity of payment of customs duties are to be regarded as inconsistent with importation, there would be few importations and few importers in the constitutional sense. For there are few who are not subject to some or all of these contingencies.

Here, it is agreed that the sale was on credit. So far as appears in those instances where the merchandise was consigned to a banker, it was for the purpose of financing the producer or shipper, pending receipt of the merchandise and payment for it by petitioner, which appears always to have purchased on credit and to have received the merchandise before payment, and never to have given security for its payment. There was therefore no occasion for an implied reservation of a security "title" as against petitioner in either the sellers or their agents, or the banker in those cases where the goods were consigned on shipment to a banker.

For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here.{3} Decision in *Waring v. The Mayor supra,* upon which the Supreme Court of Ohio relied, did not turn on technical questions [324 U.S. 663] of passage of title.{4} For, in determining the meaning and application of the constitutional provision, we are concerned with matters of substance, not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person, and ships to this country; sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien or title as security for payment of the purchase price on or after arrival. To say that the purchaser is any the less an importer in the one case than in the others is to ignore [324 U.S. 664] the constitutional purpose and substitute form for substance.

As we have said, the constitutional purpose is to protect the exclusive power of the national government to tax

imports and to prevent what, in matter of substance, would amount to the imposition of additional import duties by states in which the property might be found or stored before its sale or use. It is evident that the constitutional prohibition envisages the present quite as much as if the petitioner had sent his own agent abroad, where he had purchased and paid for the merchandise and shipped it to petitioner in this country. The purpose and result of the transaction are the same in either case. The apprehended evils of the local taxation of imports after their arrival here are the same.

It is enough for present purposes that the merchandise in this case was imported, and that petitioner was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods. We conclude that petitioner was the importer, and that the merchandise in its hands was entitled to the constitutional tax immunity, surviving delivery of the imports to it.

II

We turn now to the question whether the immunity was lost by the storage of the merchandise in the original packages in petitioner's warehouse at its factory pending its use in petitioner's manufacturing operations. For the purpose of the immunity, it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in *Brown v. Maryland, supra,* is that, unless [324 U.S. 665] the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation itself -- even its ultimate suppression -- which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

On the other hand, the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown v. Maryland, supra,* an import is deemed to retain its character as such "while remaining the property of the importer in his warehouse, in the original form or package in which it was imported," *see Brown v. Maryland, supra,* 442, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown v. Maryland, supra,* pp. 442-443, rejected the suggestion that "an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." Plainly, if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports, and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that, because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, p. 443:

> The same observations [*i.e.,* the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate or other furniture *used* by the importer.

(Italics added.)

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case, [324 U.S. 666] the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other, the immunity is only from such local regulation by taxation as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. *Woodruff v. Parham,* 8 Wall. 123; *Brown v. Houston,* 114 U.S. 622; *American Steel & Wire Co. v. Speed,* 192 U.S. 500, 521; *Sonneborn Bros. v. Cureton,* 262 U.S. 506, 508-513; *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 526-527.

This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, *May v. New Orleans, supra,* 501; *Gulf Fisheries Co. v. MacInerney, supra,* 126; *McGoldrick v. Gulf Oil*

Corporation, supra, 423, or when the original packages in which they were imported are broken, *Low v. Austin, supra,* 34; *May v. New Orleans, supra,* 508-509. But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown v. Maryland,* in which he appeared as counsel for the State, declared, as we now affirm:

> Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.

License Cases, 5 How, 504, 575. [324 U.S. 667]

In *Brown v. Maryland, supra,* the imported merchandise held in original packages in the importer's warehouse for sale was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state is the same in both cases.

It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence, we have no occasion to consider that question.

It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. But such discriminations as there may be are implicit in the constitutional provision and in its purpose [324 U.S. 668] to protect imports from state taxation. It is also suggested that it will be difficult to ascertain in particular cases when an original package is broken -- a difficulty which arises not out of the present decision, but out of the original package rule itself, which we do not understand to be challenged here. Moreover, this supposed difficulty does not seem to have baffled judicial decision in any case in the more than a hundred years which have followed the decision in *Brown v. Maryland, supra.*

As was emphasized in *Brown v. Maryland, supra,* the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax is an extremely practical matter. In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports, and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture. Unless we are to ignore the constitutional prohibition, we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported.

III

There remains the question whether the fibers which petitioner brought from the Philippine Islands and stored in its warehouse in the original packages are also imports, constitutionally immune from state taxation.

Respondents argue that the Philippine Islands are not a foreign country, and that only articles brought here [324 U.S. 669] from foreign countries are imports within the meaning of the constitutional provision. Goods transported from one

state to another are not imports, since they are articles originating in the United States and not brought into it. *Woodruff v. Parham, supra; Sonneborn Bros. v. Cureton, supra; Baldwin v. G.A.F. Seelig, Inc., supra.* It is petitioner's argument that merchandise brought from the Philippines to the United States is an import because it is brought into the United States from a place without, even though not from a foreign country. Implicit in this argument is the contention that the Philippines, while belonging to the United States as a sovereign, are not part of it, and that merchandise brought from the Philippines is an import because it originates outside of, and is brought into, the territory comprising the several states which are united under and by the Constitution, territory in which the constitutional prohibition against the state taxation of imports is alone applicable.

The Constitution provides us with no definition of the term "imports" other than such as is implicit in the word itself. Imports were defined by Chief Justice Marshall in *Brown v. Maryland, supra,* 437, as "things imported" and "articles brought into a country." He added:

> If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country.

He thus defined imports by reference not to their foreign origin, but to the physical fact that they are articles brought into the country from some place without it. Since most imports originate in foreign countries, courts have not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country. *Waring v. The Mayor, supra; Woodruff v. Parham, supra; Pittsburgh & Southern Coal Co. v. Louisiana,* 156 U.S. 590, 600; *Patapsco Guano Co. v. North Carolina,* [324 U.S. 670] 171 U.S. 345, 350; *May v. New Orleans, supra.*{ 5} But the Constitution says nothing of the foreign origin of imports, and in none of these cases was it necessary to decision to formulate the rule in terms of origin in a foreign country. In each case, the result would have been the same if the Court had treated imports merely as articles brought into the country from a point without.

Chief Justice Marshall's definition has received support in cases holding or suggesting that fish caught in the open sea and brought into this country are imports entitled to the constitutional protection, although they did not come from a foreign country. *Gulf Fisheries Co. v. Darrouzet,* 17 F.2d 374, 376; *Booth Fisheries Corp. v. Case,* 182 Wash. 392, 395, 47 P.2d 834. In *Gulf Fisheries Co. v. MacInerney, supra,* we found it unnecessary to decide the point. In that case, the fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such, and were no longer immune from the challenged state tax. *See also Fishermen's Cooperative Assn. v. State,* 193 Wash. 413, 88 P.2d 593, 92 P.2d 202. The definition of imports as articles brought into the country finds support also in the circumstance that it has never been seriously doubted that merchandise brought into the United States from without is subject to the power of Congress to impose customs duties, even though the merchandise is not of foreign origin. And the occasion for protecting the [324 U.S. 671] power of the national government to lay and collect customs duties upon such merchandise, is precisely the same as in the case of that of foreign origin. Hence, it is plain that such importations, although not of foreign origin, are within the design and purpose of the constitutional prohibition against the local taxation of imports.

We find it impossible to say that, merely because merchandise, brought into the country from a place without does not come from a foreign country, it is not an import envisaged by the words and purpose of the constitutional prohibition. The interpretation in *Brown v. Maryland, supra,* the occasional judicial decisions that foreign origin is not a necessary characteristic of imports so long as they are brought into the country from a place without it, and the purpose of the constitutional prohibition are alike persuasive that there may be imports in the constitutional sense which do not have a foreign origin.

The fact that the merchandise here in question did not come from a foreign country, if the contention be accepted that the Philippines are not to be regarded as such, is therefore without significance. It is material only whether it came from a place without the "country." Hence, in determining what are imports for constitutional purposes, we must ascertain the territorial limits of the "country" into which they are brought. Obviously, if the Philippines are to be regarded as a part of the United States in this sense, merchandise brought from the Philippines to the United States would not be brought into the United States from a place without, and would not be imports, more than articles transported from one state to another.

The term "United States" may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, [324 U.S. 672] or it may be the collective name of the states which are united by and under the Constitution.{6}

When *Brown v. Maryland, supra,* was decided, the United States was without dependencies or territories outside its then territorial boundaries on the North American continent, and the Court had before it only the question whether foreign articles brought into the Maryland could be subjected to state taxation. It seems plain that Chief Justice Marshall, in his reference to imports as articles brought into the country, could have had reference only to articles brought into a state which is one of the states united by and under the Constitution, and in which alone the constitutional prohibition here involved is applicable.

The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States. *See* *Balzac v. Porto Rico,* 258 U.S. 298, 304-305, and cases cited. Hence, we do not stop to inquire whether articles brought into such territories, or brought from such territories into a state, could have been regarded as imports constitutionally immune from state taxation. We confine the present discussion to the question whether such articles, brought from the Philippines and introduced into the United States, are imports so immune.

We have adverted to the fact that the reasons for protecting from interference, by state taxation, the constitutional [324 U.S. 673] power of the national government to collect customs duties, apply equally whether the merchandise brought into the country is of foreign origin or not. The Constitution has not made the foreign origin of articles imported the test of importation, but only their origin in a place over which the Constitution has not extended its commands with respect to imports and their taxation. Hence, our question must be decided not by determining whether the Philippines are a foreign country, as indeed they have been held not to be within the meaning of the general tariff laws of the United States, *Fourteen Diamond Rings v. United States,* 183 U.S. 176, *cf.* *De Lima v. Bidwell,* 182 U.S. 1; *Dooley v. United States,* 182 U.S. 222, and within the scope of other general laws, *Faber v. United States,* 221 U.S. 649; *cf.* *Huus v. New York & P. R. S.S. Co.,* 182 U.S. 392; *Gonzales v. Williams,* 192 U.S. 1; *West India Oil Co. v. Domenech,* 311 U.S. 20, but by determining whether they have been united governmentally with the United States by and under the Constitution.

That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of, the Union of states under the Constitution was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima v. Bidwell, supra,* 182 U.S. 244; *Dooley v. United States, supra,* 182 U.S. 222; *Downes v. Bidwell,* 182 U.S. 244; *Dooley v. United States,* 183 U.S. 151, *and see also* *Public Utility Commissioners v. Ynchausti & Co.,* 251 U.S. 401, 406-407; *Balzac v. Porto Rico, supra.* This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by § 3 of Article IV of the Constitution "to dispose of and make all needful Rules and Regulations [324 U.S. 674] respecting the Territory or other Property belonging to the United States." *Dooley v. United States, supra,* 183 U.S. at 157; *Dorr v. United States,* 195 U.S. 138, 149; *Balzac v. Porto Rico, supra,* 305; *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 323.

In exercising this power, Congress is not subject to the same constitutional limitations as when it is legislating for the United States. *See Downes v. Bidwell, supra;* *Territory of Hawaii v. Mankichi,* 190 U.S. 197; *Dorr v. United States, supra;* *Dowdell v. United States,* 221 U.S. 325, 332; *Ocampo v. United States,* 234 U.S. 91, 98; *Public Utility Commissioners v. Ynchausti & Co., supra,* 251 U.S. 406-407; *Balzac v. Porto Rico, supra.* And, in general, the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. *See Balzac v. Porto Rico, supra.* The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of §§ 8 and 9

of Article I of the Constitution, such articles may be taxed by Congress, and without apportionment. *Downes v. Bidwell, supra.* It follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from territory which is not a part of the United States into the territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable.

The status of the Philippines as territory belonging to the United States, but not constitutionally united with it, has been maintained consistently in all the governmental relations between the Philippines and the United [324 U.S. 675] States. Following the conquest of the Philippines, they were governed for a period under the war power. After annexation by the Treaty of Paris of December 10, 1898, military government was succeeded by a form of executive government. By the Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, it was provided that

> all military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion. . . .

On July 1, 1902, Congress provided for a complete system of civil government by the original Philippine Organic Act, c. 1369, 32 Stat. 691. Step by step, Congress has conferred greater powers upon the territorial government, and those of the federal government have been diminished correspondingly, although Congress retains plenary power over the territorial government until such time as the Philippines are made independent. This process culminated in the Act of March 24, 1934, c. 84, 48 Stat. 456, providing for the independence of the islands. The adoption by the Philippines and approval by the United States of a constitution for the the Philippine Islands, as provided by the Act, have prepared the way for their complete independence.

The Act of 1934 made special provisions for the relations between the two governments pending the final withdrawal of sovereignty of the United States from the Philippines and, in particular, provided for a limit on the number and amount of articles produced or manufactured in the Philippine Islands that might be "exported" to the United States free of duty. § 6. It provided for the complete withdrawal and surrender of all right of possession, [324 U.S. 676] supervision, jurisdiction, control, or sovereignty of the United States over the Philippines on the 4th of July following the expiration of ten years from the date of the inauguration of the new government, organized under the Constitution provided for by the Independence Act.{7} § 10(a). The new Philippine Constitution was adopted on February 8, 1935, and the new government under it was inaugurated on November 14, 1935. By the provisions of the Independence Act, the United States retained certain powers with respect to our trade relations with the Islands, with respect to their financial operations and currency, and the control of their foreign relations. The power of review by this Court of Philippine cases is continued and extended to all cases involving the Constitution of the the Philippine Islands. § 7(6). Thus, by the organization of the new Philippine government under the constitution of 1935, the Islands have been given, in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world.{8} [324 U.S. 677]

In the meantime, and ever since *The Insular Tax Cases, supra,* Congress has often treated as imports articles brought to the United States from the Philippines. By the Act of August 29, 1916, c. 416, 39 Stat. 548, 48 U.S.C. § 1042, the territorial government of the Philippines was authorized to enact tariff laws. The Sugar Quota Law, 7 U.S.C. § 608a(1), defined as imports the amounts of sugar permitted to be brought into the United States from the Philippines, and prohibited such importation in excess of prescribed quotas. The Act of June 14, 1935, c. 240, 49 Stat. 340, 48 U.S.C. § 1236a, provided for restriction of the amount of hard fibers and its products which could be brought annually from the Philippines to the United States. *See also* 48 U.S.C. § 1236. And the Independence Act, *supra,* 48 U.S.C. § 1236(a)(b), also regulated the amount of "export tax" which might be levied by the Philippines on articles shipped to the United States from the Philippine Islands.{9}

The Independence Act, while it did not render the Philippines foreign territory, *Cincinnati Soap Co. v. United States, supra,* 318-320, treats the Philippines as a foreign country for certain purposes. In 48 U.S.C. § 1238(a)(1), it established immigration quotas for Filipinos coming to the United States, as if the Philippines were a separate country, and in that connection extended to Filipinos the immigration laws relating to the exclusion or expulsion of aliens. It also provided, 48 U.S.C. § 1238(a)(2), that citizens of the Philippine Islands who are not citizens of the United States

shall be considered as if they were aliens. For purposes of 8 U.S.C. §§ 154 and 156, relating to deportation, the Philippine Islands are declared to be a foreign country. 48 U.S.C. § 1238(a)(4). Foreign [324 U.S. 678] service officers of the United States may be assigned to the Philippines, and are to be considered as stationed in a foreign country. 48 U.S.C. § 1238a. And the Independence Act, § 6, 48 Stat. 456, 460, provides that,

> when used in this section in a geographical sense, the term "United States" includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.

As we have said, the Philippines have frequently dealt with other countries, as a sovereignty distinct from the United States.

The United States acquired the Philippines by cession without obligation to admit them to statehood or incorporate them in the Union of states or to make them a part of the United States, as distinguished from merely belonging to it. As we have seen, they are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it. In particular, the constitutional provisions governing imports and exports and their taxation do not extend to articles brought into or out of the Philippines. The several acts of Congress providing for the government of the Philippines have not altered their status in these respects, and Congressional legislation governing trade relations of the United States with the Philippines has not only been consistent with that status, but has often treated articles brought from the Philippines to the United States as imports. Our tariff laws, in their practical operation, have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries.

The national concern in protecting national commercial relations by exempting imports from state taxation would seem not to be essentially different or less in the [324 U.S. 679] case of merchandise brought from the Philippines, which are not included in the territory organized under the Constitution, but for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. As we have said, the reasons for protecting from state taxation articles thus brought into the territorial United States are the same in either case. The advantages and disadvantages, if any, which result from the tax immunity, are inherent in the import clause. But those advantages and disadvantages in the case of the Philippines are no more beyond the reach of Congress than in the case of other imports. Congress is left free by the terms of the import clause to remove the prohibition of state taxation of imports, and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity. Congress, through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce. And Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes.

We conclude that practical as well as theoretical considerations and the structure of our constitutional system require us to hold that articles brought from the Philippines into the United States are imports, subject to the constitutional provisions relating to imports both because, as was said in *Brown v. Maryland,* they are brought into the United States, and because the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable.

Reversed.

REED, J., dissenting

MR. JUSTICE REED, dissenting in part.

My disagreement with the Court is confined to that portion of the opinion which determines that the Philippine [324 U.S. 680] Islands is not a part of this "country" as that word is defined in the opinion.

The practical effect of the decision is to place the products of those territories and possessions which have not been

incorporated into our "country" as integral parts thereof -- Puerto Rico, the Philippines, Guam, Canal Zone, and perhaps other territories or possessions -- at a considerable advantage over the competing products of states of the continental United States. It enables importers, whether for manufacture or sale, from these possessions to keep on hand, tax free, quantities of nontaxable original packages of imported goods, such as clothing, embroideries, liquors, tobacco, sugars, vegetable oils, and fibres. Freedom from taxation has today become an appreciable advantage. Furthermore, this freedom from state taxation is gained through an interpretation of Constitutional power, and therefore is beyond the reach of equalization by the states alone in all circumstances and by the Congress except by complex tariff legislation which would only reach warehoused imports from dependencies. The Congressional relief to producers of the several states of the Union therefore is an awkward approach, which will create irritation with the importing territories by reason of countervailing tariff increases.

These are only practical disadvantages of today's decision which should not override a Constitutional requirement, but, as it does not seem to me the Constitution clearly calls for this sacrifice of markets by producers in the states, I would not construe the Constitution to put the Philippines entirely beyond the pale of the American economic union. I do not see the necessity for such a ruling, and, in fact I think the Constitution calls for precisely the opposite conclusion for the following reasons.

(1) In the consideration of the taxability by Ohio of shipments from the Philippines which have completed [324 U.S. 681] their journey from the Philippines but remain intact in their original packages, the significant Constitutional provision is Article I, Section 10, Clause 2, which reads as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States, and all such Laws shall be subject to the Revision and Controul of the Congress.

The Constitution contains no definition of the word "imports," and nothing appears in its history or in the decisions of this Court which indicate that the word was used otherwise in this section than in its normal meaning of a thing brought into the limits of the nation which possesses power over the external commerce which may flow into a state or states which are subject to the prohibitions of the quoted Constitutional provision. Normally, these imports are from foreign countries, and hence there are many references to imports in legislation and decisions which indicate that the source of imports is foreign countries.{1}

Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their foreign [324 U.S. 682] character and become a part of the territories of the victor.{2} The United States has been content to leave its possessions with a large measure of self-government. To the Philippines it has promised full independence, but the time for the fulfillment of that promise has not arrived. Until that date, the United States has responsibilities toward the Philippines, and has exercised power unilaterally to make further concessions to the Islands.{3} Until complete independence is reached, the citizens of the Philippines owe allegiance to the United States, and every Philippine official recognizes this duty. 48 Stat. 456. The interrelation between the United States and the Philippines is for both a basis for amicable relations after complete dissolution of the existing ties.{4}

(2) This Court, however, determines that an import under Article I, Section 10, Clause 2, is a commodity brought into this "country," and that the Philippines is not a part of this "country" within the meaning which the Court attributes to that word. The Court is of the view that this "country" includes only those sections of the lands under our jurisdiction which have been so incorporated into our system by act of Congress as to be entitled to government under all provisions of the Constitution, rather than by Clause 2, Section 3, Article IV, regarding "Territory . . . belonging to the United States." *Downes v.* [324 U.S. 683] *Bidwell,* 182 U.S. 244. As a basis for this distinction, the Court depends upon a statement in *Brown v. Maryland,* 12 Wheat. at 437, that a "duty on imports is a custom or tax levied on articles brought into a country." The Court must make this argument to support its position, as, of course, the Philippines is not a foreign country. *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 319.

There are a number of reasons why I think that this reliance on this language of *Brown v. Maryland* leaves the opinion without support in its conclusion that shipments from the Philippines are imports. In the first place, in *Brown v.*

Maryland, there was no occasion to distinguish between articles brought into the country and articles brought from foreign places. The words used are descriptive of commerce from foreign lands. Secondly, *Woodruff v. Parham,* 8 Wall. 123, 131, interprets the meaning of "brought into the country" as used in *Brown v. Maryland* as follows, pp. 131-132:

> In the case of *Brown v. Maryland,* the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country, and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would for a moment think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown v. Maryland* was decided – namely, in 1827 – it is reasonable to suppose that the general usage was the same, and that, in defining imports as articles brought into the country, the Chief Justice used the word country as a synonym for United States.

See also *American Steel & Wire Co. v. Speed,* 192 U.S. 500, 520. Thirdly, the writer of the opinion in *Brown v. Maryland* referred, p. 439, to the purpose of the prohibition against state taxation of imports as a thing desirable [324 U.S. 684] "to preserve . . . our commercial connections with foreign nations." The dissent referred repeatedly to foreign merchandise, as did counsel in their argument. Fourthly, the suggestion that the Court's view is supported by the decisions that sea products are imports seems to me unfounded. Deep sea products come from waters beyond the national sovereignty or jurisdiction, and hence are imports under any definition. American fisheries even may require, unless American bottoms are American territory, legislation to relieve their catch of general tariff charges. *Procter & Gamble Mfg. Co. v. United States,* 19 C.C.P.A. (Customs) 415. The required conclusion, it seems to me, is that an import is an article brought from beyond the sovereignty or jurisdiction of the United States. *De Lima v. Bidwell,* 182 U.S. 1, 180.

(3) Land within the jurisdiction of the United States cannot export to the United States under Section 10, Article I, any more than one state can export to or import from another state. *American Steel & Wire Co. v. Speed,* 192 U.S. at 520. When the *Insular Cases* determined that articles from the lands Spain ceded to us were subject to tariff duties at the will of Congress, the decisions were based on the power of Congress to impose duties unequally, *i.e.,* without uniformity, despite Article I, Section 8, Clause 1, of the Constitution,{5} on commodities from lands under our flag because these lands had not been incorporated by act of Congress into the Union as an integral part of the United States. *Downes v. Bidwell,* 182 U.S. 244, 298 *et seq.; Dorr v. United States,* 195 U.S. 138, 149; *Balzac v. Porto Rico,* 258 U.S. 298, 305. The question as to the meaning of imports or imported was [324 U.S. 685] not discussed. Whether or not the articles were imports, so long as the lands of their origin were not an integral part of the United States, the Congress could put such duties as it chose on the products. It does not follow that, because the Philippines is not an integral part of the United States, its shipments are imports under Article I, Section 10, unless the view of the Court's opinion of today is adopted that an import is an article brought into the United States as that country is defined in the Court's opinion. The argument advanced by the Court to sustain its declaration that the articles brought from the Philippines are imports would have made shipments from the Louisiana Purchase, *Downes v. Bidwell,* 182 U.S. 244, 322-333; Florida, *id.,* pp. 333-334, and Hawaii, *Hawaii v. Mankichi,* 190 U.S. 197, 219, also imports until these territories were incorporated into the United States. History refutes such a position.

We are thus left to define the word import as used in Section 10, Article I, in its normal sense to accomplish the purpose of the section. It may have had several purposes. *Brown v. Maryland, supra,* at 439. Whether it was to grant the union a source of revenue, to preserve harmony among its members, or to avoid state tariffs which would affect relations with foreign governments, the purpose is not advanced by molding Philippine shipments into imports in the Constitutional sense. Revenue may be exacted by the federal government from Philippine products brought into the states and a state cannot collect a duty from such articles if they are not imports. *Downes v. Bidwell,* 182 U.S. 244; *Woodruff v. Parham,* 8 Wall. 123, 133; *Coe v. Errol,* 116 U.S. 517, 526. No light can come from the history of the adoption of the section. The idea of an American possession was not in being. But, since the Founding Fathers were creating a commercial as well as a political entity, it seems more consonant with their purpose to define imports under the section as things [324 U.S. 686] brought into the territory under the jurisdiction or sovereignty of the American government.

(4) Such a conclusion probably meant little to the Philippines. Congress has provided for their early independence. But the principle established by this decision will persist for the other lands which became American by the Treaty of Paris. The Court's opinion disclaims determination of any rights beyond the Philippines, but the basis upon which the

decision rests supports similar rights for all lands covered by the Treaty of Paris. Similar articles covered all the ceded lands.{6} Puerto Rico is in the same status as the Philippines. *Balzac v. Porto Rico,* 258 U.S. 298, 305. Today's decision thus assumes a continuing importance which justifies setting out my reasons for dissenting.

BLACK, J., dissenting

MR. JUSTICE BLACK, dissenting.

In *Brown v. Maryland,* 12 Wheat. 419, 422, Marshall, C.J., pointedly rejected the argument that the rule announced in that case would permit an importer to "bring in goods . . . for his own use, and thus retain much valuable property exempt from taxation."{1} Today, this Court, [324 U.S. 687] in holding that an Ohio manufacturer may escape payment of a nondiscriminatory state *ad valorem* tax on goods imported from abroad and held for use in its factory, interprets Marshall's opinion in a manner which squarely conflicts with his own interpretation of the rule he announced.

It has, from the very beginning, been recognized that " . . . there must be a point of time when the prohibition [to tax] ceases, and the power of the state to tax commences;" although the task of drawing this line is so difficult that no general rule "universal in its application" can be stated, yet that line nevertheless " . . . exists, and must be marked as the cases arise." *Brown v. Maryland, supra,* 441. The Court did there draw an arbitrary line of demarcation marking the boundary of a state's power to tax property "imported for sale." It held that, as to property imported for sale,

> while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

Brown v. Maryland, supra, at 442. The right to sell, it was there said, was an element of the right to import, and thus a state tax imposed before, or as a condition upon, the sale would substantially impair the right of sale granted by the government to importers. The Court reinforced its conclusion by referring to its belief that a state tax on the importer would increase the cost to the ultimate domestic purchasers, and that the effect of this would be to enable the great seaport states indirectly to levy tribute upon consumers of imported articles living in the nonseaport states, a practice which the constitutional clause here invoked was intended to prevent.{2} [324 U.S. 688]

While the rule announced in *Brown v. Maryland* has at times been severely criticized, *see e.g., License Cases,* 5 How. 504, opinion of Mr. Justice Daniel, 615-617, and has in some cases been narrowly restricted in its application,{3} it has been, and still is, the general rule of decision in this Court as regards imports for sale from foreign countries. But neither the rule nor the reasoning in *Brown v. Maryland* nor any of the cases which followed it support the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership and simultaneously claim an immunity from state taxation on the ground that it is still an import. The Court, in *Brown v. Maryland,* was in reality treating goods in the hands of an importer for sale as though they were still in transit until the first sale had been made. This was in accord with the interpretation of the rule by Chief Justice Taney in the *License Cases, supra,* 575. He there said that, while imported articles

> are in the hands of the importer for sale . . . , they may be regarded as merely *in transitu,* and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported.

But the fibers here were not *in transitu* in any possible sense of the phrase. Every conceivable relationship they had once borne to the process of importation had ended. They were at rest in the petitioner's factory along with its other raw materials, having arrived at the point where they were "to be used and consumed" in current production, [324 U.S. 689] and kept as a "backlog" to assure constant operation of the plant.

Brown v. Maryland and the cases which followed it stand for the rule that one who pays import duties on goods intended for sale thereby purchases the right to sell the goods, free from state taxation so long as the goods are held in the original package. Until today, none of this Court's decisions have ever held or even intimated that one who imports goods for his own use purchases from the federal government, by payment of import duties, a right to hold them free from liability for state taxes, after they have reached the end of their import journey and are being held for use in the

importer's factory. Neither the "purchase of a right to sell" argument nor any of the other reasons deemed relevant to support the "import for sale original package" doctrine call for its extension to goods imported for use.

It is clear under the doctrine of *Brown v. Maryland* that, after sale by an importer, imported goods are subject to state taxation. The opinion of the Court today holding that goods held for use are immune from state taxation results in this rather odd situation: one who imports goods himself and holds them for his own use in his factory is not liable to state taxes on such goods; but, if he bought the goods from one engaged in the business of importing, he would be liable to taxation on the same goods. The artificiality of this tax distinction suggests grave reasons to question the soundness of the Court's interpretation of the rule. Furthermore, implicit in Marshall's opinion is a recognition of the importance of protecting goods imported for sale from discrimination in the form of taxes. The net effect of today's opinion is to accomplish just such discrimination in favor of goods imported for use and against goods imported for sale.

Again, state taxation of previously imported goods held for use in manufacturing does not afford the great seaport [324 U.S. 690] states an opportunity to tax imports to the detriment of other states. This was one of the apprehended evils which the "import for sale" rule in *Brown v. Maryland* was fashioned to prevent. The most fertile imagination would be hard put to prove that it would injure or threaten any other state for Ohio to collect its nondiscriminatory *ad valorem* tax on fibers held for use in that state. Certainly the Court advances no persuasive argument in this respect. On the contrary, it does appear that Ohio, as well as other states, will be injured by a constitutional interpretation which denies Ohio the right to collect the tax. Ohio is injured by the Court's new rule because it cannot apportion its tax fairly upon all who carry on business under the protection of Ohio's laws.

The rule announced by the Court also discriminates against other states. Their products held for use are subject to state taxation. Products from abroad are not. Wines offer an illustration. Wines, stocked in one's private cellar, produced from California or New York grapes, are held for future use in the original package or otherwise, are subject to state taxation. Today's rule renders a state wholly powerless to tax wines imported from abroad and held for future use side by side with taxable wines made in the United States. Thus, through constitutional interpretation, all foreign products are granted a tax subsidy at the expense of the individual states affected. If I thought the Constitution required such tax discriminations against American products, I should agree to the Court's opinion. The whole history of events leading up to the Constitution, and this Court's opinions in construing it, persuade me that no such consequence was ever contemplated by those who wrote or approved our Constitution.

A final word as to today's new constitutional doctrine. Precisely how it is to be applied the Court does not tell [324 U.S. 691] us. From one part of the Court's opinion, it appears that the state can never tax these fibers at all, since it seems to be said the state can never tax until they "are subjected to the manufacture for which they were imported." Another part of the opinion indicates they can be taxed when the original package is broken. Previous opinions of this Court have indicated the difficulties and defects of an original package doctrine.{4} Are these fibers to be taxed when the "reed" which covers them is removed, or must the state wait until it can prove one of the steel bands has been broken? Other questions suggest themselves in regard to wine imported for use and stored in one's private cellar for individual consumption. When, if at all, can a state tax it? Is it when the wine reaches the cellar, or must the state withhold its taxing hand until the wine is "subjected to the [consumption] for which it was imported"? Or can the state tax each crate when the owner, or someone for him, removes the crate's top with a crowbar? If the wine is imported in large casks, does it become taxable when the stopper is removed from the bunghole, or only when a part or all of it has been consumed? The states are entitled to have a definite answer to these practical questions.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join in this opinion. MR. JUSTICE DOUGLAS is of the view that, accepting the Court's ruling that these products are "imports," the rule should be applied without discrimination against the Philippines.

MURPHY, J., concurring

MR. JUSTICE MURPHY, concurring in part.

With MR. JUSTICE BLACK's view that whatever constitutional tax immunity the merchandise in question may have had was lost by virtue of its storage in petitioner's [324 U.S. 692] warehouse pending its use in petitioner's manufacturing operations, I agree. But the Court holds otherwise on that issue. We therefore are met with the further issue as to whether the fact that the merchandise was shipped from the Philippine Islands to the United States made the merchandise an import within the meaning of Article I, Section 10, Clause 2 of the Constitution, and therefore immune from state taxation. As to that problem, I am convinced that the affirmative answer given by the CHIEF JUSTICE is the correct one, and I concur in that portion of his opinion.

That affirmative answer, in my estimation, is compelled in good measure by practical considerations. The moral and legal obligations owed the Philippine Islands by the United States are, so far as I am aware, matchless and unique. The United States is committed to a policy of granting complete independence to the Philippines. It has already granted their people and their officials a large measure of autonomy. But, until the sovereignty of the United States is finally withdrawn, the United States retains plenary and unrestricted powers over them and is responsible for their welfare.

We have as a nation exhibited an ideal and a selfless concern for the wellbeing of the Philippine people, a concern that has been deepened by the devastation that war has brought to their land. Since the Islands were ceded to us, we have at once fostered their economic development through preferential trade agreements and encouraged their desires for freedom and independence. Their industries and their agriculture have gradually been adjusted in contemplation of their eventual sovereign independence. But war has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Filipinos in countless numbers have yielded up [324 U.S. 693] not only their property but their lives and their liberties. Their economic and social structure has fallen about them in ruins.

Now, with the Islands liberated, our moral and legal obligations are greater than ever before. Our responsibility for providing urgent relief and rehabilitation has been readily assumed. But the more complex and difficult duty of helping to reconstruct the Philippine economic structure remains to be fulfilled. It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States, without either country abandoning or retreating from the common ideal of independence for the Philippines.

Accordingly, it is my view that, if it is reasonably possible to do so, we should avoid a construction of the term "imports," as used in Article I, Section 10, Clause 2 of the Constitution, that would place Philippine products at a disadvantage on the American market to the advantage of products from other countries or that might be a means of impeding the economic rehabilitation of the Philippines. If we can justifiably construe that term to prohibit state taxation on shipments from the Philippines, we shall to that extent have conformed to the national policy of aiding the Philippine reconstruction. Any taxation or tariff on Philippine shipments that may be felt to be necessary from the standpoint of the United States would then become a matter solely for Congress, which could properly balance any conflicting interests of the two nations.

Such a construction, in my estimation, is entirely fair and reasonable. There are, to be sure, statements by this Court to the effect that the term "imports" refers only to those goods brought in from a country foreign to the United States. *Woodruff v. Parham,* 8 Wall. 123, 136; [324 U.S. 694] *Dooley v. United States,* 183 U.S. 151, 154. But such statements, as pointed out by the Court today, were unnecessary to the decision of the issues there involved, and cannot control the problem presented here. It has also been held that the Philippine Islands are not a foreign country within the meaning of tariff laws specifically referring to any "foreign country." *Fourteen Diamond Rings v. United States,* 183 U.S. 176; *De Lima v. Bidwell,* 182 U.S. 1. The inapplicability of these cases is obvious.

It further appears that Congress has usually avoided the use of the term "imports" in the enactment of legislation affecting trade with the Philippines and other dependencies, and that the term has been regarded by certain government agencies as inapplicable to articles coming from the Philippines. But such usage clearly cannot affect our interpretation of a constitutional provision.

As appears more fully in the Court's opinion, there is thus no controlling authority requiring us to hold that

shipments from the Philippines are not imports within the meaning of Article I, Section 10, Clause 2 of the Constitution. Under such circumstances, the interpretation of this constitutional provision adopted by the CHIEF JUSTICE is a permissible one. And, in view of what I conceive to be the practical considerations, it is a highly necessary and desirable one. Only under that interpretation can this part of the Constitution be consistent with our duties as trustee for the Philippines.

Footnotes

STONE, J., lead opinion (Footnotes)

1. The Supreme Court of Washington has held contrary to the decision of the Ohio Court. *See Washington Chocolate Co. v. King County,* 21 Wash.2d 630, 152 P.2d 981.

2. *See* Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

3. Section 1483(1) of 19 U.S.C., provides that merchandise imported into the United States "shall be held to be the property of the person to whom the same is consigned." We do not deem this provision to be significant here, since it is designed merely to identify the person liable for the payment of customs duties, and since, as we have said, the time when title passes to petitioner is immaterial to decision.

4. In the *Waring* case, the purchaser, claiming tax immunity as the importer, purchased the merchandise, after its shipment from abroad, from the American consignee, sometimes before and sometimes after its arrival in the port of entry. Risk of loss was to be on the seller until the merchandise was entered at the custom house and delivered from the vessel into the purchaser's lighters alongside. The Court thought it immaterial whether the purchase contract was entered into before or after arrival. Since the risk of loss remained on the shipper until the custom house entry and delivery to the purchaser, it held that the shipper or the consignee was the importer; that the purchaser's sale of the goods, which was taxed, was the second sale after importation, and for that reason was not free of tax. In these circumstances, it is clear that the purchaser was not the cause of the importation, that the purchaser had no control over or right to demand the merchandise before arrival in port and that the foreign shipper, who bore the risk of loss and retained control of the merchandise and the right to control it until its delivery to petitioner, was the importer.

5. In *Dooley v. United States,* 183 U.S. 151, the Court sustained under the Foraker Act of April 12, 1900, c.191, 31 Stat. 77, the levy and collection of a tax in Puerto Rico upon goods brought there from New York. The tax was held to be a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty, *see Downes v. Bidwell,* 182 U.S. 244. The Court stated also as an alternative ground, but one unnecessary for decision, that the levy was not a prohibited tax on exports, since Puerto Rico was not a foreign country.

6. *See* Langdell, "The Status of our New Territories," 12 Harv.L.Rev. 365, 371; *see also* Thayer, "Our New Possessions," 12 Harv.L.Rev. 464; Thayer, "The Insular Tariff Cases in the Supreme Court," 15 Harv.L.Rev. 164; Littlefield, "The Insular Cases," 15 Harv.L.Rev. 169, 281.

7. Since the war with Japan and that country's temporary occupation of the Philippines, Congress has provided that the date of the independence of the Philippines may be advanced by the President of the United States, upon his proclamation of their liberation and the restoration of the normal functions of government. Act of June 29, 1944, c. 322, Public Law No. 380, 78th Cong., 2d Sess., 58 Stat. 625.

8. The Philippine Commonwealth participated as a signatory in the following: Agreement and Protocol Regarding Production and Marketing of Sugar of May 6, 1937; Universal Postal Convention of May 23, 1939; Declaration by United Nations of January 1, 1942 (the Philippines signed the Declaration on June 14, 1942); Agreement for United Nations Relief and Rehabilitation Administration of November 9, 1943; United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, of July 1 to 22, 1944; The Protocol Prolonging the International Agreement Regarding the Regulation of Production and Marketing of Sugar of August 31, 1944; The International

Civil Aviation Conference of November 1 to December 7, 1944.

9. This Court has referred to goods brought here from the Philippines as "imports." *See* *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 320.

REED, J., dissenting (Footnotes)

1. Products of the sea brought in as imports are a minor variation.

Tariff Act of 1930, 46 Stat. 590, provides that dutiable articles are those "imported from any foreign country." The Philippines is not a foreign country under a tariff act which prohibits importation from a foreign country of goods made by convict labor. 28 Op.Atty.Gen. 422. The Philippines is not foreign country under the tariff laws. *De Lima v. Bidwell,* 182 U.S. 1, 197; *Fourteen Diamond Rings v. United States,* 183 U.S. 176; *Dooley v. United States,* 182 U.S. 222, 234; *Dooley v. United States,* 183 U.S. 151; *American Steel & Wire Co. v. Speed,* 192 U.S. 500, 520.

2. *American Insurance Co. v. Canter,* 1 Pet. 511, 542; *Fleming v. Page,* 9 How. 603, 614; *Dooley v. United States,* 182 U.S. 222, 233.

3. Philippine Independence Act of March 24, 1934, 48 Stat. 456; amending the Philippine Independence Act as to trade and financial relations and rights of Philippine citizens in the United States and all places subject to its jurisdiction, act of August 7, 1939, 53 Stat. 1226; suspending the export tax on Philippine products, act of December 22, 1941, 55 Stat. 852; Filipino Rehabilitation Commission Act of June 29, 1944, 58 Stat. 625.

4. Address of President Sergio Osmena on the occasion of the Reestablishment of the Commonwealth Government in Manila, February 27, 1945.

5. Article I, Section 8, Clause 1:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. . . .

6. Treaty of Paris, December 10, 1898, 30 Stat. 1754:

> Article II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.
>
> Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line. . . .

BLACK, J., dissenting (Footnotes)

1. Counsel for Maryland had argued that to permit state tax immunity in that case would result in granting immunity to "an importer who may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." In reply to this argument, Marshall rejected the assumption that the principles then announced would grant state tax exemptions to imports that had reached their ultimate destination and were being used or held for use by the importer. "The tax," he said,

> finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege [*i.e.,* of sale] he has purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

P. 443.

2. To the same effect, *see Woodruff v. Parham,* 8 Wall. 123, 134-136.

3. *See e.g.,* *May v. New Orleans,* 178 U.S. 496; *Burke v. Wells,* 208 U.S. 14; *Sonneborn Bros. v. Cureton,* 262 U.S. 506; *Gulf Fisheries Co. v. MacInerney,* 276 U.S. 124; *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 526. *See also Mexican Petroleum Corp. v. South Portland,* 121 Me. 128, 115 A. 900; *Tres Ritos Ranch Co. v. Abbott,* 44 N.M. 556, 105 P.2d 1070.

4. Note 3, *supra.*

7 FAM 1100 ACQUISITION AND RETENTION OF U.S. CITIZENSHIP AND NATIONALITY

7 FAM 1110 ACQUISITION OF U.S. CITIZENSHIP BY BIRTH IN THE UNITED STATES

7 FAM 1111 BASIC TERMS AND DISTINCTIONS

7 FAM 1111.1 Terms Not Always Interchangeable

(TL:CON-64; 11-30-95)

While most people and countries use the terms "citizenship" and "nationality" interchangeably, U.S. law differentiates between the two [see Section 101(a)(21)-(22) of the Immigration and Nationality Act (INA)]. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S. citizens.

7 FAM 1111.2 Citizenship

(TL:CON-64; 11-30-95)

a. U.S. citizenship may be acquired *either* at birth or through naturalization.

b. U.S. laws *governing* the acquisition of citizenship at birth embody two legal principles:

(1) *Jus soli* (*the law* of the soil), a rule of common law under which the place of a person's birth determines citizenship. *In addition to common law, this principle is embodied in the 14th Amendment to the U.S. Constitution and the various U.S. citizenship and nationality statutes.*

(2) *Jus sanguinis* (the *law* of the *bloodline*), a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of *one or both* parents. This rule, *frequently* called "citizenship by descent" or "derivative citizenship", *is not embodied in the U.S. Constitution, but such citizenship is granted through statute. As laws have changed, the requirements for conferring and retaining derivative citizenship have also changed*.

c. Naturalization is "the conferring of nationality of a state upon a person after birth, by any means whatsoever" (Section 101(a)(23) INA) or conferring of citizenship upon a person (Sections 310 and 311 INA). Naturalization can be granted automatically or pursuant to an application. *Under U.S. law, foreign naturalization acquired automatically is not an expatriating act [*see chapter 7 FAM 1200*].*

d. Historically, a number of U.S. laws have provided for the automatic naturalization of children or wives (not husbands) of naturalized U.S. citizens or for automatic collective naturalization of persons residing in territories over which the United States has gained sovereignty.

7 FAM 1111.3 Nationality

(TL:CON-64; 11-30-95)

a. The term "nationals of the United States", as defined by statute (Section l0l(a)(22) INA) includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship.

b. Nationals of the United States who are not citizens are entitled to the consular protection of the United States when abroad, and to U.S. documentation, such as U.S. passports. They are not entitled to voting representation in Congress and, under most state laws, are not entitled to vote in federal, State, or local elections except in their place of birth.

c. Historically, Congress, through statutes, granted U.S. nationality, but not citizenship, to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals.

d. Under current law (the Immigration and Nationality Act of 1952, as amended through October 1994), only persons born in American Samoa and the Swains Islands are U.S. nationals (Secs. 101(a)(29) and 308(1) INA).

7 FAM 1111.4 Dual or Multiple Nationality

(TL:CON-64; 11-30-95)

a. U.S. nationals and citizens may possess dual or multiple nationality and owe allegiance to one or several foreign states. They may even have identified themselves more closely with the foreign state than with the United States, thereby calling into question the propriety of extending protection to them. Since each country establishes its own law of nationality, dual nationality cannot be eliminated, may result in confusion, and could complicate the ability of the U.S. Government to protect its nationals/citizens.

b. The United States has no special arrangements with individual countries to "permit" dual nationality. U.S. Government policy toward dual nationality is the same regardless of other nationalities involved.

c. While a person who has dual or multiple nationality resides in the United States, the right of the United States to claim his or her allegiance is held to be paramount of the right of the other countries of which he or she may be a national. Conversely, while a person who has dual nationality resides abroad in a foreign country of which he or she also is a national, the right of that country to claim his or her allegiance is paramount to that of the United States.

d. It has been the policy of the U.S. Government, when the occasion arises, to intercede on behalf of a person in another country who owes allegiance both to that country and the United States, when the facts clearly indicate that the person has been detained, harassed, or molested by the authorities of the foreign country of which he or she is also a national.

e. The circumstances of a person's conduct abroad may very well be a determining factor in considering the extent to which such protection should be granted. In the case of a dual national living in the foreign country of which he or she is also a national, the circumstances may restrict, to a great extent, a national's ability to receive the protection and consular services of the U.S. Government.

7 FAM 1112 AUTHORITY

(TL:CON-64; 11-30-95)

The two principal U.S. laws on which most citizenship and nationality matters now are based are the Immigration and Nationality Act of 1952, effective December 24, 1952, as amended *(herein "INA"),* and the Nationality Act of 1940, effective January 13, 1941 *(herein "NA"),* which was repealed by the INA. Numerous other authorities are cited in this chapter. Because all posts have been furnished copies of the INA, this chapter quotes from it sparingly.

7 FAM 1113 DEFINITIONS

(TL:CON-64; 11-30-95)

The following definitions apply in citizenship and nationality cases (and other terms are defined in the context of the sections 7 FAM where they occur):

a. "Alien" means any person who is not a citizen or national of the United States *(Sec. 101(a)(3) INA).*

b. "American", *for purposes of this chapter*, means a person who is a citizen or national of the United States, or, when used as a modifier, pertaining to or of the United States, its people, customs, laws and regulations, documents, government agencies, and services. Because other groups of people in the Western Hemisphere also consider themselves to be American (that is, Central American, North American, South American), the modifier "U.S." generally is used in this volume of the Foreign Affairs Manual instead of "American" (such as, U.S. citizen, U.S. court decrees, U.S. veteran; but American Embassy).

c. "Citizen", *for purposes of this chapter*, means a person who acquired U.S. citizenship at birth or upon naturalization as provided by law. All U.S. citizens are nationals of the United States.

d. "Citizenship" indicates the status of being a U.S. citizen.

e. "Dual National", for the purposes of this chapter, means a person who owes permanent allegiance to more than one country.

*f. "INA" means the Immigration and Nationality Act of 1952 as amended by various Acts up to and including 1994 [*see sections 7 FAM 1112 and 7 FAM 1132.8 *].*

g. "NA" means the Nationality Act of 1940 [see section 7 FAM 1112 *].*

h. "Minor," for the purposes of this chapter, means a person under the age of 18.

i. "National", *for purposes of this chapter*, means a person on whom U.S. nationality has been conferred and who owes permanent allegiance to the United States but who is not a citizen *[see* section 7 FAM 1111.3 *b]* . All U.S. citizens are nationals, but U.S. nationals are not necessarily U.S. citizens. For purposes of expatriation, references to U.S. citizens extend to U.S. nationals [see chapter 7 FAM 1200 on loss and restoration of U.S. citizenship].

j. "Nationality" indicates the status of being a national of the United States. *(Nationality is also part of citizenship.)*

k. "Naturalization" means conferring the citizenship or nationality of a state on a person after birth by any means whatsoever *[see* section 7 FAM 1111.2 *c].*

l. "Outlying possessions of the United States" means American Samoa and Swains Island (Section 101(a)(29) INA).

m. "Person" means an individual.

n. "Residence" means the "place of general abode" which is the "principal, actual dwelling place in fact, without regard to intent" (Section 101(a)(33) INA).

o. "United States" means "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States" (Section 101(a)(38) INA).

7 FAM 1114 CITIZENSHIP DURING EARLY YEARS OF THE NATION

(TL:CON-64; 11-30-95)

a. Until 1866, the citizenship status of persons born in the United States was not defined in the Constitution or in any federal statute. Under the common law rule of *jus soli*--the law of the soil-persons born in the United States generally acquired U.S. citizenship at birth *[*see section 7 FAM 1116.1-1 *].*

b. This rule was made part of the Civil Rights Act of April 9, 1866 (14 Stat. 27) and, 2 years later, it was adopted as part of the 14th Amendment to the Constitution.

7 FAM 1115 CITIZENSHIP UNDER THE 14th AMENDMENT

(TL:CON-64; 11-30-95)

a. The 14th Amendment states, in part, that-

> All persons born *or naturalized* in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside...*

b. Questions have arisen about the meaning of the phrases "in the United States" and "subject to the jurisdiction thereof." Some of the conclusions reached by U.S. courts and administrative authorities are summarized *in* section 7 FAM 1116 .

7 FAM 1116 KEY PHRASES USED IN THE 14th AMENDMENT AND IN LAWS DERIVED FROM IT

7 FAM 1116.1 "In The United States"

7 FAM 1116.1-1 States and Incorporated Territories

(TL:CON-64; 11-30-95)

a. *The phrase* "in the United States" *as used in the 14th Amendment* clearly includes States that have been admitted to the Union. *Sections 304 and 305 of the INA provide a basis for citizenship of persons born in Alaska and Hawaii while they were territories of the United States. These sections reflect, to a large extent, prior statutes and judicial decisions which addressed the l4th Amendment citizenship implications of birth in these and other U.S. territories. Guidance on evidence on such births should be sought from CA/OCS.*

b. Sec. 101(a)(38) INA *provides that, for the purposes of the INA,*

> The term "United States",... when used in the geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.*In addition, under Pub. L. 94-241, the "approving Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America", (Sec. 506(c)), which took effect on November 3, 1986, the Northern Mariana Islands are treated as part of the United States for the purposes of sections 301 and 308 of the INA.*

c. All of the *aforenamed* areas, except Guam *and the Northern Mariana Islands, came within the definition of "United States" given in the Nationality Act of 1940, which was effective from January 13, 1941 through December 23, 1952.*

d. Prior to January 13, 1941, there was no statutory definition of "the United States" for citizenship purposes. Thus there were varying interpretations. Guidance should be sought from the Department (CA/OCS) when such issues arise.

7 FAM 1116.1-2 In U.S. Waters

(TL:CON-64; 11-30-95)

a. Persons born on ships *located within U.S. internal* waters are considered to have been born in the United States. *Such persons will acquire U.S. citizenship at birth if they are subject to the jurisdiction of the United States [*see section 7 FAM 1116.2-1 *]. Internal waters include the ports, harbors, bays and other enclosed areas of the sea along the U.S. coast.*

b. *Prior FAM guidance advised that persons born within the 3-mile limit of the U.S. territorial sea were born "within the United States" and could be documented as U.S. citizens if they were also born subject to U.S. jurisdiction. Analysis of this issue undertaken in 1994-1995 revealed, however, that there is a substantial legal question whether persons born outside the internal waters of the United States but within the territorial sea are in fact born "within the United States" for purposes of the 14th Amendment and the INA. Cases involving persons born outside the internal waters but within the U.S. territorial sea should, therefore, be submitted to the Department (CA/OCS) for adjudication.*

7 FAM 1116.1-3 Airspace

(TL:CON-64; 11-30-95)

a. Airspace above the *land territory and internal waters* is held to be part of the United States (Art. 1(1), 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, TIAS 5639). Gordon and Rosenfeld, in Immigration Law and Procedure, Volume 3, Nationality (New York: Matthew Bender, 1986), *commenting on the applicability of the 14th Amendment to vessels and planes, states:*

> ..The rules applicable to vessels obviously apply equally to airplanes. Thus a child born on a plane in the United States, or flying over its territory, would acquire United States citizenship at birth.

b. Cases of persons born on planes in airspace outside the U.S. coastal borders but within the U.S. territorial sea should be submitted to the Department (CA/OCS) for adjudication.

7 FAM 1116.1-4 Not Included in the Meaning of "In the United States"

(TL:CON-64; 11-30-95)

a. A U.S.-registered or *documented* ship on the high seas or in the exclusive economic zone is not considered to be part of the United States. A child born on such a vessel does not acquire U.S. citizenship by reason of the place of birth (*Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir., 1928)).

b. *A U.S.-registered aircraft outside U.S. airspace is not considered to be part of U.S. territory. A child born on such an aircraft outside U.S. airspace does not acquire U.S. citizenship by reason of the place of birth.*

c. Despite widespread popular belief, U.S. military installations abroad and U.S. diplomatic or consular facilities are not part of the United States within the meaning of the 14th Amendment. A child born on the premises of such a facility is not subject to the jurisdiction of the United States and does not acquire U.S. citizenship by reason of birth.

7 FAM 1116.2 "Subject to the Jurisdiction" of the United States

7 FAM 1116.2-1 Subject at Birth to U.S. Law

(TL:CON-64; 11-30-95)

a. Simply stated, “subject to the jurisdiction” of the United States means subject to the laws of the United States.

b. In *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. Supreme Court examined at length the theories and legal precedents on which the U.S. citizenship laws are based and, in particular, the types of persons who are subject to U.S. jurisdiction. After doing so, it affirmed that a child born in the United States to Chinese parents acquired U.S. citizenship even though the parents were, *at the time*, racially ineligible for naturalization. The Court concluded that:

> The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.

c. Pursuant to this ruling, it has been *considered* that:

(1) Acquisition of U.S. citizenship *generally* is not affected by the fact that the parents may be in the United States temporarily or illegally; and that

(2) A child born in an immigration detention center *physically located in the United States* is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child’s parents have not been legally admitted to the United States and, for immigration purposes, *may be* viewed as not being in the United States.

7 FAM 1116.2-2 Officers and Employees of Foreign Embassies and Consulates and their Families

(TL:CON-64; 11-30-95)

a. Under international law, *diplomatic agents are immune from the criminal jurisdiction of the receiving state. Diplomatic agents are also immune, with limited exception, from the civil and administrative jurisdiction of the state. The immunities of diplomatic agents extend to the members of their family forming part of their household.* For this reason children born in the United States to diplomats to the United States are not subject to U.S. jurisdiction and do not acquire U.S. citizenship under the 14th Amendment or the laws derived from it.

b. The names of *diplomatic agents* accredited or notified to the United States and who have full diplomatic privileges and immunities are published every three months in the Department's *Diplomatic List*, often called the "Blue List." The *Diplomatic List* also gives the name of the spouses residing with them, but does not include other members of the family forming part of the household, although *they may* be entitled to *privileges and immunities*.

c. *The Diplomatic List does not indicate the dates of accreditation or notification, or of termination, and any given issue of the Diplomatic List does not include accreditations, notifications or terminations occurring after the closing date for submission of information for that issue. In addition, the Diplomatic List does not include persons who have entered the territory of the United states to take up the post of diplomatic agent but who are not yet accredited or notified, although they enjoy privileges and immunities from the moment of entry pursuant to Article 39 of the Vienna Convention on Diplomatic Relations. For all of these reasons, the Diplomatic List, while an important source in citizenship inquiries involving the children of diplomats, cannot by itself resolve such inquiries. The Office of Protocol (CPR) maintains complete records to supplement the Diplomatic List. CA/OCS will inquire of CPR if necessary.*

d. As a rule, children born in the United States to the following employees of foreign governments acquire U.S. citizenship:

(1) Members of the administrative and technical (A&T) staff or service staff of foreign embassies. However, bilateral agreements with certain countries grant A&T and service staff members and their families diplomatic-level privileges and immunities, and children born in the United States to such persons do not acquire U.S. citizenship. CA/OCS, through the Office of Protocol, will address inquiries as to whether such bilateral agreements affect the A&T or service staff members of specific countries;

(2) Foreign diplomats accredited to a country other than the United States;

(3) Diplomatic agents whose functions in the United States have ended, and whose privileges and immunities have ceased upon the expiration of a reasonable time for departure. The general practice of the United States is to consider 30 days a reasonable period of departure. In specific cases, the Department may allow a shorter or longer period;

(4) Diplomatic agents who have the children in question with U.S. citizens capable of transmitting U.S. citizenship to children born abroad. Such children acquire citizenship under pertinent law as if born abroad and would be subject to any citizenship retention requirements in effect at the time of birth;

(5) Consular officers and employees [see NOTES].

NOTES:

(a) Consular officers assigned to the embassy of the sending state are accredited as diplomatic agents. Children born to such officers do not acquire U.S. citizenship.

(b) Bilateral agreements with certain countries grant consular officers and their families diplomatic-level privileges and immunities, and children born in the United States to such persons do not acquire U.S. citizenship. CA/OCS should be queried as to whether such bilateral agreements affect the consular officers of specific countries.

e. The recollections of the parents or child about the parents' status at the time of the child's birth may be imprecise, and the only way to ascertain whether the child was born subject to U.S. jurisdiction is to review the *Diplomatic List* and other records dating from the time of the birth. Therefore, a post that has received an application from a first-time applicant born in the United States to a *member of a diplomatic mission or consular post* or

an inquiry about the citizenship status of such a person should request the Department (CA/OCS/ACS) by telegram to check the pertinent records [see 7 FAM 1116 Exhibit 1116.2-2]. The telegram should give the child's name, date and place of birth, the name of the parent who may have had diplomatic status at the time of the child's birth, and the name of the country represented. The telegram should indicate whether the other parent was a U.S. citizen when the child was born.

7 FAM 1116.2-3 Resident Representatives to and Officials of the United Nations

(TL:CON-64; 11-30-95)

a. *The considerations noted in Section 7 FAM 1116.2-2 relating to the children of diplomatic agents also apply to those of the Resident Representatives to and Officials of the United Nations described as follows:*

(1) Resident Representatives. Under the UN Headquarters Agreement, certain individuals are entitled to the same privileges and immunities accorded to diplomatic envoys. These individuals include:

(i) the principal resident representative to the UN of a member state or a resident representative with the rank of Ambassador or minister plenipotentiary;

(ii) resident staffs of members agreed upon by the Secretary-General, the United States, and the member state;

(iii) principal resident representatives with the rank of Ambassador or minister plenipotentiary to specialized agencies of the UN with headquarters in the United States;

(iv) other principal resident representatives and resident staffs of members to specialized agencies agreed upon by the principal executive officer of the agency, the United States, and the member state.

(2) High-level UN Officials. Under the Convention on the Privileges and Immunities of the United Nations, the Secretary-General and all Assistant Secretaries-General are entitled to the same privileges and immunities as are accorded to diplomatic envoys.

b. The U.S. Mission to the United Nations issues a "Blue List" of the resident representatives and staff of the Missions to the United Nations who are entitled to diplomatic privileges and immunities accorded to diplomatic envoys. As in the case of the Diplomatic List for bilateral diplomats, the Blue List should be viewed as a resource, but not the definitive source of information. Upon receipt of a telegram, as described in 7 FAM 1116 Exhibit 1116.2-2 *, modified to indicate the name of the UN Mission or the position of the diplomat with the UN secretariat, CA/OCS/ ACS will check the relevant records and provide an opinion of the child's claim to citizenship.*

c. As a rule, children born in the United States to the following members of the UN community acquire U.S. citizenship:

(1) Members of the non-diplomatic staff of the UN Missions, e.g., secretaries, administrative clerks and drivers;

(2) Employees of the UN secretariat not included in section 7 FAM 1116.2-3 *a.(2);*

(3) Members of UN Observer Missions;

(4) Members who were accorded diplomatic immunity, but whose functions in the U.S. have ended, and whose privileges and immunities have ceased; and

(5) Members who are U.S. citizens or have the children in question with citizens capable of transmitting U.S. citizenship to children born abroad. A child who acquired U.S. citizenship under such circumstances would be subject to any citizenship retention requirements in effect at the time of birth.

7 FAM 1116.2-4 Representatives to and Officials of Certain Other International Organizations

(TL:VISA-64; 11-30-95)

a. The considerations noted in Section 7 FAM 1116.2-2 *relating to the children of diplomatic agents, also apply to those of certain Resident Representatives to and Officials of international organizations including, but not limited to, the Organization of American States, the International Monetary Fund and the World Bank. The number of such Resident Representatives and Officials entitled to diplomatic immunity is small. Generally, most employees of international organizations with offices in the United States are not entitled to diplomatic immunity and their children born in the United States are U.S. citizens.*

b. Because the source of immunity derives from several different conventions or treaties, and because there are not consolidated lists for all of those eligible for diplomatic immunity, consular officers should send a cable, as described in 7 FAM 1116 Exhibit 1116.2-2 *, modified to indicate the name of the international organization, to CA/OCS/ ACS for an opinion on the child's claim to citizenship.*

7 FAM 1116.2-5 Foreign Heads of State

(TL:CON-64; 11-30-95)

Acquisition of U.S. citizenship by children born to foreign sovereigns or heads of state visiting the United States is a complex issue. Posts should notify the Department (CA/OCS and L/SFP) in any case in which this issue arises.

7 FAM 1116.2-6 Foreign Vessels

(TL:CON-64; 11-30-95)

a. Foreign *warships, naval auxiliaries, and other vessels or aircraft owned or operated by a state and used for the time being, only on government non-commercial service,* are not subject to jurisdiction of the United States. Persons born on such vessels while in U.S. *internal waters* do not acquire U.S. citizenship at birth.

b. A child born on a foreign merchant ship *or privately owned vessel* in U.S. internal waters is considered as having been born subject to the jurisdiction of the United States.

7 FAM 1116.2-7 Alien Enemies During Hostile Occupation

(TL:CON-64; 11-30-95)

a. If part of the United States were occupied by foreign armed forces against the wishes of the United States, children born to enemy aliens in the occupied areas would not be subject to U.S. jurisdiction and would not acquire U.S. citizenship at birth.

b. Children born to others in an area temporarily occupied by hostile forces would acquire U.S. citizenship at birth because sovereignty would not have been transferred to the other country.

7 FAM 1116.2-8 Native Americans and Eskimos

(TL:CON-64; 11-30-95)

a. Before Wong Kim Ark *[*see section 7 FAM 1116.2-1 *],* the only occasion on which the Supreme Court had considered the meaning of the 14th Amendment's phrase "subject to the jurisdiction" of the United States was in Elk v. Wilkins, 112 U.S. 94 (1884). That case hinged on whether a *Native American* who severed ties with the tribe and lived among whites was a U.S. citizen and entitled to vote. The Court held that the plaintiff had been born subject to tribal rather than U.S. jurisdiction and could not become a U.S. citizen merely by leaving the tribe and moving within the jurisdiction of the United States. The Court stated that:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal...through treaties...or acts of Congress...They were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens upon application...for naturalization...

b. The Act of June 2, 1924 (43 Stat. 253) was the first comprehensive law relating to the citizenship of Native Americans. *It provided:*

> *That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.*

c. Section 201(b) NA, effective January 13, 1941, declared that persons born in the United States to members of an Indian, Eskimo, Aleutian, or other aboriginal tribe were nationals and citizens of the United States at birth. Section 301(b) (formerly Sec. 301(a)(2) INA), in effect from December 24, 1952, restates this provision.

7 FAM 1117 LEGISLATION REGARDING CITIZENSHIP BY BIRTH IN THE UNITED STATES

(TL:CON-64; 11-30-95)

a. The citizenship provision of the 14th Amendment is essentially restated in Section 201(a) of the Nationality Act of 1940 (NA) and in Section 301(a) [formerly Section 301(a)(1)] of the Immigration and Nationality Act of 1952 (INA).

b. The current section of law that governs the acquisition of citizenship by birth in the United States is Section 301 INA, which states:

Sec. 301. The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe, Provided, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right to tribal or other property;...

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;...

c. The provisions of Section 201(a) and (b) NA were identical to those of Section 301(a) and (b) INA. The differences between Section 201(f) NA and Section 301(f) INA are discussed in section 7 FAM 1118 .

d. All children born in and subject, *at the time of birth*, to the jurisdiction of the United States acquire U.S. citizenship at birth *even if their parents were in the United States illegally at the time of birth.*

7 FAM 1118 FOUNDLINGS

(TL:CON-64; 11-30-95)

a. Under Section 301(f) INA (formerly Section 301(a)(6)), a child of unknown parents is conclusively presumed to be a U.S. citizen if found in the United States when under 5 years of age, unless foreign birth is established before the child reaches age 21.

b. Under Section 201(f) NA, a child of unknown parents, found in the United States, was presumed to have been a U.S. citizen at birth until shown not to have been born in the United States *no matter at what age this might have been demonstrated.*

7 FAM 1119 PROOF OF CITIZENSHIP BY BIRTH IN THE UNITED STATES

(TL:CON-64; 11-30-95)

a. To establish a claim to U.S. citizenship by birth in the United States:

A person born in the United States in a place where official records of birth were kept at the time of his birth shall submit with the application for a passport a birth certificate under the seal of the official custodian of records. [22 CFR 51.43.]

b. The birth certificate must:

(1) Show the applicant's full name, and date and place of birth;

(2) Have a filing date within 1 year of the birth; and

(3) Bear the signature of the official custodian of birth records and the raised, impressed, or multicolored seal of the issuing office.

c. Bulletin M-343 (Notice to Applicant Concerning Birth Records) may be given to the applicant to assist in obtaining an acceptable birth certificate.

d. Information on the availability and cost of birth certificates is published by the Department of Health and Human Services in *Where to Write for Vital Records: Births, Deaths, Marriages, and Divorces* (DHHS Publication No. (PHS) 93 -1142; Hyattsville, MD., U.S. Department of Health and Human Services, March l993, revised periodically).

e. Consular officers are urged to obtain, with post funds, a copy of this publication which will assist them in advising applicants needing documentation on how to procure birth or other required documents.

f. For details on evidence of U.S. citizenship, including information on the documentation that may be presented by U.S.-born applicants who cannot obtain a birth certificate of the type described in 7 FAM 1119 (b), see subchapters 7 FAM 1130 and 7 FAM 1330 .

g. Posts are authorized to document, without prior approval from the Department, first-time applicants who present citizenship evidence meeting the requirement of 22 CFR 51.43 and satisfactory evidence of identity, unless it appears that the applicant was not subject to the jurisdiction of the United States at birth, e.g. because he or she was born to a foreign diplomat or one of the other categories of persons not subject to the jurisdiction of the United States. Any questions regarding this issue should be referred to CA/OCS with a CPAS TAGS.

7 FAM 1116 Exhibit 1116.2-2

SAMPLE INQUIRY ABOUT THE CITIZENSHIP STATUS OF A CHILD OF A FOREIGN DIPLOMAT

FROM: Amembassy Cotonou

ACTION: SecState WASHDC ROUTINE

UNCLAS COTONOU

CLASSIFICATION: Unclassified

Attention: CA/OCS/ACS/AF

E.O. 12356: N/A

TAGS: CPAS (UMOH, Richard Tombo)

SUBJECT: Citizenship Status of Child of Foreign Diplomat

REF: 7 FAM 1116.2-2

1. Richard Tombo Umoh, DPOB 7/025/70, Silver Spring Md, inquired today about his possible claim to U.S. citizenship. He reports that his father, Mr. Friday Eyi Umoh, was assigned to the Nigerian Embassy in Washington from 1970 to 1979 as Attache (Finance). His mother, Veronica Nwoko Umoh, is a Nigerian citizen.

2. Please verify whether Friday Eyi Umoh was on the diplomatic list at the time of Richard's birth and whether Richard was born subject to the jurisdiction of the United States.
COOPER

DRAFTED BY: CON/SRHydes
DRAFTING DATE: 7/12/95
APPROVED BY: DCM; AZMaendert

7 FAM 1100 ACQUISITION AND RETENTION OF U.S. CITIZENSHIP AND NATIONALITY

7 FAM 1110 ACQUISITION OF U.S. CITIZENSHIP BY BIRTH IN THE UNITED STATES

7 FAM 1111 BASIC TERMS AND DISTINCTIONS

7 FAM 1111.1 Terms Not Always Interchangeable

(TL:CON-64; 11-30-95)

While most people and countries use the terms "citizenship" and "nationality" interchangeably, U.S. law differentiates between the two [see Section 101(a)(21)-(22) of the Immigration and Nationality Act (INA)]. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S. citizens.

7 FAM 1111.2 Citizenship

(TL:CON-64; 11-30-95)

a. U.S. citizenship may be acquired *either* at birth or through naturalization.

b. U.S. laws *governing* the acquisition of citizenship at birth embody two legal principles:

(1) *Jus soli* (*the law* of the soil), a rule of common law under which the place of a person's birth determines citizenship. *In addition to common law, this principle is embodied in the 14th Amendment to the U.S. Constitution and the various U.S. citizenship and nationality statutes.*

(2) *Jus sanguinis* (the *law* of the *bloodline*), a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of *one or both* parents. This rule, *frequently* called "citizenship by descent" or "derivative citizenship", *is not embodied in the U.S. Constitution, but such citizenship is granted through statute. As laws have changed, the requirements for conferring and retaining derivative citizenship have also changed*.

c. Naturalization is "the conferring of nationality of a state upon a person after birth, by any means whatsoever" (Section 101(a)(23) INA) or conferring of citizenship upon a person (Sections 310 and 311 INA). Naturalization can be granted automatically or pursuant to an application. *Under U.S. law, foreign naturalization acquired automatically is not an expatriating act [*see chapter 7 FAM 1200*].*

d. Historically, a number of U.S. laws have provided for the automatic naturalization of children or wives (not husbands) of naturalized U.S. citizens or for automatic collective naturalization of persons residing in territories over which the United States has gained sovereignty.

7 FAM 1111.3 Nationality

(TL:CON-64; 11-30-95)

a. The term "nationals of the United States", as defined by statute (Section l0l(a)(22) INA) includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship.

b. Nationals of the United States who are not citizens are entitled to the consular protection of the United States when abroad, and to U.S. documentation, such as U.S. passports. They are not entitled to voting representation in Congress and, under most state laws, are not entitled to vote in federal, State, or local elections except in their place of birth.

c. Historically, Congress, through statutes, granted U.S. nationality, but not citizenship, to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals.

d. Under current law (the Immigration and Nationality Act of 1952, as amended through October 1994), only persons born in American Samoa and the Swains Islands are U.S. nationals (Secs. 101(a)(29) and 308(1) INA).

7 FAM 1111.4 Dual or Multiple Nationality

(TL:CON-64; 11-30-95)

a. U.S. nationals and citizens may possess dual or multiple nationality and owe allegiance to one or several foreign states. They may even have identified themselves more closely with the foreign state than with the United States, thereby calling into question the propriety of extending protection to them. Since each country establishes its own law of nationality, dual nationality cannot be eliminated, may result in confusion, and could complicate the ability of the U.S. Government to protect its nationals/citizens.

b. The United States has no special arrangements with individual countries to "permit" dual nationality. U.S. Government policy toward dual nationality is the same regardless of other nationalities involved.

c. While a person who has dual or multiple nationality resides in the United States, the right of the United States to claim his or her allegiance is held to be paramount of the right of the other countries of which he or she may be a national. Conversely, while a person who has dual nationality resides abroad in a foreign country of which he or she also is a national, the right of that country to claim his or her allegiance is paramount to that of the United States.

d. It has been the policy of the U.S. Government, when the occasion arises, to intercede on behalf of a person in another country who owes allegiance both to that country and the United States, when the facts clearly indicate that the person has been detained, harassed, or molested by the authorities of the foreign country of which he or she is also a national.

e. The circumstances of a person's conduct abroad may very well be a determining factor in considering the extent to which such protection should be granted. In the case of a dual national living in the foreign country of which he or she is also a national, the circumstances may restrict, to a great extent, a national's ability to receive the protection and consular services of the U.S. Government.

7 FAM 1112 AUTHORITY

(TL:CON-64; 11-30-95)

The two principal U.S. laws on which most citizenship and nationality matters now are based are the Immigration and Nationality Act of 1952, effective December 24, 1952, as amended *(herein "INA"),* and the Nationality Act of 1940, effective January 13, 1941 *(herein "NA"),* which was repealed by the INA. Numerous other authorities are cited in this chapter. Because all posts have been furnished copies of the INA, this chapter quotes from it sparingly.

7 FAM 1113 DEFINITIONS

(TL:CON-64; 11-30-95)

The following definitions apply in citizenship and nationality cases (and other terms are defined in the context of the sections 7 FAM where they occur):

a. "Alien" means any person who is not a citizen or national of the United States *(Sec. 101(a)(3) INA).*

b. "American", *for purposes of this chapter*, means a person who is a citizen or national of the United States, or, when used as a modifier, pertaining to or of the United States, its people, customs, laws and regulations, documents, government agencies, and services. Because other groups of people in the Western Hemisphere also consider themselves to be American (that is, Central American, North American, South American), the modifier "U.S." generally is used in this volume of the Foreign Affairs Manual instead of "American" (such as, U.S. citizen, U.S. court decrees, U.S. veteran; but American Embassy).

c. "Citizen", *for purposes of this chapter*, means a person who acquired U.S. citizenship at birth or upon naturalization as provided by law. All U.S. citizens are nationals of the United States.

d. "Citizenship" indicates the status of being a U.S. citizen.

e. "Dual National", for the purposes of this chapter, means a person who owes permanent allegiance to more than one country.

*f. "INA" means the Immigration and Nationality Act of 1952 as amended by various Acts up to and including 1994 [*see sections 7 FAM 1112 and 7 FAM 1132.8 *].*

g. "NA" means the Nationality Act of 1940 [see section 7 FAM 1112 *].*

h. "Minor," for the purposes of this chapter, means a person under the age of 18.

i. "National", *for purposes of this chapter*, means a person on whom U.S. nationality has been conferred and who owes permanent allegiance to the United States but who is not a citizen *[see* section 7 FAM 1111.3 *b]* . All U.S. citizens are nationals, but U.S. nationals are not necessarily U.S. citizens. For purposes of expatriation, references to U.S. citizens extend to U.S. nationals [see chapter 7 FAM 1200 on loss and restoration of U.S. citizenship].

j. "Nationality" indicates the status of being a national of the United States. *(Nationality is also part of citizenship.)*

k. "Naturalization" means conferring the citizenship or nationality of a state on a person after birth by any means whatsoever *[see* section 7 FAM 1111.2 *c].*

l. "Outlying possessions of the United States" means American Samoa and Swains Island (Section 101(a)(29) INA).

m. "Person" means an individual.

n. "Residence" means the "place of general abode" which is the "principal, actual dwelling place in fact, without regard to intent" (Section 101(a)(33) INA).

o. "United States" means "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States" (Section 101(a)(38) INA).

7 FAM 1114 CITIZENSHIP DURING EARLY YEARS OF THE NATION

(TL:CON-64; 11-30-95)

a. Until 1866, the citizenship status of persons born in the United States was not defined in the Constitution or in any federal statute. Under the common law rule of *jus soli*--the law of the soil-persons born in the United States generally acquired U.S. citizenship at birth *[*see section 7 FAM 1116.1-1 *].*

b. This rule was made part of the Civil Rights Act of April 9, 1866 (14 Stat. 27) and, 2 years later, it was adopted as part of the 14th Amendment to the Constitution.

7 FAM 1115 CITIZENSHIP UNDER THE 14th AMENDMENT

(TL:CON-64; 11-30-95)

a. The 14th Amendment states, in part, that-

> All persons born *or naturalized* in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside...*

b. Questions have arisen about the meaning of the phrases "in the United States" and "subject to the jurisdiction thereof." Some of the conclusions reached by U.S. courts and administrative authorities are summarized *in* section 7 FAM 1116 .

7 FAM 1116 KEY PHRASES USED IN THE 14th AMENDMENT AND IN LAWS DERIVED FROM IT

7 FAM 1116.1 "In The United States"

7 FAM 1116.1-1 States and Incorporated Territories

(TL:CON-64; 11-30-95)

a. *The phrase* "in the United States" *as used in the 14th Amendment* clearly includes States that have been admitted to the Union. *Sections 304 and 305 of the INA provide a basis for citizenship of persons born in Alaska and Hawaii while they were territories of the United States. These sections reflect, to a large extent, prior statutes and judicial decisions which addressed the l4th Amendment citizenship implications of birth in these and other U.S. territories. Guidance on evidence on such births should be sought from CA/OCS.*

b. Sec. 101(a)(38) INA *provides that, for the purposes of the INA,*

> The term "United States",... when used in the geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.*In addition, under Pub. L. 94-241, the "approving Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America", (Sec. 506(c)), which took effect on November 3, 1986, the Northern Mariana Islands are treated as part of the United States for the purposes of sections 301 and 308 of the INA.*

c. All of the *aforenamed* areas, except Guam *and the Northern Mariana Islands, came within the definition of "United States" given in the Nationality Act of 1940, which was effective from January 13, 1941 through December 23, 1952.*

d. Prior to January 13, 1941, there was no statutory definition of "the United States" for citizenship purposes. Thus there were varying interpretations. Guidance should be sought from the Department (CA/OCS) when such issues arise.

7 FAM 1116.1-2 In U.S. Waters

(TL:CON-64; 11-30-95)

a. Persons born on ships *located within U.S. internal* waters are considered to have been born in the United States. *Such persons will acquire U.S. citizenship at birth if they are subject to the jurisdiction of the United States [*see section 7 FAM 1116.2-1 *]. Internal waters include the ports, harbors, bays and other enclosed areas of the sea along the U.S. coast.*

b. *Prior FAM guidance advised that persons born within the 3-mile limit of the U.S. territorial sea were born "within the United States" and could be documented as U.S. citizens if they were also born subject to U.S. jurisdiction. Analysis of this issue undertaken in 1994-1995 revealed, however, that there is a substantial legal question whether persons born outside the internal waters of the United States but within the territorial sea are in fact born "within the United States" for purposes of the 14th Amendment and the INA. Cases involving persons born outside the internal waters but within the U.S. territorial sea should, therefore, be submitted to the Department (CA/OCS) for adjudication.*

7 FAM 1116.1-3 Airspace

(TL:CON-64; 11-30-95)

a. Airspace above the *land territory and internal waters* is held to be part of the United States (Art. 1(1), 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, TIAS 5639). Gordon and Rosenfeld, in Immigration Law and Procedure, Volume 3, Nationality (New York: Matthew Bender, 1986), *commenting on the applicability of the 14th Amendment to vessels and planes, states:*

> ..The rules applicable to vessels obviously apply equally to airplanes. Thus a child born on a plane in the United States, or flying over its territory, would acquire United States citizenship at birth.

b. Cases of persons born on planes in airspace outside the U.S. coastal borders but within the U.S. territorial sea should be submitted to the Department (CA/OCS) for adjudication.

7 FAM 1116.1-4 Not Included in the Meaning of "In the United States"

(TL:CON-64; 11-30-95)

a. A U.S.-registered or *documented* ship on the high seas or in the exclusive economic zone is not considered to be part of the United States. A child born on such a vessel does not acquire U.S. citizenship by reason of the place of birth (*Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir., 1928)).

b. *A U.S.-registered aircraft outside U.S. airspace is not considered to be part of U.S. territory. A child born on such an aircraft outside U.S. airspace does not acquire U.S. citizenship by reason of the place of birth.*

c. Despite widespread popular belief, U.S. military installations abroad and U.S. diplomatic or consular facilities are not part of the United States within the meaning of the 14th Amendment. A child born on the premises of such a facility is not subject to the jurisdiction of the United States and does not acquire U.S. citizenship by reason of birth.

7 FAM 1116.2 "Subject to the Jurisdiction" of the United States

7 FAM 1116.2-1 Subject at Birth to U.S. Law

(TL:CON-64; 11-30-95)

a. Simply stated, “subject to the jurisdiction” of the United States means subject to the laws of the United States.

b. In *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. Supreme Court examined at length the theories and legal precedents on which the U.S. citizenship laws are based and, in particular, the types of persons who are subject to U.S. jurisdiction. After doing so, it affirmed that a child born in the United States to Chinese parents acquired U.S. citizenship even though the parents were, *at the time*, racially ineligible for naturalization. The Court concluded that:

> The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.

c. Pursuant to this ruling, it has been *considered* that:

(1) Acquisition of U.S. citizenship *generally* is not affected by the fact that the parents may be in the United States temporarily or illegally; and that

(2) A child born in an immigration detention center *physically located in the United States* is considered to have been born in the United States and be subject to its jurisdiction. This is so even if the child’s parents have not been legally admitted to the United States and, for immigration purposes, *may be* viewed as not being in the United States.

7 FAM 1116.2-2 Officers and Employees of Foreign Embassies and Consulates and their Families

(TL:CON-64; 11-30-95)

a. Under international law, *diplomatic agents are immune from the criminal jurisdiction of the receiving state. Diplomatic agents are also immune, with limited exception, from the civil and administrative jurisdiction of the state. The immunities of diplomatic agents extend to the members of their family forming part of their household.* For this reason children born in the United States to diplomats to the United States are not subject to U.S. jurisdiction and do not acquire U.S. citizenship under the 14th Amendment or the laws derived from it.

b. The names of *diplomatic agents* accredited or notified to the United States and who have full diplomatic privileges and immunities are published every three months in the Department's *Diplomatic List*, often called the "Blue List." The *Diplomatic List* also gives the name of the spouses residing with them, but does not include other members of the family forming part of the household, although *they may* be entitled to *privileges and immunities*.

c. *The Diplomatic List does not indicate the dates of accreditation or notification, or of termination, and any given issue of the Diplomatic List does not include accreditations, notifications or terminations occurring after the closing date for submission of information for that issue. In addition, the Diplomatic List does not include persons who have entered the territory of the United states to take up the post of diplomatic agent but who are not yet accredited or notified, although they enjoy privileges and immunities from the moment of entry pursuant to Article 39 of the Vienna Convention on Diplomatic Relations. For all of these reasons, the Diplomatic List, while an important source in citizenship inquiries involving the children of diplomats, cannot by itself resolve such inquiries. The Office of Protocol (CPR) maintains complete records to supplement the Diplomatic List. CA/OCS will inquire of CPR if necessary.*

d. As a rule, children born in the United States to the following employees of foreign governments acquire U.S. citizenship:

(1) Members of the administrative and technical (A&T) staff or service staff of foreign embassies. However, bilateral agreements with certain countries grant A&T and service staff members and their families diplomatic-level privileges and immunities, and children born in the United States to such persons do not acquire U.S. citizenship. CA/OCS, through the Office of Protocol, will address inquiries as to whether such bilateral agreements affect the A&T or service staff members of specific countries;

(2) Foreign diplomats accredited to a country other than the United States;

(3) Diplomatic agents whose functions in the United States have ended, and whose privileges and immunities have ceased upon the expiration of a reasonable time for departure. The general practice of the United States is to consider 30 days a reasonable period of departure. In specific cases, the Department may allow a shorter or longer period;

(4) Diplomatic agents who have the children in question with U.S. citizens capable of transmitting U.S. citizenship to children born abroad. Such children acquire citizenship under pertinent law as if born abroad and would be subject to any citizenship retention requirements in effect at the time of birth;

(5) Consular officers and employees [see NOTES].

NOTES:

(a) Consular officers assigned to the embassy of the sending state are accredited as diplomatic agents. Children born to such officers do not acquire U.S. citizenship.

(b) Bilateral agreements with certain countries grant consular officers and their families diplomatic-level privileges and immunities, and children born in the United States to such persons do not acquire U.S. citizenship. CA/OCS should be queried as to whether such bilateral agreements affect the consular officers of specific countries.

e. The recollections of the parents or child about the parents' status at the time of the child's birth may be imprecise, and the only way to ascertain whether the child was born subject to U.S. jurisdiction is to review the *Diplomatic List* and other records dating from the time of the birth. Therefore, a post that has received an application from a first-time applicant born in the United States to a *member of a diplomatic mission or consular post* or

an inquiry about the citizenship status of such a person should request the Department (CA/OCS/ACS) by telegram to check the pertinent records [see 7 FAM 1116 Exhibit 1116.2-2]. The telegram should give the child's name, date and place of birth, the name of the parent who may have had diplomatic status at the time of the child's birth, and the name of the country represented. The telegram should indicate whether the other parent was a U.S. citizen when the child was born.

7 FAM 1116.2-3 Resident Representatives to and Officials of the United Nations

(TL:CON-64; 11-30-95)

a. *The considerations noted in Section 7 FAM 1116.2-2 relating to the children of diplomatic agents also apply to those of the Resident Representatives to and Officials of the United Nations described as follows:*

(1) Resident Representatives. Under the UN Headquarters Agreement, certain individuals are entitled to the same privileges and immunities accorded to diplomatic envoys. These individuals include:

(i) the principal resident representative to the UN of a member state or a resident representative with the rank of Ambassador or minister plenipotentiary;

(ii) resident staffs of members agreed upon by the Secretary-General, the United States, and the member state;

(iii) principal resident representatives with the rank of Ambassador or minister plenipotentiary to specialized agencies of the UN with headquarters in the United States;

(iv) other principal resident representatives and resident staffs of members to specialized agencies agreed upon by the principal executive officer of the agency, the United States, and the member state.

(2) High-level UN Officials. Under the Convention on the Privileges and Immunities of the United Nations, the Secretary-General and all Assistant Secretaries-General are entitled to the same privileges and immunities as are accorded to diplomatic envoys.

b. The U.S. Mission to the United Nations issues a "Blue List" of the resident representatives and staff of the Missions to the United Nations who are entitled to diplomatic privileges and immunities accorded to diplomatic envoys. As in the case of the Diplomatic List for bilateral diplomats, the Blue List should be viewed as a resource, but not the definitive source of information. Upon receipt of a telegram, as described in 7 FAM 1116 Exhibit 1116.2-2 *, modified to indicate the name of the UN Mission or the position of the diplomat with the UN secretariat, CA/OCS/ ACS will check the relevant records and provide an opinion of the child's claim to citizenship.*

c. As a rule, children born in the United States to the following members of the UN community acquire U.S. citizenship:

(1) Members of the non-diplomatic staff of the UN Missions, e.g., secretaries, administrative clerks and drivers;

(2) Employees of the UN secretariat not included in section 7 FAM 1116.2-3 *a.(2);*

(3) Members of UN Observer Missions;

(4) Members who were accorded diplomatic immunity, but whose functions in the U.S. have ended, and whose privileges and immunities have ceased; and

(5) Members who are U.S. citizens or have the children in question with citizens capable of transmitting U.S. citizenship to children born abroad. A child who acquired U.S. citizenship under such circumstances would be subject to any citizenship retention requirements in effect at the time of birth.

7 FAM 1116.2-4 Representatives to and Officials of Certain Other International Organizations

(TL:VISA-64; 11-30-95)

a. The considerations noted in Section 7 FAM 1116.2-2 *relating to the children of diplomatic agents, also apply to those of certain Resident Representatives to and Officials of international organizations including, but not limited to, the Organization of American States, the International Monetary Fund and the World Bank. The number of such Resident Representatives and Officials entitled to diplomatic immunity is small. Generally, most employees of international organizations with offices in the United States are not entitled to diplomatic immunity and their children born in the United States are U.S. citizens.*

b. Because the source of immunity derives from several different conventions or treaties, and because there are not consolidated lists for all of those eligible for diplomatic immunity, consular officers should send a cable, as described in 7 FAM 1116 Exhibit 1116.2-2 *, modified to indicate the name of the international organization, to CA/OCS/ ACS for an opinion on the child's claim to citizenship.*

7 FAM 1116.2-5 Foreign Heads of State

(TL:CON-64; 11-30-95)

Acquisition of U.S. citizenship by children born to foreign sovereigns or heads of state visiting the United States is a complex issue. Posts should notify the Department (CA/OCS and L/SFP) in any case in which this issue arises.

7 FAM 1116.2-6 Foreign Vessels

(TL:CON-64; 11-30-95)

a. Foreign *warships, naval auxiliaries, and other vessels or aircraft owned or operated by a state and used for the time being, only on government non-commercial service,* are not subject to jurisdiction of the United States. Persons born on such vessels while in U.S. *internal waters* do not acquire U.S. citizenship at birth.

b. A child born on a foreign merchant ship *or privately owned vessel* in U.S. internal waters is considered as having been born subject to the jurisdiction of the United States.

7 FAM 1116.2-7 Alien Enemies During Hostile Occupation

(TL:CON-64; 11-30-95)

a. If part of the United States were occupied by foreign armed forces against the wishes of the United States, children born to enemy aliens in the occupied areas would not be subject to U.S. jurisdiction and would not acquire U.S. citizenship at birth.

b. Children born to others in an area temporarily occupied by hostile forces would acquire U.S. citizenship at birth because sovereignty would not have been transferred to the other country.

7 FAM 1116.2-8 Native Americans and Eskimos

(TL:CON-64; 11-30-95)

a. Before Wong Kim Ark *[*see section 7 FAM 1116.2-1 *],* the only occasion on which the Supreme Court had considered the meaning of the 14th Amendment's phrase "subject to the jurisdiction" of the United States was in Elk v. Wilkins, 112 U.S. 94 (1884). That case hinged on whether a *Native American* who severed ties with the tribe and lived among whites was a U.S. citizen and entitled to vote. The Court held that the plaintiff had been born subject to tribal rather than U.S. jurisdiction and could not become a U.S. citizen merely by leaving the tribe and moving within the jurisdiction of the United States. The Court stated that:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal...through treaties...or acts of Congress...They were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens upon application...for naturalization...

b. The Act of June 2, 1924 (43 Stat. 253) was the first comprehensive law relating to the citizenship of Native Americans. *It provided:*

> *That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.*

c. Section 201(b) NA, effective January 13, 1941, declared that persons born in the United States to members of an Indian, Eskimo, Aleutian, or other aboriginal tribe were nationals and citizens of the United States at birth. Section 301(b) (formerly Sec. 301(a)(2) INA), in effect from December 24, 1952, restates this provision.

7 FAM 1117 LEGISLATION REGARDING CITIZENSHIP BY BIRTH IN THE UNITED STATES

(TL:CON-64; 11-30-95)

a. The citizenship provision of the 14th Amendment is essentially restated in Section 201(a) of the Nationality Act of 1940 (NA) and in Section 301(a) [formerly Section 301(a)(1)] of the Immigration and Nationality Act of 1952 (INA).

b. The current section of law that governs the acquisition of citizenship by birth in the United States is Section 301 INA, which states:

Sec. 301. The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe, Provided, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right to tribal or other property;...

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;...

c. The provisions of Section 201(a) and (b) NA were identical to those of Section 301(a) and (b) INA. The differences between Section 201(f) NA and Section 301(f) INA are discussed in section 7 FAM 1118 .

d. All children born in and subject, *at the time of birth*, to the jurisdiction of the United States acquire U.S. citizenship at birth *even if their parents were in the United States illegally at the time of birth.*

7 FAM 1118 FOUNDLINGS

(TL:CON-64; 11-30-95)

a. Under Section 301(f) INA (formerly Section 301(a)(6)), a child of unknown parents is conclusively presumed to be a U.S. citizen if found in the United States when under 5 years of age, unless foreign birth is established before the child reaches age 21.

b. Under Section 201(f) NA, a child of unknown parents, found in the United States, was presumed to have been a U.S. citizen at birth until shown not to have been born in the United States *no matter at what age this might have been demonstrated.*

7 FAM 1119 PROOF OF CITIZENSHIP BY BIRTH IN THE UNITED STATES

(TL:CON-64; 11-30-95)

a. To establish a claim to U.S. citizenship by birth in the United States:

A person born in the United States in a place where official records of birth were kept at the time of his birth shall submit with the application for a passport a birth certificate under the seal of the official custodian of records. [22 CFR 51.43.]

b. The birth certificate must:

(1) Show the applicant's full name, and date and place of birth;

(2) Have a filing date within 1 year of the birth; and

(3) Bear the signature of the official custodian of birth records and the raised, impressed, or multicolored seal of the issuing office.

c. Bulletin M-343 (Notice to Applicant Concerning Birth Records) may be given to the applicant to assist in obtaining an acceptable birth certificate.

d. Information on the availability and cost of birth certificates is published by the Department of Health and Human Services in *Where to Write for Vital Records: Births, Deaths, Marriages, and Divorces* (DHHS Publication No. (PHS) 93 -1142; Hyattsville, MD., U.S. Department of Health and Human Services, March l993, revised periodically).

e. Consular officers are urged to obtain, with post funds, a copy of this publication which will assist them in advising applicants needing documentation on how to procure birth or other required documents.

f. For details on evidence of U.S. citizenship, including information on the documentation that may be presented by U.S.-born applicants who cannot obtain a birth certificate of the type described in 7 FAM 1119 (b), see subchapters 7 FAM 1130 and 7 FAM 1330 .

g. Posts are authorized to document, without prior approval from the Department, first-time applicants who present citizenship evidence meeting the requirement of 22 CFR 51.43 and satisfactory evidence of identity, unless it appears that the applicant was not subject to the jurisdiction of the United States at birth, e.g. because he or she was born to a foreign diplomat or one of the other categories of persons not subject to the jurisdiction of the United States. Any questions regarding this issue should be referred to CA/OCS with a CPAS TAGS.

7 FAM 1116 Exhibit 1116.2-2

SAMPLE INQUIRY ABOUT THE CITIZENSHIP STATUS OF A CHILD OF A FOREIGN DIPLOMAT

FROM: Amembassy Cotonou

ACTION: SecState WASHDC ROUTINE

UNCLAS COTONOU

CLASSIFICATION: Unclassified

Attention: CA/OCS/ACS/AF

E.O. 12356: N/A

TAGS: CPAS (UMOH, Richard Tombo)

SUBJECT: Citizenship Status of Child of Foreign Diplomat

REF: 7 FAM 1116.2-2

1. Richard Tombo Umoh, DPOB 7/025/70, Silver Spring Md, inquired today about his possible claim to U.S. citizenship. He reports that his father, Mr. Friday Eyi Umoh, was assigned to the Nigerian Embassy in Washington from 1970 to 1979 as Attache (Finance). His mother, Veronica Nwoko Umoh, is a Nigerian citizen.

2. Please verify whether Friday Eyi Umoh was on the diplomatic list at the time of Richard's birth and whether Richard was born subject to the jurisdiction of the United States.
COOPER

DRAFTED BY: CON/SRHydes
DRAFTING DATE: 7/12/95
APPROVED BY: DCM; AZMaendert

U.S. Supreme Court

U.S. v. WONG KIM ARK, 169 U.S. 649 (1898)

169 U.S. 649

UNITED STATES
v.
WONG KIM ARK.
No. 132.

March 28, 1898

This was a writ of habeas corpus, issued October 2, 1895, by the district court of the United States for the Northern district of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than 21 years of age, and was born at San Francisco in 1873, of parents of Chinese descent, and subjects of the emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic, in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretense that he was not a citizen of the United States.

At the hearing, the district attorney of the United States was permitted to intervene in behalf of the United States, in opposition to the writ, and stated the grounds of his intervention in writing, as follows:

> 'That, as he is informed and believes, the said person in [169 U.S. 649, 650] whose behalf said application was made is not entitled to land in the United States, or to be or remain therein, as is alleged in said application, or otherwise.
>
> 'Because the said Wong Kim Ark, although born in the city and county of San Francisco, state of California, United States of America, is not, under the laws of the state of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons, and subjects of the emperor of China, and the said Wong Kim Ark being also a Chinese person, and a subject of the emperor of China.

'Because the said Wong Kim Ark has been at all times, by reason of his race, language, color, and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.

'That the said Wong Kim Ark is not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of congress, known as the 'Chinese Exclusion Acts,'1 which would exempt him from the class or classes which are especially excluded from the United States by the provisions of the said acts.

'Wherefore the said United States attorney asks that a judgment and order of this honorable court be made and entered in accordance with the allegations herein contained, and that the said Wong Kim Ark be detained on board of said vessel until released as provided by law, or otherwise to be returned to the country from whence he came, and that such further order be made as to the court may seem proper and legal in the premises.'

h e case was submitted to the decision of the court upon the following facts agreed by the parties:

'That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento street, in the city and county of San Francisco, state of California, United States of America, and [169 U.S. 649, 651] that his mother and father were persons of Chinese descent, and subjects of the emperor of China, and that said Wong Kim Ark was and is a laborer.

'That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile and residence therein, at said city and county of San Francisco, state aforesaid.

'That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

'That during all the time of their said residence in the United States, as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the emperor of China.

'That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said state of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

'That in the year 1890 the said Wong Kim Ark departed for China, upon a temporary visit, and with the intention of returning to the United States, and did return thereto on July 26, 1890, on the steampship Gaelic, and was permitted to enter the United States by the collector of customs, upon the sole ground that he was a native-born citizen of the United States.

'That, after his said return, the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land; and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States. [169 U.S. 649, 652] 'That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.'

The court ordered Wong Kim Ark to be discharged, upon the ground that he was a citizen of the United States. 71 Fed. 382. The United States appealed to this court.

Sol. Gen. Conrad, for the United States.

Thomas D. Riordan, Maxwell Evarts, and J. Hubley Ashton, for appellee.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco. They continued to reside and remain in the United States until 1890, when they departed for China; and, during all the time of their residence in the United States, they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; n d neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him [169 U.S. 649, 653] therefrom. In 1890 (when he must have been about 17 years of age) he departed for China, on a temporary visit, and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit, and with the intention of returning to the United States; and he did return thereto, by sea, in August, 1895, and applied to the collector of customs for permission to land, and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of congress known as the 'Chinese Exclusion Acts,' prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.'

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history [169 U.S. 649, 654] of the law as previously existing, and in the light of which the new act must be read and interpreted.

The constitution of the United States, as originally adopted, uses the words 'citizen of the United States' and 'natural-born citizen of the United States.' By the original constitution, every representative in congress is required to have been 'seven years a citizen of the United States,' and every senator to have been 'nine years a citizen of the United States'; and 'no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president.' Article 2, 1. The fourteenth article of amendment, besides declaring that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' also declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' And the fifteenth article of amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.'

The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so

far as this is done by the affirmative declaration that 'all persons born r naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. Minor v. Happersett, 21 Wall. 162; Ex parte Wilson, 114 U.S. 417, 422 , 5 S. Sup. Ct. 935; Boyd v. U. S., 116 U.S. 616, 624 , 625 S., 6 Sup. Ct. 524; Smith v. Alabama, 124 U.S. 465 , 8 Sup. Ct. 564. The language of the constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Comm. 336; Bradley, J., in Moore v. U. S., 91 U.S. 270 , 274. [169 U.S. 649, 655] In Minor v. Happersett, Chief Justice Waite, when construing, in behalf of the court, the very provision of the fourteenth amendment now in question, said: 'The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.' And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167.

In Smith v. Alabama, Mr. Justice Matthews, delivering the judgment of the court, said: 'There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes.' 'There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' 124 U.S. 478 , 8 Sup. Ct. 569.

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance-also called 'ligealty,' 'obedience,' 'faith,' or 'power'-of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,-as expressed in the maxim, 'Protectio trahit subjectionem, et subjectio protectionem,'-and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.

This fundamental principle, with these qualifications or or [169 U.S. 649, 656] explanations of it, was clearly. though quaintly, stated in the leading case known as 'Calvin's Case,' or the 'Case of the Postnati,' decided in 1608, after a hearing in the exchequer chamber before the lord chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Coke, 1, 4b-6a, 18a, 18b; Ellesmere, Postnati, 62-64; s. c. 2 How. St. Tr. 559, 607, 613-617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Litt. 8a, 128b; Lord Hale, in Harg. Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Comm. 366, 369, 370, 374; 4 Bl. Comm. 74, 92; Lord Kenyon, in Doe v. Jones, 4 Term R. 300, 308; Cockb. Nat. 7; Dicey, Confl. Laws, pp. 173-177, 741.

In Udny v. Udny (1869) L. R. 1 H. L. Sc. 441, the point decided was one of inheritance, depending upon the question whether the domicile of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: 'The question of naturalization and of allegiance is distinct from that of domicile.' Page 452. Lord Westbury, in the passage rei ed on by the counsel for the United States, began by saying: 'The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions,-one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status.' And then, while maintaining that the civil status is universally governed by the single principle of domicile (domicilium), the criterion established by international law for the purpose of determining civil status, and the basis on which 'the personal rights of the party-that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy- [169 U.S. 649, 657] must depend,' he yet distinctly recognized that a man's political status, his country (patria), and his 'nationality,-that is, natural allegiance,'- 'may depend on different laws in different countries.' Pages 457, 460. He evidently used the word 'citizen,' not as equivalent to 'subject,' but rather to 'inhabitant'; and had no thought of impeaching the established rule that all persons born under British dominion are

natural-born subjects.

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: 'By the common law of England, every person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality.' Cockb. Nat. 7.

Mr. Dicey, in his careful and thoughtful Digest of the Law of England with Reference to the Conflict of Laws, published in 1896, states the following propositions, his principal rules being printed below in italics : "British subject' means any person who owes permanent allegiance to the crown. 'Permanent' allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien, who, because he is within the British dominions, owes 'temporary' allegiance to the crown. 'Natural- born British subject' means a British subject who has become a British subject at the moment of his birth.' 'Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject. This rule contains the leading principle of English law on the subject of British nationality.' The exceptions afterwards mentioned by Mr. Dicey are only these two: '(1) Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such [169 U.S. 649, 658] person's birth is in hostile occupation, is an alien.' '(2) Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien.' And he adds: 'The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of Enl and; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the crown.' Dicey, Confl. Laws, pp. 173-177, 741.

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established.

In the early case of The Charming Betsy (1804) it appears to have been assumed by this court that all persons born in the United States were citizens of the United States, Chief Justice Marshall saying: 'Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can devest himself absolutely of [169 U.S. 649, 659] that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide.' 2 Cranch, 64, 119.

In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99, in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English colonies in America. Mr. Justice Thompson, speaking for the majority of the court, said: 'It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects.' Id. 120. Mr. Justice Johnson said: 'He was entitled to inherit as a citizen born of the state of New York.' Id. 136. Mr. Justice Story stated the reasons upon this point more at large, referring to Calvin's Case, Blackstone's Commentaries, and Doe v. Jones, above cited, and saying: 'Allegiance is

nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be [169 U.S. 649, 660] subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince.' Id. 155. 'The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens.' Id. 156. 'Nt hing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.' Id. 164.

In Shanks v. Dupont, 3 Pet. 242, decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the treaty of peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case that Mr. Justice Story, delivering the opinion of the court, said: 'The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations.' Id. 248. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States: for he referred (page 245) to the contemporaneous opinions in Inglis v. Sailors' Snug Harbor, [169 U.S. 649, 661] above cited, in which this rule had been distinctly recognized, and in which he had said (page 162) that 'each government had a right to decide for itself who should be admitted or deemed citizens.' And in his treatise on the Conflict of Laws, published in 1834, he said that, in respect to residence in different countries or sovereignties, 'there are certain principles which have been generally recognized, by tribunals administering public law [adding, in later editions, 'or the law of nations'], as of unquestionable authority'; and stated, as the first of those principles: 'Persons who are born in a country are generally deemed citizens and subjects of that country.' Story, Confl. Laws, 48.

The English statute of 11 & 12 Wm. III. (1700) c. 6, entitled 'An act to enable his majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens,' enacted that 'all and every person or persons, being the king's natural-born subject or subjects, within any of the king's realms or dominions,' might and should thereafter lawfully inherit and make their titles by descent to any lands 'from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ancestor, of such person or persons, by, from, through or under whom' title should be made or derived, had been or should be 'born out of the king's allegiance, and out of his majesty's realms and dominions,' as fully and effectually, as if such parents or ancestors 'had been naturalized or natural-born subject or subjects within the king's dominions.' 7 Statutes of the Realm, 590. It may be observed that, throughout that statute, persons born within the realm, although children of alien parents, were called 'natural-born subjects.' As that statute included persons born 'within any of the king's realms or dominions,' if of course extended to the colonies, and, not having been repealed in Maryland, was in force there. In McCreery v. Somerville (1824) 9 Wheat. 354, which concernedt he title to land in the state of Maryland, it was assumed that children born in that state of an alien who was still living, and who had not been naturalized, were 'native-born citizens of the [169 U.S. 649, 662] United States'; and without such assumption the case would not have presented the question decided by the court, which, as stated by Mr. Justice Story in delivering the opinion, was 'whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would

exist by the common law, if the ancestor were a natural-born subject.' Id. 356.

Again, in Levy v. McCartee (1832) 6 Pet. 102, 112, 113, 115, which concerned a descent cast since the American Revolution, in the state of New York, where the statute of 11 & 12 Wm. III. had been repealed, this court, speaking by Mr. Justice Story, held that the case must rest for its decision exclusively upon the principles of the common law, and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject; quoting the statement of Lord Coke in Co. Litt. 8a, that 'if an alien cometh into England, and hath issue two sons, these two sons are indigenae, subjects born, because they are born within the realm'; and saying that such a child 'was a native-born subject, according to the principles of the common law, stated by this court in McCreery v. Somerville, 9 Wheat. 354.'

In Dred Scott v. Sandford (1857) 19 How. 393, Mr. Justice Curtis said: 'The first section of the second article of the constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the constitution, which referred citizenship to the place of birth.' Id. 576. And to this extent no different opinion was expressed or intimated by any of the other judges.

In U. S. v. Rhodes (1866), Mr. Justice Swayne, sitting in the circuit court, said: 'All persons born in the allegiance of the king are natural- born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England.' 'We find no warrant for the opinion [169 U.S. 649, 663] that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.' 1 Abb. (U. S.) 28, 40, 41, Fed. Cas. No. 16,151.

The supreme judicial court of Massachusetts, speaking by Mr. Justice (afterwards Chief Justice) Sewall, early held that the determination of the question whether a man was a citizen or an alien was 'to be governed altogether by the principles of the common law,' and that it was established, with few exceptions, 'that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship." Gardner v. Ward (1805) 2 Mass. 244, note. And again: 'The doctrine of the common law is that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born.' Kilham v. Ward (1806) Id. 236, 265. It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the queen's bench division that the statutes of 4 Geo. II. (1731) c. 21, and 13 Geo. III. (1773) c. 21 (hereinafe r referred to), 'clearly recognize that to the king in his politic, and not in his personal, capacity, is the allegiance of his subjects due.' Isaacson v. Durant, 17 Q. B. Div. 54, 65.

The supreme court of North Carolina, speaking by Mr. Justice Gaston, said: 'Before our Revolution, all free persons born within the dominions of the king of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens.' 'Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign [169 U.S. 649, 664] state.' 'British subjects in North Carolina became North Carolina freemen;' 'and all free persons born within the state are born citizens of the state.' 'The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from the man to the collective body of the people; and he who before was a 'subject of the king' is now 'a citizen of the state." State v. Manuel (1838) 4 Dev. & b. 20, 24-26.

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than 50 years after the adoption of the constitution, when the matter was elaborately argued in the court of chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. Lynch v. Clarke (1844)

1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, secretary of state, in 1854 (2 Whart. Int. Dig. [2d Ed.] p. 394); by Attorney General Black in 1859 (9 Ops. Attys. Gen. 373); and by Attorney General Bates in 1862 (10 Ops. Attys. Gen. 328, 382, 394, 396).

Chancellor Kent, in his Commentaries, speaking of the 'general division of the inhabitants of every country, under the comprehensive title of 'Aliens' and 'Natives,'' says: 'Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent.' 'To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state, while [169 U.S. 649, 665] abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects de facto, their children, born under such a temporary dominion, are not born under the ligeance of the conquered.' 2 Kent, Comm. (6th Ed.) 39, 42. And he elsewhere says: 'And if, at common law, all human beings born within the ligeance of the king, and under the king's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary.' ''Subject' and 'citizen' are, in a degree, convertible terms as applied to natives; and though the term 'citizen' seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, 'subjects,' for we are equally bound by allegiance and subjection to the government and law of the land.' Id. 258, note.

Mr. Binney in the second edition of a paper on the Alienigenae of the United States, printed in pamphlet at Philadelphia, with a preface bearing his signature and the date of December 1, 1853, said: 'The common- law principle of allegiance was the law of all the states at the time of the Revolution and at the adoption of the constitution; and by that principle the citizens of the United States are, with the exceptions before mentioned [namely, foreign-born children of citizens, under statutes to be presently referred to], such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the states before the constitution, or, since that time, by virtue of an act of the congress of the United States.' Page 20. 'The right of citizenship never descends in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.' [169 U.S. 649, 666] Page 22, note. This paper, without Mr. Binney's name, and with the note in a less complete form, and not containing the passage last cited, was published (perhaps from the first edition) in the American Law Register for February, 1854. 2 Am. Law Reg. 193, 203, 204.

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, 'citizens, true and native-born citizens, are those who are born within the extent of the dominion of France,' and 'mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile'; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by 'a favor, a sort of fiction,' and Calvo, 'by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality.' Poth. Trait e des Personnes, pt. 1, tit. 2, 1, Nos. 43, 45; Walsh-Serrant v. Walsh-Serrant (1802) 3 Journal du Palais, 384, 8 Merlin, Jurisprudence, 'Domicile' (5th Ed.) 13; Pr efet du Nord v. Lebeau (1862) Journal du Palais 1863, 312, and note; 1 Laurent, Droit Civil, No. 321; 2 Calvo, Droit International (5th Ed.) 542; Cockb. Nat. 13, 14; Hall, Int. Law (4th Ed.) 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and

was affirmed in successive constitutions from the one adopted by the constituent assembly in 1791 to that of the French republic in 1799. Constitutions et Chartes (Ed. 1830) pp. 100, 136, 148, 186. [169 U.S. 649, 667] The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, jus soli, the rule of descent or blood, jus sanguinis, as the leading principle; but an eminent commentator has observed that the framers of that code 'appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe,-'De la vieille regle francaise, ou plutot meme de la vieille regle europ eenne,'-according to which nationality had always been, in former times, determined by the place of birth.' 1 Demolombe, Cours de Code Napoleon (4th Ed.) No. 146.

The later modifications of the rule in Europe res upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the constitution of the United States. The English naturalization act of 33 Vict. (1870) c. 14, and the commissioners' report of 1869, out of which it grew, both bear date since the adoption of the fourteenth amendment of the constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Confl. Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockb. Nat. 14-21.

There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion. [169 U.S. 649, 668] Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.

The earliest statute was passed in the reign of Edward III. In the Rolls of Parliament of 17 Edw. III. (1343), it is stated that, 'before these times there have been great doubt and difficulty among the lords of this realm and the commons, as well men of the law as others, whether children who are born in parts beyond sea ought to bear inheritance after the death of their ancestors in England, because no certain law has been thereon ordained'; and by the king, lords, and commons it was unanimously agreed that 'there was no manner of doubt that the children of our lord, the king, whether they were born on this side the sea or beyond the sea, should bear the inheritance of their ancestors'; 'and in regard to other children it was agreed in this parliament that they also should inherit wherever they might be born in the service of the king'; but, because the parliament was about to depart, and the business demanded great advisement and good deliberation how it should be best and most surely done, the making of a statute was put off to the next parliament. 2 Rot. Parl. 139. By reason, apparently, of the prevalence of the plague in England, no act upon the subject was passed until 25 Edw. III. (1350), when parliament passed an act entitled 'A statute for those who are born in parts beyond sea,' by which, after reciting that 'some people be in doubt if the children born in the parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance, or not, whereof a petition was put [169 U.S. 649, 669] in the parliament' of 17 Edw. III., 'and was not at the same time wholly assented,' it was (1) agreed and affirmed 'that the law of the crown of England is, and always hath been such, that the children of the kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors' ; (2) also agreed that certain persons named, 'which were born beyond the sea, out of the ligeance of England, shall be from henceforth able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those that should be born within the same ligeance'; (3) and further agreed 'that all children inheritors, which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the king of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance, as the other

inheritors aforesaid, in time to come; so always, that the mothers of such children do pass the sea by the license and wills of their husbands.' 2 Rot. Parl. 231; 1 Statutes of the Realm, 310.

It has sometimes been suggested that this general provision of the statute of 25 Edw. III. was declaratory of the common law. See Bacon, arguendo, in Calvin's Case, 2 How. St. Tr. 585; Westlake and Pollock, arguendo, in De Geer v. Stone, 22 Ch. Div. 243, 247; 2 Kent, Comm. 50, 53; Lynch v. Clarke, 1 Sandf. Ch. 583, 659, 660; Ludlam v. Ludlam, 26 N. Y. 536. But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of these two sources: The one, the Year Book of 1 Rich. III. (1483) fol. 4, pl. 7, reporting a saying of Hussey, C. J., 'that he who is born beyond sea, and his father and mother are English, their issue inherit by the common law, but the statute makes clear,' etc.,-which, at best, was but obiter dictum, for the chief justice appears to have finally rested his opinion on the statute. The other, a note added to the edition of 1688 of Dyer's Reports, 224a, stating that at Trinity term 7 Edw. III. Rot. 2 B. R., it was adjudged that children of subjects born [169 U.S. 649, 670] beyond the sea in the service of the king were inheritable,-which has been shown, by a search of the roll in the king's bench so referred to, to be a mistake, inasmuch as the child there in question did not appear to have been born beyond sea, but only to be living abroad. Westl. Priv. Int. Law (3d Ed.) 324.

The statute of 25 Edw. III. recites the existence of doubts as to the right of foreignborn children to inherit in England; and, while it is declaratory of the rights of children of the king, and is retrospective as to the persons specifically named, yet as to all others it is, in terms, merely prospective, applying to those only 'who shall be born henceforth.' Mr. Binney, in his paper above cited, after a critical examination of the statute, and of the early English cases, concluded: 'There is nothing in the statute which would justify the conclusion that it is declaratory of the common law in any but a single particular, namely, in regard to the children of the king; nor has it at any time been judicially held to be so.' 'The notion that there is any common-law principle to naturalize the children born in foreign countries, of native-born American father 'and' mother, father 'or' mother, must be discarded. There is not, and never was, any such common-law principle.' Binney, Alienigenae, 14, 20; 2 Am. Law Reg. 199, 203. And the great weight of the English authorities, before and since he wrote, appears to support his conclusion. Calvin's Case, 7 Coke, 17a, 18a; Co. Litt. 8a, and Hargrave's note 36; 1 Bl. Comm. 373; Barrington, Statutes (5th Ed.) 268; Lord Kenyon, in Doe v. Jones, 4 Term R. 300, 308; Lord Chancellor Cranworth, in Shedden v. Patrick, 1 Macq. 535, 611; Cockb. Nat. 7, 9; De Geer v. Stone, 22 Ch Div. 243, 252; Dicey, Confl. Laws, 178, 741. 'The acquisition,' says Mr. Dicey (page 741), 'of nationality by descent, is foreign to the principles of the common law, and is based wholly upon statutory enactments.'

It has been pertinently observed that, if the statute of Edward III. had only been declaratory of the common law, the sb sequent legislation on the sebject would have been wholly unnecessary. Cockb. Nat. 9. By the [169 U.S. 649, 671] statute of 29 Car. II. (1677) c. 6, 1, entitled 'An act for the naturalization of children of his majesty's subjects born in foreign countries during the late troubles,' all persons who, at any time between June 14, 1641, and March 24, 1660, 'were born out of his majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm,' were declared to be natural-born subjects. By the statute of 7 Anne (1708) c. 5, 3, 'the children of all natural-born subjects, born out of the ligeance of her majesty, her heirs and successors,'-explained by the statute of 4 Geo. II. (1731) c. 21, to mean all children born out of the ligeance of the crown of England, 'whose fathers were or shall be natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively,'-'shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever.' That statute was limited to foreign-born children of natural-born subjects; and was extended by the statute of 13 Geo. III. (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchndren; or, as put by Mr. Dicey, 'British nationality does not pass by descent or inheritance beyond the second generation.' See De Geer v. Stone, above cited; Dicey, Confl. Laws, 742.

Moreover, under those statutes, as is stated in the report, in 1869, of the commissioners for inquiring into the laws of naturalization and allegiance: 'No attempt has ever been made on the part of the British government (unless in Eastern countries, where special jurisdiction is conceded by treaty) to enforce claims upon, or to assert rights in respect of, persons born abroad, as against the country of their birth while they were resident therein, and when by its law they were invested with its nationality.' In the appendix to their report are collected many such cases in which the British government declined to interpose, the reasons being most clearly brought out in a dispatch of March 13, 1858, from Lord Malmesbury, the foreign secretary, to the British ambassador at Paris, saying: 'It is competent to any country to confer by general or special legislation the privileges of nationality upon those [169 U.S. 649, 672] who are born out of

its own territory; but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot, therefore, deny the right of other nations to do the same. But Great Britain cannot permit the nationality of the children of foreign parents born within her territory to be questioned.' Naturalization Commission Report, pp. viii. 67; U. S. Foreign Relations, 1873-74, pp. 1237, 1337. See, also, Drummond's Case (1834) 2 Knapp, 295.

By the constitution of the United States, congress was empowered 'to establish an uniform rule of naturalization.' In the exercise of this power, congress, by successive acts, beginning with the act entitled 'An act to establish an uniform rule of naturalization,' passed at the second session of the first congress under the constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time 'within the limits and under the jurisdiction of the United States,' and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, 'dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization.' Third. Foreign- born children of American citizens, coming within the definitions prescribd by congress. Acts March 26, 1790, c. 3 (1 Stat. 103); January 26, 1795, c. 20 (Id. 414); June 18, 1798, c. 54 (Id. 566); April 14, 1802, c. 28 (2 Stat. 153); March 26, 1804, c. 47 (Id. 292); February 10, 1855, c. 71 (10 Stat. 604); Rev. St. 2165, 2172, 1993.

In the act of 1790, the provision as to foreign-born children of American citizens was as follows: 'The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: provided, that the right of citizenship shall not descend to persons whose fathers have never been [169 U.S. 649, 673] resident in the United States.' 1 Stat. 104. In 1795, this was re-enacted, in the same words, except in substituting, for the words 'beyond sea, or out of the limits of the United States,' the words, 'out of the limits and jurisdiction of the United States.' Id. 415.

In 1802, all former acts were repealed, and the provisions concerning children of citizens were re-enacted in this form: 'The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States.' Act April 14, 1802, c. 28, 4 (2 Stat. 155).

The provision of that act, concerning 'the children of persons duly naturalized under any of the laws of the United States,' not being restricted to the children of persons already naturalized, might well be held to include children of persons thereafter to be naturalized. 2 Kent, Comm. 51, 52; West v. West, 8 Paige, 433; U. S. v. Kellar, 11 Biss. 314, 13 Fed. 82; Boyd v. Nebraska, 143 U.S. 135, 177 , 12 S. Sup. Ct. 375.

But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. 2 Kent, Comm. 52, 53; Binney, Alienigenae, 20, 25; 2 Am. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that congress might supply this defect in our law.

In accordance with his suggestions, it was enacted by the [169 U.S. 649, 674] statute of February 10, 1855, c. 71, that 'persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.' 10 Stat. 604; Rev. St. 1993.

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation

whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizes hip by birth within its sovereignty.

So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective) conferring citizenship on foreign-born children of citizens have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country which have gone the furthest towards holding such statutes to be but declaratory of the common law have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent, Comm. 39, 50, 53, 258, note; Lynch v. Clarke, 1 Sandf. Ch. 583, 659; Ludlam v. Ludlam, 26 N. Y. 356, 371.

Passing by questions once earnestly controverted, but finally put at rest by the fourteenth amendment of the constitution, it is beyond doubt that, before the enactment of the civil rights act of 1866 or the adoption of the constitutional [169 U.S. 649, 675] amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explcit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth congress, began by enacting that 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.' Act April 9, 1866, c. 31, 1 (14 Stat. 27).

The same congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several states; and on July 28, 1868, the secretary of state issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states. 14 Stat. 358; 15 Stat. 708.

The first section of the fourteenth amendment of the constitution [169 U.S. 649, 676] begins with the words, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Tae y in Scott v. Sandford (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. Slaughter House Cases (1873) 16 Wall. 36, 73; Strauder v. West Virginia (1879) 100 U.S. 303 , 306; Ex parte Virginia (1879) Id. 339, 345; Neal v. Delaware (1880) 103 U.S. 370 , 386; Elk v. Wilkins (1884) 112 U.S. 94, 101 , 5 S. Sup. Ct. 41. But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and

jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the Slaughter House Cases, above cited.

In those cases the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for 25 years to have and maintain slaughter houses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughter houses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the state, and not in conflict with the thirteenth amendment of the constitution, as creating an involuntary servitude, nor with the fourteenth amendment, as abridging the privileges or immunities of citizens of the United States [169 U.S. 649, 677] or as depriving persons of their liberty or property without due process of law, or as denying to them the equal protection of the laws.

Mr. Justice Miller, delivering the opinion of the majority of the court, after observing that the thirteenth, fourteenth, and fifteenth articles of amendment of the constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: 'We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.' 16 Wall. 72. And, in treating of the first clause of the fourteenth amendment, he said: 'The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.' Id. 73, 74.

Mr. Justice Field, in a dissenting opinion, in which Chief Justice Chase and Justices Swayne and Bradley concurred, said of the same clause: 'It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry.' 16 Wall. [169 U.S. 649, 678] 95, 111. Mr. Justice Bradley also said: 'The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country, and that state citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The states have not now, if they ever had,a ny power to restrict their citizenship to any classes or persons.' Id. 112. And Mr. Justice Swayne added: 'The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant all such citizens; and by 'any person' was meant all persons within the jurisdiction of the state. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men.' Id. 128, 129.

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the fourteenth amendment, made this remark: 'The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States.' 16 Wall. 73. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness as if the case before the court had called for an exact definition of the phrase is apparent from its classing foreign ministers and consuls together; whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his intercourse [169 U.S. 649, 679] with foreign states, or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent, Comm. 44; Story, Confl. Laws, 48; Wheat. Int. Law (8th Ed.)

249; The Anne (1818) 3 Wheat. 435, 445, 446; Gittings v. Crawford (1838) Taney, 1, 10, Fed. Cas. No. 5,465; In re Baiz (1890) 135 U.S. 403, 424 , 10 S. Sup. Ct. 854.

In weighing a remark uttered under such circumstances, it is well to bear in mind the often-quoted words of Chief Justice Marshall: 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' Cohens v. Virginia (1821) 6 Wheat. 264, 399.

That neither Mr. Justice Miller, nor any of the justices who took part in the decision of the Slaughter House Cases, understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign states were excluded from the operation of the first sentence of the fourteenth amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said: 'Allegiance and protection are, in this connection (that is, in relation to citizenship) reciprocal obligations. The one is a compensation for the other; allegiance for protection, and protection for allegiance.' 'At common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children born in a country, of [169 U.S. 649, 680] parents who were its citizens, became themselves, upon their birth, citizens also. These were natives or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further, and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens.' Minor v. Happersett (1874) 21 Wall. 162, 166-168. The decision in that case was that a woman born of citizen parents within the United States was a citizen of the United States, although not entitled to vote, the right to the elective franchise not being essential to citizenship.

The only adjudication that has been made by this court upon the meaning of the clause 'and subject to the jurisdiction thereof,' in the leading provision of the fourteenth amendment, is Elk v. Wilkins, 112 U.S. 94 , 5 Sup. Ct. 41, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, 'and subject to the jurisdiction thereof,' within the meaning of the clause in question.

That decision was placed upon the grounds that the meaning of those words was 'not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance'; that by the constitution, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives in congress and direct taxes were apportioned among the [169 U.S. 649, 681] several states, and congress was empowered to regulate commerce, not only 'with foreign nations,' and among the several states, but 'with the Indian tribes'; that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of congress; and, therefore, that 'Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or otehr public ministers of foreign nations.' And it was observed that the language used, in defining citizenship, in the first section of the civil rights act of 1866,

by the very congress which framed the fourteenth amendment, was 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' 112 U.S. 99 -103, 5 Sup. Ct. 44-46.

Mr. Justice Harian and Mr. u stice Woods, dissenting, were of opinion that the Indian in question, having severed himself from his tribe and become a bona fide resident of a state, had thereby become subject to the jurisdiction of the United States, within the meaning of the fourteenth amendment, and, in reference to the civil rights act of 1866, said: 'Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race (excluding only 'Indians not taxed'), who were born within [169 U.S. 649, 682] the territorial limits of the United States, and were not subject to any foreign power.' And that view was supported by reference to the debates in the senate upon that act, and to the ineffectual veto thereof by President Johnson, in which he said: 'By the first section of the bill, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific states, Indians subject to taxation, the people called 'Gypsies,' as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States.' 112 U.S. 112 -114, 5 Sup. Ct. 51, 52.

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,- children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,-both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Coke, 1, 18b; Cockb. Nat. 7; Dicey, Confl. Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155; 2 Kent, Comm. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court. [169 U.S. 649, 683] In U. S. v. Rice (1819) 4 Wheat. 246, goods imported into Castine, in the state of Maine, while it was in the exclusive possession of the British authorities during the lase war with England were held not to be subject to duties under the revenue laws of the United States, because, as was said by Mr. Justice Story in delivering judgment: 'By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for, where there is no protection or allegiance or sovereignty, there can be no claim to obedience.' 4 Wheat. 254.

In the great case of The Exchange (1812) 7 Cranch. 116, the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justc e Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards, in Cherokee Nation v. Georgia (1831) 5 Pet. 1; nor upon the case of a suspension of the sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in U. S. v. Rice, above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The chief justice first laid down the general principle: 'The jurisdiction of the nation within its own territory is [169 U.S. 649, 684] necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction

upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.' 7 Cranch, 136.

He then stated, and supported by argument and illustration, the propositions that 'this full and absolute territorial jurisdiction, being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power,' has 'given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation,' the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because 'a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation'; 'a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers'; 'a third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions'; and, in conclusion, that 'a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise that while necessarily within it, and demeaning herself in a friendly [169 U.S. 649, 685] manner, she should be exempt from the jurisdiction of the country.' 7 Cranch, 137-139, 147.

As to the immunity of a foreign minister, he said: 'Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.' 'The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from h e considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose cannot intend to subject his minister in any degree to that power; and therefore a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain,-privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.' 7 Cranch, 138, 139.

The reasons for not allowing to other aliens exemption 'from the jurisdiction of the country in which they are found' were stated as follows: 'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were [169 U.S. 649, 686] not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.' 7 Cranch, 144.

In short, the judgment in the case of The Exchange declared, as incontrovertible principles, that the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied; that upon its consent to cede, or to waive the exercise of, a part of its territorial jurisdiction, rest the exemptions from that jurisdiction of foreign sovereigns or their armies entering its territory with its permission, and of their foreign ministers and public ships of war; and that the implied license, under which private individuals of another

nation enter the territory and mingle indiscriminately with its inhabitants, for purposes of business or pleasure, can never be construed to grant to them an exemption from the jurisdiction of the country in which they are found. See, also, Carlisle v. U. S. (1872) 16 Wall. 147, 155; Radich v. Hutchins (1877) 95 U.S. 210 ; Wildenhus' Case (1887) 120 U.S. 1 , 7 Sup. Ct. 385; Chae Chan Ping v. U. S . (1889) 130 U.S. 581, 603 , 604 S., 9 Sup. Ct. 623.

From the first organization of the national government under the constitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time 'within the limits and under the jurisdiction of the United States,' and thus applied the words 'under the jurisdiction of the United States' to aliens residing here before they had taken an oath to support the constitution of the United States, or had renounced allegiance [169 U.S. 649, 687] to a foreign government. Acts March 26, 1790, c. 3 (1 Stat. 103); January 29, 1795, c. 20, 1 (1 Stat. 414); June 18, 1798, c. 54, 1, 6 (1 Stat. 566, 568); April 14, 1802, c. 28, 1 (2 Stat. 153); March 22, 1816, c. 32 , 1 (3 Stat. 258); May 24, 1828, c. 116, 2 (4 Stat. 310); Rev. St. 2165. And, from 1795, the provisions of those acts, which granted citizenship to foreign-born childe n of American parents, described such children as 'born out of the limits and jurisdiction of the United States.' Acts Jan. 29, 1795, c. 20, 3 (1 Stat. 415); April 14, 1802, c. 28, 4 (2 Stat. 155); February 10, 1855, c. 71 (10 Stat. 604); Rev. St. 1993, 2172. Thus congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as 'under the jurisdiction of the United States,' and American parents residing abroad as 'out of the jurisdiction of the United States.'

The words 'in the United States, and subject to the jurisdiction thereof,' in the first sentence of the fourteenth amendment of the constitution, must be presumed to have been understood and intended by the congress which proposed the amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the wellknown case of The Exchange, and as the equivalent of the words 'within the limits and under the jurisdiction of the United States,' and the converse of the words 'out of the limits and jurisdiction of the United States,' as habitually used in the naturalization acts. This presumption is confirmed by the use of the word 'jurisdiction,' in the last clause of the same section of the fourteenth amendment, which forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws.' It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence, as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.'

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the fourteenth [169 U.S. 649, 688] amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

By the civil rights act of 1866, 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed,' were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, 'not subject to any foreign power,' were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children or foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.'

This sentence of the fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,-'born in the United States,' 'naturalized in the United States,' and 'subject to the jurisdiction thereof'; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined,

and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in wel- considered opinions of the executive departments of the government, since the adoption of the fourteenth amendment of the constitution. [169 U.S. 649, 689] In 1869, Attorney General Hoar gave to Mr. Fish, the secretary of state, an opinion that children born and domiciled abroad, whose fathers were native-born citizens of the United States, and had at some time resided therein, were, under the statute of February 10, 1855 (chapter 71), citizens of the United States, and 'entitled to all the privileges of citizenship which it is in the power of the United States government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens.' 'But,' the attorney general added, 'while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its government, I do not think that it is competent for the United States, by any legislation, to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be that a person 'born in a strange country, under the obedience of a strange prince or country, is an alien' (Co. Litt. 128b), and that every person owes allegiance to the country of his birth' (13 Ops. Attys. Gen. U. S. 89-91).

In 1871, Mr. Fish, writing to Mr. Marsh, the American minister to Italy, said: 'The fourteenth amendment to the constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' This is simply an affirmance [169 U.S. 649, 690] of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification 'and subject to the jurisdiction thereof was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality.' 2 Whart. Int. Dig. p. 394.

In August, 1873, President Grant, in the exercise of the authority expressly conferred upon the president by article 2, 2, of the constitution, to 'require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices,' required the opinions of the members of his cabinet upon several questions of allegiance, naturalization, and expatriation. Mr. Fish, in his opinion, which is entitled to much weight, as well from the circumstances under which it was rendered, as from its masterly treatment of the subject, said:

> 'Every independent state has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization, and this, without regard to the municipal laws of the country whose subjects are so naturalized, as long as they remain, or exercise the rights conferred by naturalization, within the territory and jurisdiction of the state which grants it.
>
> 'It may also endow with the rights and privileges of its citizenship persons rei ding in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the state thus conferring its citizenship.
>
> 'But no sovereignty can extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction, from their obligations or duties thereto; nor can the municipal law of one state interfere with the duties or obligations which its citizens incur while voluntarily resident in such foreign state, and without the jurisdiction of their own country. [169 U.S. 649, 691] 'It is evident from the proviso in the act of February 10, 1855, viz. 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' that the lawmaking power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction, but that it has conferred only a qualified citizenship upon the

children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the fourteenth amendment of the constitution, have made themselves 'subject to the jurisdiction thereof.'

'The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father.

'The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.

'Such children are born to a double character: the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country: but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father.'

Opinions of the Executive Departments on Expatriation, Naturalization, and Allegiance (1873) 17, 18; U. S. Foreign Relations, 1873-74, pp. 1191, 1192.

In 1886, upon the application of a son born in France of an American citizen, and residing in France, for a passport, Mr. Bayard, the secretary of state, as appears by letters from him to the secretary of legation in Paris, and from the latter to the applicant, quoted and adopted the conclusions of Attorney General Hoar in his opinion above cited. U. S. Foreign Relations, 1886, p. 303; 2 Calvo, Droit International, 546. [169 U.S. 649, 692] These opinions go to show that since the adoption of the fourteenth amendment the executive branch of the government-the one charged with the duty of protecting American citizens abroad against unjust treatment by other nations-has taken the same view of the act of congress of 1855, declaring children born abroad of American citizens to be themselves citizens, which, as mentioned in a former part of this opinion, the English foreign office has taken of similar acts of parliament,-holding that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extraterritorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country.

In a very recent case, the supreme court of New Jersey held that a person born in this country of Scotch parents who were domiciled, but had not been naturalized, here, was 'subject to the jurisdiction of the United States,' within the meaning of the fourteenth amendment, and was 'not subject to any foreign o wer,' within the meaning of the civil rights act of 1866; and in an opinion delivered by Justice Van Syckel, with the concurrence of Chief Justice Beasley, said: 'The object of the fourteenth amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth, and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States, by reason of their birth here, than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races; and, unless the general rule that, when the parents are domiciled here, birth establishes the right to citizenship, is accepted, the fourteenth amendment has failed to accomplish its purpose, and the colored people are not citizens. The fourteenth amendment, by the language, 'all persons born in the United States, and subject to the jurisdiction thereof,' was intended [169 U.S. 649, 693] to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race.' Benny v. O'Brien (1895) 58 N. J. Law, 36, 39, 40, 32 Atl. 696.

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies

within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Coke, 6a, 'strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject'; and his child, as said by Mr. Binney in his essay before quoted, 'If born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.' It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's case in 1851, and since repeated by this court: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,-it is well known that by the public law an alien, or a stranger [169 U.S. 649, 694] born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations.' Executive Documents H. R. No. 10, 1st Sess. 32d Cong. p. 4; 6 Webster's Works, 526; U. S. v. Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Coke, 6a; Ellesmere, Postnati, 63; 1 Hale, P. C. 62; 4 Bl. Comm. 74, 92.

To hold that the fourteenth amn dment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth amendment, which declares and ordains that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States. Yick Wo v. Hopkins (1886) 118 U.S. 356 , 6 Sup. Ct. 1064; Lau Ow Bew v. U. S. (1892) 144 U.S. 47, 61 , 62 S., 12 Sup. Ct. 517; Fong Yue Ting v. U. S. (1893) 149 U.S. 698, 724 , 13 S. Sup. Ct. 1016; Lem Moon Sing v. U. S. (1895) 158 U.S. 538, 547 , 15 S. Sup. Ct. 967; Wong Wing v. U. S. (1896) 163 U.S. 228, 238 , 16 S. Sup. Ct. 977.

In Yick Wo v. Hopkins, the decision was that an ordinance [169 U.S. 649, 695] of the city of San Francisco, regulating a certain business, and which, as executed by the board of supervisors, made an arbitrary discrimination between natives of China, still subjects of the emperor of China, but domiciled in the United States, and all other persons, was contrary to the fourteenth amendment of the constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: 'The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.' 'The fourteenth amendment to the constitution is not confined to the protection of citizens. It says, 'Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the

rights of every citizen of the United States, equally with those of the strangers and aliens who now invoke the jurisdiction of this court.' 118 U.S. 368, 369 , 6 S. Sup. Ct. 1070.

The manner in which reference was made in the passage above quoted to section 1977 of the Revised Statutes shows that the change of phrase in that section, re-enacting section 16 of the statute of May 31, 1870, c. 114 (16 Stat. 144), as compared with section 1 of the civil rights act of 1866, by substituting, for the words in that act, 'of every race and color,' the words, 'within the jurisdiction of the United States,' was not [169 U.S. 649, 696] considered as making the section, as it now stands, less applicable to persons of every race and color and nationality than it was in its original form; and is hardly consistent with attributing any narrower meaning to the words 'subject to the jurisdiction thereof,' in the first sentence of the fourteenth amendment of the constitution, which may itself have been the cause of the change in the phraseology of that provision of the civil rights act.

The decision in Yick Wo v. Hopkins, indeed, did not directly pass upon the effect of these words in the fourteenth amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, 'subject to the jurisdiction thereof' (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words 'within its jurisdiction' (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably 'within the jurisdiction' of the state, are not 'subject to the jurisdiction' of the nation.

It necessarily follows that persons born in China, subjects of the emperor of China, but domiciled in the United States, having been adjudged, in Yick Wo v. Hopkins, to be within the jurisdiction of the state, within the meaning of the concluding sentence, must be held to be subject to the jurisdiction of the United States, within the meaning of the first sentence of this section of the constitution; and their children, 'born in the United States,' cannot be less 'subject to the jurisdiction thereof.'

Accordingly, in Quock Ting v. U. S. (1891) 140 U.S. 417 , 11 Sup. Ct. 733, 851, which like the case at bar, was a writ of habeas corpus to test the lawfulness of the exclusion of a Chinese person who alleged that he was a citizen of the United States by birth, it was assumed on all hands that a person of the Chinese race, born in the United States, was a citizen of the United States. The decision turned upon the failure of the petitioner to prove that he was born in this country, and the question at issue was, as stated in the opinion of the majority of the court, delivered by Mr. Justice Field, 'whether the evidence was sufficient to show that the petitioner was a citizen of the [169 U.S. 649, 697] United States,' or, as stated by Mr. Justice Brewer in his dissenting opinion, 'whether the petitioner was born in this country or not.' 140 U.S. 419, 423 , 11 S. Sup. Ct. 851.

In State v. Ah Chew (188) 16 Nev. 50, 58, the supreme court of Nevada said: 'The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States.' In the courts of the United States in the Ninth circuit it has been uniformly held, in a series of opinions delivered by Mr. Justice Field, Judge Sawyer, Judge Deady, Judge Hanford, and Judge Morrow, that a child born in the United States of Chinese parents, subjects of the emperor of China, is a native-born citizen of the United States. In re Look Tin Sing (1884) 10 Sawy. 353, 2 Fed. 905; Ex parte Chin King (1888) 13 Sawy. 333, 35 Fed. 354; In re Yung Sing Hee (1888) 13 Sawy. 482, 36 Fed. 437; In re Wy Shing (1888), 13 Sawy. 530, 36 Fed. 553; Gee Fook Sing v. U. S. (1892), 7 U. S. App. 27, 1 C. C. A. 211, and 49 Fed. 146; In re Wong Kim Ark (1896) 71 Fed. 382. And we are not aware of any judicial decision to the contrary.

During the debates in the senate in January ary and February, 1866, upon the civil rights bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read: 'All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color.' Mr. Cowan, of Pennsylvania, asked 'whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?' Mr. Trumbull answered, 'Undoubtedly;' and asked, 'Is not the child born in this country of German parents a citizen?' Mr.C owan replied, 'The children of German parents are citizens; but Germans are not Chinese.' Mr. Trumbull rejoined, 'The law makes no such distinction, and the child of an Asiatic is just as much a citizen as the child of a European.' Mr. Reverdy Johnson suggested that the words, 'without distinction of color,' should be omitted as unnecessary; and said: 'The amendment, as it stands, is that all

persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that I am willing to consent; [169 U.S. 649, 698] and that comprehends all persons, without any reference to race or color, who may be so born.' And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt. Cong. Globe, 39th Cong. 1st Sess. pt. 1, pp. 498, 573, 574.

The fourteenth amendment of the constitution, as originally framed by the house of representatives, lacked the opening sentence. When it came before the senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form (less the words 'or naturalized'), and reading: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded, and said, 'Is the child of the Chinese immigrant in California a citizen?' 'I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that state and the other Pacific states to manage them as they may see fit, they may be useful; but I would not tie their hands by the constitution mgone from the country, and is beyond its jurisdiction them hereafter from dealing with them as in their wisdom they see fit.' Mr. Conness, of California, replied: 'The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.' 'We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the constitution of [169 U.S. 649, 699] the United States to be entitled to civil rights and to equal protection before the law with others.' Cong. Globe, 39th Cong. 1st Sess. pt. 4, pp. 2890-2892. It does not appear to have been suggested, in either house of congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the fourteenth amendment.

Doubtless, the intention of the congress which framed, and of the states which adopted, this amendment of the constitution, must be sought in the words of the amendment, and the debates in congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves, and are, at the least, interesting as showing that the application of the amendment to the Chinese race was considered and not overlooked.

The acts of congress, known as the 'Chinese Exclusion Acts,' the earliest of which was passed some 14 years after the adoption of the constitutional amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. Ad the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the emperor of China, though having acquired a commercial domicile in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. Chae Chan Ping v. U. S., 130 U.S. 581 , 9 Sup. Ct. 623; Nishimura Ekiu v. U. S., 142 U.S. 651 , 12 Sup. Ct. 336; Fong Yue Ting v. U. S., 149 U.S. 698 , 13 Sup. Ct. 1016; Lem Moon Sing v. U. S., 158 U.S. 538 , 15 Sup. Ct. 967; Wong Wing v. U. S., 163 U.S. 228 , 16 Sup. Ct. 977.

In Fong Yue Ting v. U. S., the right of the United States to expel such Chinese persons was placed upon the grounds that the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and independent [169 U.S. 649, 700] nation, essential to its safety, its independence, and its welfare; that the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene; that the power to exclude and the power to expel aliens rests upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power; and therefore that the power of congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or congress may call in the aid of the judiciary to ascertain any contested

facts on which an alien's right to be in the country has been made by congress to depend. 149 U.S. 711, 713 , 714 S., 13 Sup. Ct. 1016.

In Lem Moon Sing v. U. S., the same principles were reaffirmed, and were applied to a Chinses person, born in China, who had acquired a commercial domicile in the United States, and who, having voluntarily left the country on a temporary visit to China, and with the intention of returning to and continuing his residence in this country, claimed the right under a statute or treaty to re-enter it; and the distinction between the right of an alien to the protection of the constitution and laws of the United States for his person and property while within the jurisdiction thereof, and his claim of a right to re-enter the United States after a visit to his native land, was expressed by the court as follows: 'He is none the less an alien, because of his having a commercial domicile in this country. While he lawfully remains here, he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or [169 U.S. 649, 701] naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the government as expressed in enactments of the law-making power.' 158 U.S. 547, 548 , 15 S. Sup. Ct. 971.

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject, always bearing in mind that statutes enacted by congress,a well as treaties made by the president and senate, must yield to the paramount and supreme law of the constitution.

The power, granted to congress by the constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in congress. Chirac v. Chirac (1817) 2 Wheat. 259. For many years after the establishment of the original constitution, and until two years after the adoption of the fourteenth amendment, congress never authorized the naturalization of any one but 'free white persons.' Acts March 26, 1790, c. 3, and Jan. 29, 1795, c. 20 (1 Stat. 103, 414); April 14, 1802, c. 28, and March 26, 1804, c. 47 (2 Stat. 153, 292); March 22, 1816, c. 32 (3 Stat. 258); May 26, 1824, c. 186, and May 24, 1828, c. 116 (4 Stat. 69, 310). By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that 'nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.' 16 Stat. 740. By the act of July 14, 1870, c. 254, 7, for the first time, the naturalization laws were 'extended to aliens of African nativity and to persons of African descent.' Id . 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should 'apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent'; and it was amended by the act of Feb. [169 U.S. 649, 702] 18, 1875, c. 80, by inserting the words above printed in brackets. Rev. St . (2d Ed.) 2169 (18 Stat. 318). Those statutes were held, by the circuit court of the United States in California, not to embrace Chinses aliens. In re Ah Yup (1878) 5 Sawy. 155, Fed. Cas. No. 104. And by the act of May 6, 1882, c. 126, 14, it was expressly enacted that, 'hereafter no state court or court of the United States shall admit Chinese to citizenship.' 22 Stat. 61.

In Fong Yue Ting v. U. S. (1893), above cited, this court said: 'Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.' 149 U.S. 716 , 13 Sup. Ct. 1023.

The convention between the United States and China of 1894 provided that 'Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens.' 28 Stat. 1211. And it has since been decided, by the same judge who held this appellee to be a citizen of the United States by virtue of his birth therein, that a native of China of the Mongolian race could not be admitted to citizenship under the naturalization laws. In re Gee Hop (1895) 71 Fed. 274.

The fourteenth amendment of the constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,'

contemplates two sources of citizenship, and two only,-birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case [169 U.S. 649, 703] of the annexation of foreign territory, or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by n abling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue.' Osborn v. Bank, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, a fortiori no act or omission of congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of congress to permit certain [169 U.S. 649, 704] classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment.

The fact, therefore, that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by congress, 'the right of expatriation is a natural and inherent right of all people,' and 'any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent wth the fundamental principles of the republic.' Rev. St. 1999, re-enacting Act July 27, 1868, c. 249, 1 (15 Stat. 223, 224). Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry, inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about 17 years old, and the otherf or something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and 'that said Wong Kim Ark has not, either by himself or his parents acting [169 U.S. 649, 705] for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.'

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion,

namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

Mr. Justice McKENNA, not having been a member of the court when this case was argued, took no part in the decision.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, dissenting.

I cannot concur in the opinion and judgment of the court in this case.

The proposition is that a child born in this country of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such,-as was the fact from the beginning of the government in respect of the class of aliens to which the parents in this instance belonged,-is, from the moment of his birth, a citizen of the United States, by virtue of the first clause of the fourteenth amendment, any act of congress to the contrary notwithstanding.

The argument is that although the constitution prior to that amendment nowhere attempted to define the words 'citizens of the United States' and 'natural-born citizen,' as used therein, yet that it must be interpreted in the light of the English common-law rule which made the place of birth the criterion of nationality; that that rule 'was in force in all [169 U.S. 649, 706] the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established'; and 'that, before the enactment of the civil rights act of 1866 and the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.'

Thus, the fourteenth amendment is held to be merely declaratory, except that it brings all persons, irrespective of color, within the scope of the alleged rule, and puts that rule beyond the control of the legislative power.

If the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the amendment was declared ratified, were and are aliens, unless they have or shall, on attaining majority, become citizens by naturalization in the United States; and no statutory provision to the contrary is of any force or effect. And children who are aliens by descent, but born on our soil, are exempted from the exercise of the power to exclude or to expel aliens, or any class of aliens, so often maintained by this court,-an exemption apparently disregarded by the acts in respect of the exclusion of persons of Chinese descent.

The English common-law rule, which it is insisted was in force after the Declaration of Independence, was that 'every person born within the dominions of the crown, no matter whether of English or of o reign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England.' Cockb. Nat. 7.

The tie which bound the child to the crown was indissoluble. [169 U.S. 649, 707] The nationality of his parents had no bearing on his nationality. Though born during a temporary stay of a few days, the child was irretrievably a British subject. Hall, Foreign Jur. 15.

The rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liege men to their liege lord. It was not local and temporary, as was the obedience to the

laws owed by aliens within the dominions of the crown, but permanent and indissoluble, and not to be canceled by any change of time or place or circumstances.

And it is this rule, pure and simple, which it is asserted determined citizenship of the United States during the entire period prior to the passage of the act of April 9, 1866, and the ratification of the fourteenth amendment, and governed the meaning of the words, 'citizen of the United States' and 'natural-born citizen,' used in the constitution as originally framed and adopted. I submit that no such rule obtained during the period referred to, and that those words bore no such construction; that the act of April 9, 1866, expressed the contrary rule; that the fourteenth amendment prescribed the same rule as the act; and that, if that amendment bears the construction now put upon it, it imposed the English common-law rule on this country for the first time, and made it 'absolute and unbending,' just as Great Britain was being relieved from its inconveniences.

Obviously, where the constitution deals with common-law rights and uses common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving, as it does, international relations, and political as contradistinguished from civil status, international principles must be considered; and, unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.

Nationality is essentially a political idea, and belongs to the sphere of public law. Hence Mr. Justice Story, in Shanks v. Dupont, 3 Pet. 248, said that the incapacities of femes [169 U.S. 649, 708] covert, at common law, 'do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations.'

Twiss, in his work on the Law of Nations, says that 'natural allegiance, or the obligation of perpetual obedience to the government of a country, wherein a man may happen to have been born, which he cannot forfeit or cancel or vary by any change of time or place or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law.' Volume 1, p. 231.

Before the Revolution, the views of the publicists had been thus put by Vattel: 'The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is h erefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.' Vatt. Law Nat. bk. 1, c. 19, 212. 'The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. ... The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction.'

And to the same effect are the modern writers, as, for instance, [169 U.S. 649, 709] Bar, who says: 'To what nation a person belongs is by the laws of all nations closely dependent on descent. It is almost a universal rule that the citizenship of the parents determines it,-that of the father where children are lawful, and, where they are bastards, that of their mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent.' Int. Law, 31.

The framers of the constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin; and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

Manifestly, when the sovereignty of the crown was thrown off, and an independent government established, every rule of the common law, and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated.

The states, for all national purposes embraced in the constitution, became one, united under the same sovereign authority, and governed by the same laws; but they retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the constitution, and protection to life, liberty, and property rested primarily with them. So far as the jus commune, or 'folk right,' relating to the rights of persons, was concerned, the colonies regarded it as their birthright, and adopted such parts of it as they found applicable to their condition. Van Ness v. Pacard, 2 Pet. 137.

They became sovereign and independent states, and, when the republic was created, each of the 13 states had its own local usages, customs, and common law, while in respect of the national government there necessarily was no general, independent, and separate common law of the United States, nor has there ever been. Wheaton v. Peters, 8 Pet. 591, 658. [169 U.S. 649, 710] As to the jura coronae, including therein the obligation of allegiance, the extent to which these ever were applicable in this country depended on circumstances; and it would seem quite clear that the rule making locality of birth the criterion of citizenship, because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution.

Doubtless, before the latter event, in the progress of monarchical power, the rule which involved the principle of liege homage may have become the rule of Europe; but that idea never had any basis in the United States.

As Chief Justice Taney observed in Fleming v. Page, 9 How. 618, though in a different connection: 'It is true that most of the states have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And, when such rights are in question, we habitually refer to the Englishd ecisions, not only with respect, but in many cases as authoritative. But, in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the president of the United States and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own constitution and form of government must be our only guide.'

And Mr. Lawrence, in his edition of Wheaton (Lawr. Wheat. Int. Law, p. 920), makes this comment: 'There is, it is believed, as great a difference between the territorial allegiance claimed by an hereditary sovereign on feudal principles and the personal right of citizenship participated in by all the members of a political community, according to American institutions, as there is between the authority and sovereignty of the queen of England and the power of the American president; and the inapplicability of English precedents is as clear in the one case as in the other. The same view, with particular application to naturalization, was early taken by [169 U.S. 649, 711] the American commentator on Blackstone. 1 Tuck. Bl. Comm. pt. 2, p. 96, Append.'

Blackstone distinguished allegiance into two sorts,-the one, natural and perpetual; the other, local and temporary. 'Natural allegiance,' so called, was allegiance resulting from birth in subjection to the crown, and indelibility was an essential, vital, and necessary characteristic.

The royal commission to inquire into the laws of naturalization and allegiance was created May 21, 1868; and, in their report, the commissioners, among other things, say: 'The allegiance of a natural-born British subject is regarded by the common law as indelible. We are of opinion that this doctrine of the common law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good, as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a state which allows to its subjects absolute freedom of emigration.'

However, the commission, by a majority, declined to recommend the abandonment of the rule altogether, though

'clearly of opinion that it ought not to be, as it now is, absolute and unbending,' but recommended certain modifications which were carried out in subsequent legislation.

But from the Declaration of Independence to this day, the United States have rejected the doctrine of indissoluble allegiance, and maintained the general right of expatriation, to be exercised in subordination to the public interests, and subject to regulation.

As early as the act of January 29, 1795 (1 Stat. 414, c. 20), applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects.

St. 3 Jac. I. c. 4, provided that promising obedience [169 U.S. 649, 712] to any other prince, state, or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason; and in respect of the act of 1795 Lord Grenville wrote to our minister, Rufus King: 'No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, devest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the king's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part.' 2 Am. St. Papers, 149. And see Fitch v. Wee r, 6 Hare, 51.

Nevertheless, congress has persisted from 1795 in rejecting the English rule, and in requiring the alien, who would become a citizen of the United States, in taking on himself the ties binding him to our government, to affirmatively sever the ties that bound him to any other.

The subject was examined at length in 1856, in an opinion given the secretary of state by Atty. Gen. Cushing (8 Ops. Attys. Gen. 139), where the views of the writers on international law and those expressed in cases in the federal and state courts are largely set forth, and the attorney general says: 'The doctrine of absolute and perpetual allegiance, the root of the denial of the right of any emigration, is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union.

> 'Moreover, the right of expatriation, under fixed circumstances of time and of manner, being expressly asserted in the legislatures of several of our states, and affirmed by decisions of their courts, must be considered as thus made a part of the fundamental law of the United States.'

Expatriation included not simply the leaving of one's native country, but the becoming naturalizen in the country adopted as a future residence. The emigration which the United States encouraged was that of those who could become incorporate with its people, make its flag their own, and aid in the accomplishment of a common destiny; and it was obstruction to such emigration that made one of the charges against the crown in the Declaration. [169 U.S. 649, 713] Ainslie v. Martin (1813) 9 Mass. 454, 460; Murray v. McCarty (1811) 2 Munf. 393; Alsberry v. Hawkins (1839) 9 Dana, 177,-are among the cases cited. In Ainslie v. Martin the indelibility of allegiance, according to the common-law rule, was maintained; while in Murray v. McCarty and Alsberry v. Hawkins the right of expatriation was recognized as a practical and fundamental doctrine of America. There was no uniform rule so far as the states were severally concerned, and none such assumed in respect of the United States.

In 1859, Atty. Gen. Black thus advised the president (9 Ops. Attys. Gen. 356): 'The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance, and substituting another allegiance in its place,-the general right, in one word, of expatriation,-is incontestable. I know that the common law of England denies it; that the judicial decisions of that country are opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance.'

In the opinion of the attorney general, the United States, in recognizing the right of expatriation, declined, from the beginning, to accept the view that rested the obligation of the citizen on feudal principles, and proceeded on the law of nations, which was in direct conflict therewith.

And the correctness of this conclusion was specifically affirmed not many years after, when the right, as the natural and inherent right of all people and fundamental in this country, was declared by congress in the act of July 27, 1868 (15 Stat. 223, c. 249), carried forward into sections 1999 and 2000 of the Revised Statutes, in 1874. [169 U.S. 649, 714] It is beyond dispute that the most vital constituent of the English common-law rule has always been rejected in respect of citizenship of the United States.

Whether it was also the rule at common law that the children of British subjects born abroad were themselves British subjects-nationalit being attributed to parentage instead of locality-has been variously determined. If this were so, of course the statute of Edw. III. was declaratory, as was the subsequent legislation. But if not, then such children were aliens, and the statute of 7 Anne and subsequent statutes must be regarded as in some sort acts of naturalization. On the other hand, it seems to me that the rule, 'Partus sequitur patrem,' has always applied to children of our citizens born abroad, and that the acts of congress on this subject are clearly declaratory, passed out of abundant caution, to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere.

Section 1993 of the Revised Statutes provides that children so born 'are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.' Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent nonresidence, and this limitation was contained in all the acts from 1790 down. Section 2172 provides that such children shall 'be considered as citizens thereof.'

The language of the statute of 7 Anne is quite different in providing that 'the children of all natural-born subjects born out of the ligeance of her majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever.'

In my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this government. If not, and if the correct view is that they were aliens, but collectively naturalized under the acts of congress which recognized them as natural born, then those born since the fourteenth imendment are not citizens at all [169 U.S. 649, 715] unless they have become such by individual compliance with the general laws for the naturalization of aliens, because they are not naturalized 'in the United States.'

By the fifth clause of the first section of article 2 of the constitution it is provided that 'no person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of the constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.'

In the convention it was, says Mr. Bancroft, 'objected that no number of years could properly prepare a foreigner for that place; but as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the 7th of September it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the constitution are eligible to the office of president.' 2 Bancroft, Hist. U. S. Const. 192.

Considering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that 'naturalborn citizen' applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency, while children of our citizens, born abroad, were not.

By the second clause of the second section of article 1 it is provided that 'no person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall

not, when elected, be an inhabitant of that state of which he shall be chosen'; and by the third clause of section 3, that 'no person shall be a senator who shall not have attained to the age of thirty years, and been nine yer a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.' [169 U.S. 649, 716] At that time the theory largely obtained, as stated by Mr. Justice Story, in his Commentaries on the Constitution (section 1693), 'that every citizen of a state is ipso facto a citizen of the United States.'

Mr. Justice Curtis, in Dred Scott v. Sandford, 19 How. 577, expressed the opinion that under the constitution of the United States 'every free person born on the soil of a state, who is a citizen of that state by force of its constitution or laws, is also a citizen of the United States.' And he said: 'Among the powers unquestionably possessed by the several states was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First, the power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts; second, determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several states; third, what native-born persons should be citizens of the United States.

> 'The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a constitution containing only limited and defined powers of government, the argument derived from this definite and re stricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the general government, there arises a strong presumption that this is all which is granted, and that the residue is left to the states and to the people. And this presumption is, in my opinion, converted into a certainty, by an examination of all such other clauses of the constitution as touch this subject.' [169 U.S. 649, 717] But in that case Mr. Chief Justice Taney said: 'The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty. ... In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of a citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state; for, previous to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper,o r upon any class or deseription of persons; yet he would not be a citizen in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The constitution has conferred on congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal [169 U.S. 649, 718] government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the state attached to that character.'

Plainly, the distinction between citizenship of the United States and citizenship of a state, thus pointed out, involved then, as now, the complete rights of the citizen internationally as contradistinguished from those of persons not citizens of the United States.

The English common-law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. As allegiance sprang from the place of birth regardless of parentage, and supervened at the moment of birth, the inquiry whether the parents were permanently or only temporarily within the realm was wholly immaterial. And it is settled in England that the question of domicile is entirely distinct from that of allegiance. The one relates to the civil, and the other to the political, status. Udny v. Udny, L. R. 1 H. L. Sc. 457.

But a different view as to the effect of permanent abode on nationality has been expressed in this country.

In his work on Conflict of Laws (section 48), Mr. Justice Story, treating the subject as one of public law, said: 'Persons who are born in a country are generally deemed to be citizens of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were in itinere in the country, or who were abiding there for temporary purposes, as for health or curiosity or occasional business. It would be difficult, however, to assert that, in the present state of public law, such a qualification is universally established.'

Undoubtedly, all persons born in a country are presumptively citizens thereof, but the presumption is not irrebuttable.

In his Lectures on Constitutional Law (page 279), Mr. Justice Miller remarked: 'If a stranger or traveler passing through or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our government, has a child born here, which goes out of the country [169 U.S. 649, 719] with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.'

And to the same effect are the rulings of Mr. Secretary Frelinghuysen in the matter of Hausding, and Mr. Secretary Bayard in the matter of Greisser.

Hausding was born in the United States, went to Europe, and, desiring to return, applied to the minister of the United States for a passport, which was refused, on the ground that the applicant was born of Saxon subjects temporarily in the United States. Mr. Secretary Frelinghuysen wrote to Mr. Kasson, our minister: 'You ask, 'Can one born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace?' It seems not, and that he must change his allegiance by emigration and legal process of naturalization.' Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship and that thec itizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at the time within the jurisdiction of the tribunal of record which confers that character.'

Greisser was born in the state of Ohio in 1867, his father being a German subject, and domiciled in Germany, to which country the child returned. After quoting the act of 1866 and the fourteenth amendment, Mr. Secretary Bayard said: 'Richard Greisser was, no doubt, born in the United States, but he was on his birth 'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the constitution, a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship.' 2 Whart. Int. Dig. 399.

The civil rights act became a law April 9, 1866 (14 Stat. 27, c. 31), and provided 'that all persons born in the United States, and not subject to any foreign power, excluding Indians [169 U.S. 649, 720] not taxed, are hereby declared to be citizens of the United States.' And this was re-enacted June 22, 1874, in the Revised Statutes (section 1992).

The words 'not subject to any foreign power' do not in themselves refer to mere territorial jurisdiction, for the persons referred to are persons born in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that, nevertheless, they may be subject to the political jurisdiction of a foreign government. In other words, by the terms of the act, all persons born in the United States, and not owing allegiance to any foreign power, are citizens.

The allegiance of children so born is not the local allegiance arising from their parents merely being domiciled in the country; and it is single, and not double, allegiance. Indeed, double allegiance, in the sense of double nationality, has

no place in our law, and the existence of a man without a country is not recognized.

But it is argued that the words 'and not subject to any foreign power' should be construed as excepting from the operation of the statute only the children of public ministers and of aliens born during hostile occupation.

Was there any necessity of excepting them? And, if there were others described by the words, why should the language be construed to exclude them?

Whether the immunity of foreign ministers from local allegiance rests on the fiction of extraterritoriality or on the waiver of territorial jurisdiction, by receiving them as representatives of other sovereignties, the result is the same.

They do not owe allegiance otherwise than to their own governments, and their children cannot be regarded as born within any other.

And this is true as to the children of aliens within territory in hostile occupation, who necessarily are not under the protection of, nor bound to render obedience to, the sovereign whose domains are invaded; but it is not pretended that the children of citizens of a government so situated would not become its citizens at their birth, as the permanent allegiance [169 U.S. 649, 721] of their parents would not be severed by the mere fact of the enemy's possession.

If the act of 1866 had not contained the words 'and not subject to any foreign power,' the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the words, although they were embraced by them.

But there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanenta llegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.

Two months after the statute was enacted, on June 16, 1866, the fourteenth amendment was proposed, and declared ratified July 28, 1868. The first clause of the first section reads: 'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' The act was passed and the amendment proposed by the same congress, and it is not open to reasonable doubt that the words 'subject to the jurisdiction thereof,' in the amendment, were used as synonymous with the words 'and not subject to any foreign power,' of the act.

The jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: 'What do we mean by 'subject to the jurisdiction of the United States'? Not owing allegiance to anybodyelse; that is what it means.' And Senator Johnson: 'Now, all that this amendment provides [169 U.S. 649, 722] is that all persons born within the United States, and not subject to some foreign power (for that, no doubt, is the meaning of the committee who have brought the matter before us), shall be considered as citizens of the United States.' Cong. Globe, 1st Sess. 39th Cong. 2893 et seq.

This was distinctly so ruled in Elk v. Wilkins, 112 U.S. 101 , 5 Sup. Ct. 41; and no reason is perceived why the words were used if they apply only to that obedience which all persons not possessing immunity therefrom must pay the laws of the country in which they happen to be.

Dr. Wharton says that the words 'subject to the jurisdiction' must be construed in the sense which international law

attributes to them, but that the children of our citizens born abroad, and of foreigners born in the United States, have the right, on arriving at full age, to elect one allegiance, and repudiate the other. Whart. Confl. Laws, 10-12.

The constitution and statutes do not contemplate double allegiance, and how can such election be determined? By section 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation by their persistent abandonment of their country; while, by sections 2167 and 2168, special provision is made for the naturalization of alien minor residents on attaining majority by dispensing with the previous declaration of intention, and allowing three years of minority on the five-years residence required, and also for the naturalization of children of aliens whose parents have died after making declaration of intention. By section 2172, children of naturalized citizens are to be considered citizens.

While, then, the naturalization of the father carries with it that of his minor children, and his declaration of intention relieves them from the preliminary steps for naturalization, and minors are allowed to count part of the pesidence of their minority on the whole term required, and are relieved from the declaration of intention, the statutes make no provision for formal declaration of election by children born in this country of alien parents on attaining majority.

The point, however, before us, is whether permanent allegiance [169 U.S. 649, 723] is imposed at birth without regard to circumstances,-permanent until thrown off and another allegiance acquired by formal acts; not local and determined by a mere change of domicile.

The fourteenth amendment came before the court in the Slaughter-House Cases, 16 Wall. 36, 73, at December term, 1872,-the cases having been brought up by writ of error in May, 1870 (10 Wall. 273); and it was held that the first clause was intended to define citizenship of the United States and citizenshipo f a state, which definitions recognized the distinction between the one and the other; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the federal constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of congress by the second clause.

And Mr. Justice Miller, delivering the oponion of the court, in analyzing the first clause, observed that 'the phrase 'subject to the jurisdiction thereof' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States.'

That eminent judge did not have in mind the distinction between persons charged with diplomatic functions and those who were not, but was well aware that consuls are usually the citizens or subjects of the foreign states from which they come, and that, indeed, the appointment of natives of the places where the consular service is required, though permissible, has been pronounced objectionable in principle.

His view was that the children of 'citizens or subjects of foreign states' owing permanent allegiance elsewhere, and only local obedience here, are not otherwise subject to the jurisdiction of the United States than are their parents. [169 U.S. 649, 724] Mr. Justice Field dissented from the judg ment of the court, and subsequently, in the case of Look Tin Sing, 10 Sawy. 353, 21 Fed. 905, in the circuit court for the district of California, held children born of Chinese parents in the United States to be citizens, and the cases subsequently decided in the Ninth circuit following that ruling; hence the conclusion in this case, which the able opinion of the district judge shows might well have been otherwise.

I do not insist that, although what was said was deemed essential to the argument and a necessary part of it, the point was definitively disposed of in the Slaughter-House Cases, particularly as Chief Justice Waite, in Minor v. Happersett, 21 Wall. 167, remarked that there were doubts, which, for the purposes of the case then in hand, it was not necessary to solve. But that solution is furnished in Elk v. Wilkins, 112 U.S. 101 , 5 Sup. Ct. 41, where the subject received great consideration, and it was said:

> 'By the thirteenth amendment of the constitution, slavery was prohibited. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (Scott v. Sandford, 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States, and of the state in which they reside (Slaughter-House Cases, 16 Wall. 36, 73; Strauder v. West Virginia, 100 U.S. 303 , 306).
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> 'This section contemplates two sources of citizenship, and two sources only,-birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do [169 U.S. 649, 725] to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the timeo f birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.'

To be 'completely subject' to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now, I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

Generally speaking, I understand the subjects of the emperor of China- that ancient empire, with its history of thousands of years, and its unbroken continuity in belief, traditions, and government, in spite of revolutions and changes of dynasty-to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors, and, in effect, held the relatives at home of Chinese in foreign lands as hostages for their loyalty. 2 And, [169 U.S. 649, 726] whatever concession may have been made by treaty in the direction of admitting the right of expatriation in some sense, they seem in the United States to have remained pigrims and sojourners as all their fathers were. 149 U.S. 717 , 13 Sup. Ct. 1016. At all events, they have never been allowed by our laws to acquire our nationality, and, except in sporadic instances, do not appear ever to have desired to do so.

The fourteenth amendment was not designed to accord citizenship to persons so situated, and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of a country is as absolute and unqualified as the right to prohibit and prevent their entrance into the county. 149 U.S. 707 , 13 Sup. Ct. 1016.

But can the persos expelled be subjected to 'cruel and unusual punishments' in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots?

The fifteenth amendment provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.' Was it intended thereby that children of aliens should, by virtue of being born in the [169 U.S. 649, 727] United States, be entitled, on attaining majority, to vote, irrespective of the treaties and laws of the United States in regard to such aliens?

In providing that persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, the fourteenth amendment undoubtedly had particular reference to securing citizenship to the members of the colored race, whose servile status had been obliterated by the thirteenth amendment, and who had been born in the United States, but were not, and never had been, subject to any foreign power. They were not aliens (and, even if they could be so regarded, this operated as a collective naturalization), and their political status could not be affected by any change of the laws for the naturalization of individuals.

Nobody can deny that the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition; and I cannot think that any safeguard surrounding it was intended to be thrown down by the amendment.

In suggesting some of the privileges and immunities of national citizenship in the Slaughter-House Cases, Mr. Justice Miller said: 'Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.'

Mr. Hall says, in his work on Foreign Jurisdiction (sections 2, 5), the principle is that 'the legal relations by which a person is encompassed in his country of birth and residence cannot be wholly put aside when he goes abroad for a time. Many of the acts which he may do outside his native state have inevitable consequences within it. He may, for many purposes, be temporarily under the control of another sovereign than his own, and he may be bound to yield to a foreign government a large measure of obedience; but his own state possesses a right to his allegiance; he is still an integral part of the national community. A state, therefore, can enact laws [169 U.S. 649, 728] enjoining or forbidding acts, and defining legal relations, which apply to its subjects abroad in common with those within its dominions. It can declare under what conditions it will regard as valid acts done in foreign countries, which profess to have legal effect; it can visit others with penalties; it can estimate circumstances and facts as it chooses.' On the other hand, the 'duty of protection is correlative to the rights of a sovereign over his subjects. The maintenance of a bond between a state and its subjects while they are abroad implies that the former must watch over and protect them within the due limit of the rights of other states. ... It enables governments to exact reparation for oppression from which their subjects have suffered, or for injuries done to them otherwise than by process of law; and it gives the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized, and finally of an administration of the laws bad beyond a certain point. When, in these directions, a state grossly fails in its duties; when it is either incapable of rui ng, or rules with patent injustice,-the right of protection emerges in the form of diplomatic remonstrance, and in extreme cases of ulterior measures. It provides a material sanction for rights; it does not offer a theoretic foundation. It does not act within a foreign territory with the consent of the sovereign; it acts against him contentiously from without.'

The privileges or immunities which, by the second clause of the amendment, the states are forbidden to abridge, are the privileges or immunities pertaining to citizenship of the United States, but that clause also places an inhibition on the states from depriving any person of life, liberty, or property, and from denying 'to any person within its jurisdiction the equal protection of the laws'; that is, of its own laws,- the laws to which its own citizens are subjected.

The jurisdiction of the state is necessarily local, and the limitation relates to rights primarily secured by the states, and not by the United States. Jurisdiction, as applied to the general government, embraces international relations; as applied [169 U.S. 649, 729] to the state, it refers simply to its power over persons and things within its particular limits.

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the fourteenth amendment differed from the English common-law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary and birth during permanent residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact or in point of law.

Did the fourteenth amendment impose the original English common-law rule as a rigid rule on this country?

Did the amendment operate to abridge the treary-making power, or the power to establish a uniform rule of naturalization?

I insist that it cannot be maintained that this government is unable, through the action of the president, concurred in by the senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.

A treaty couched in those precise terms would not be incompatible with the fourteenth amendment, unless it be held that that amendment has abridged the treaty-making power.

Nor would a naturalization law exceping persons of a certain race and their children be invalid, unless the amendment has abridged the power of naturalization. This cannot apply to our colored fellow citizens, who never were aliens, were never beyond the jurisdiction of the United States.

> 'Born in the United States, and subject to the jurisdiction thereof,' and 'naturalized in the United States, and subject to the jurisdiction thereof,' mean born or naturalized under such circumstances as to be completely subject to that jurisdiction,-that is, as completely as citizens of the United States [169 U.S. 649, 730] who are, of course, not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized, such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our government, if they happen to be found in the country of their parents' origin and allegiance, or any other.

Turning to the treaty between the United States and China, concluded July 28, 1868, the ratifications of which were exchanged November 23, 1869, and the proclamation made February 5, 8 70, we find that by its sixth article it was provided: 'Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect of travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally Chinese subjects residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization on the citizens of the United States in China, nor upon the subjects of China in the United States.'

It is true that in the fifth article the inherent right of man to change his home or allegiance was recognized, as well as 'the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of traffic, or as permanent residents.'

All this, however, had reference to an entirely voluntary emigration for these purposes, and did not involve an admission of change of allegiance unless both countries assented, but the contrary, according to the sixth article.

By the convention of March 17, 1894, it was agreed 'that Chinese laborers or Chinese of any other class, either permanently [169 U.S. 649, 731] or temporarily residing within the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens.'

These treaties show that neither government desired such change, nor assented thereto. Indeed, if the naturalization laws of the United States had provided for the naturalization of Chinese persons. China manifestly would not have been obliged to recognize that her subjects had changed their allegiance thereby. But our laws do not so provide, and, on the contrary, are in entire harmony with the treaties.

I think it follows that the children of Chinese born in this country do not, ipso facto, become citizens of the United States unless the fourteenth amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here, and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?

But the Chinese, under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Whart. Confl. Laws, 12.

In Fong Yue Ting v. U. S., 149 U.S. 698, 717 , 13 S. Sup. Ct. 1023, it was said, in respect of the treaty of 1868: 'After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained form China a modification of the treaty.'

It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the contrary, [169 U.S. 649, 732] I am of opinion that the president and senate by treaty, and the congress by legislation, have the power, notwithstanding the fourteenth amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this countr under such consent, in spite of treaty and statute.

In other words, the fourteenth amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the district court should be reversed.

I am authorized to say that Mr. Justice HARLAN concurs in this dissent.

Footnotes

[Footnote 1] Acts May 6, 1882, c. 126 (22 Stat. 58); July 5, 1884, c. 220 (23 Stat. 115); September 13, 1888, c. 1015; October 1, 1888, c. 1064 (25 Stat. 476, 504); May 5, 1892, c. 60 (27 Stat. 25); August 18, 1894, c. 301 (28 Stat. 390).

[Footnote 2] The fundamental laws of China have remained practically unchanged since the second century before Christ. The statutes have from time to time undergone modifications, but there does not seem to be any English or French translation of the Chinese Penal Code later than that by Staunton, published in 1810. That Code provided: 'All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offense, no distinction shall be made between principals and accessories. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of state. ... The parents, grandparents, brothers, and grand-

children of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2,000 lee.

> 'All those who purposely conceal and connive at the perpetration of this crime, shall be strangled. Those who inform against, and bring to justice criminals of this description, shall be rewarded with the whole of their property.
>
> 'Those who are privy to the perpetration of this crime, and yet omit to give any notice or information thereof to

the magistrate, shall be punished with 100 blows and banished perpetually to the distance of 3,000 lee.

'If the crime is contrived, but not executed, the principal shall be strangled, and all the accessories shall, each of them, be punished with 100 blows, and perpetual banishment to the distance of 3,000 lee. ...' Staunton's Pen. Code China, 272, 255.

U.S. Supreme Court

STATE OF WISCONSIN v. PELICAN INS. CO., 127 U.S. 265 (1888)

127 U.S. 265

STATE OF WISCONSIN
v.
PELICAN INS. CO. OF NEW ORLEANS.

May 14, 1888

[127 U.S. 265, 269] S. Shellabarger, J. M. Wilson, and H. W. Cheynowith, for plaintiff.

[127 U.S. 265, 286] J.A. Campbell, for defendant.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

This action is brought upon a judgment recovered by the state of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to [127 U.S. 265, 287] the insurance commissioner of the state, as required by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court. The ground on which the jurisdiction is invoked, is not the nature of the cause, but the character of the parties; the plaintiff being one of the states of the Union, and the defendant a corporation of another of those states. The constitution of the United States, as originally established, ordains in article 3, 2, that the judicial power of the United States shall extend 'to controversies between two or more states, between a state and citizens of another state, between citizens of different states between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, the foreign states, citizens, or subjects;' and that in all cases 'in which a state shall be party' this court shall have original jurisdiction. The eleventh article of amendment simply declares that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' By the constitution, therefore, this court has original jurisdiction of suits brought by a state against citizens of another state, as well as of controversies between two states; and it is well settled that a corporation created by a state is a citizen of the state, within the meaning of those provisions of the constitution and statutes of the United States which define the jurisdiction of the

federal courts. Railroad Co. v. Railroad Co., 112 U.S. 414 , 5 Sup. Ct. Rep. 208; Paul v. Virginia, 8 Wall. 168, 178; Pennsylvania v. Bridge Co., 13 How. 518. Yet, notwithstanding the comprehensive words of the constitution, the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens; and a consideration of the cases in which it has heretofore had occasion to pass upon the construction and effect of these provisions of the constitution may throw light on the determination of the question before us. [127 U.S. 265, 288] As to 'controversies between two or more states.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two states as to the boundaries of their territory, such as were determined before the Revolution by the king in council, and under the articles of confederation (while there was no national judiciary) by committees or commissioners appointed by congress. 2 Story, Const. 1681; New Jersey v. New York, 3 Pet. 461, 5 Pet. 284, and 6 Pet. 323; Rhode Island v. Massachusetts, 12 Pet. 657, 724, 736, 754, 13 Pet. 23, 14 Pet. 210, 15 Pet. 233, and 4 How. 591, 628; Missouri v. Iowa, 7 How. 660, and 10 How. 1; Florida v. Georgia, 17 How. 478; Alabama v. Georgia, 23 How. 505; Virginia v. West Virginia, 11 Wall. 39; Missouri v. Kentucky, Id. 395. See, also, Georgia v. Stanton, 6 Wall. 50, 72, 73. The books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two states. In Fowler v. Lindsey and Fowler v. Miller, actions of ejectment were pending in the circuit court of the United States for the district of Connecticut between private citizens for lands over which the states of Connecticut and New York both claimed jurisdiction; and a writ of certiorari to remove those actions into this court as belonging exclusively to its jurisdiction was refused, because a state was neither nominally nor substantially a party to them. 3 Dall. 411. Upon a bill in equity afterwards filed in this court by the state of New York against the state of Connecticut to stay the actions of ejectment, this court refused the injunction prayed for, because the state of New York was not a party to them, and had no such interest in their decision as would support the bill. New York v. Connecticut, 4 Dall. 1, 3. This court has declined to take jurisdiction of suits between states to compel the performance of obligations which, if the states had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in Kentucky v. Dennison, 24 How. 66, where the state of Kentucky, by her governor [127 U.S. 265, 289] applied to this court, in the exercise of its original jurisdiction, for a writ of mandamus to the governor of Ohio to compel him o surrender a fugitive from justice, this court, while holding that the case was a controversy between two states, decided that it had no authority to grant the writ. And in New Hampshire v. Louisiana, and New York v. Louisiana, 108 U.S. 76 , 2 Sup. Ct. Rep. 176, it was adjudged that a state to whom, pursuant to her statutes, some of her citizens, holding bonds of another state, had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other state in this court. See, also, Cherokee Nation v. Georgia, 5 Pet. 1, 20, 28, 51, 75. In South Carolina v. Georgia, 93 U.S. 4 , this court, speaking by Mr. Justice STRONG, left the question open whether 'a state, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;' and dismissed the bill because no unlawful obstruction of navigation was proved. Id. 14. As to 'controversies between a state and the citizens of another state.' The object of vesting in the courts of the United States jurisdiction of suits by one state against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid she partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens. Federalist, No. 80; Chief Justice JAY, in Chisholm v. Georgia, 2 Dall. 419, 475; 2 Story, Const. 1638, 1682. The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all.

By the law of England and of the United States the penal laws of a country do not reach beyond its own territory [127 U.S. 265, 290] except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheat. Int. Law, (8th Ed.) 113, 121. Chief Justice MARSHALL stated the rule in the most condensed form, as an incontrovertible maxim, 'the courts of no country execute the penal laws of another.' The Antelope, 10 Wheat. 66, 123. The only cases in which the courts of the United States have entertained suits by a foreign state have been to enforce demands of a strictly civil nature. The Sapphire, 11 Wall. 164; King of Spain v. Oliver, 2 Wash. C. C. 429, and Pet. C. C. 217, 276. The case of The Sapphire was a libel in admiralty, filed by the late emperor of the French, and prosecuted by the French republic, after his deposition, to recover damages for a collision between an American ship and a French transport; and Mr. Justice BRADLEY, delivering the judgment of this court sustaining the suit, said: 'A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may

prosecute it in our courts.' 11 Wall. 167. The case of King of Spain v. Oliver, although a suit to recover duties imposed by the revenue laws of Spain, was not founded upon those laws, or brought against a person who had broken them, but was in the nature of an action of assumpsit against other persons alleged to be bound by their own contract to pay the duties; and the action failed because no express or implied contract of the defendants was proved. Pet. C. C. 286-290. The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violato n of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Whart. Confl. Law, 833; [127 U.S. 265, 291] West. Pr. Int. Law, (1st Ed.) 388; Pig. Judgm. 209, 210. Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in his Commentaries on the Conflict of Laws, after having said: 'The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself,' and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages, adds. 'But this includes not a decree decerning for a penalty, because no court reckons itself bound to punish, or to concur in punishing, any delict committed extra territorium.' 2 Kames, Eq. (3d Ed.) 326, 366; Story, Confl. Law, 600, 622. It is true that if the prosecution in the courts of one country for a violation of its municipal law is in rem, to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the state, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue. Rose v. Himely, 4 Cranch, 241; Hudson v. Guestier, Id. 293; Bradstreet v. Insurance Co., 3 Sum. 600, 605; Pig. Judgm. 264. But the recognition of a vested title in property is quite different from the en forcement of a claim for a pecuniary penalty. In the one case a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right. The application of the rule to the courts of the several states and of the United States is not affected by the provisions of the constitution and of the act of congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered. Const. art. 4, 1; Act May 26, 1790, c. 11, (1 St. 122;) Rev. St. 905. Those provisions establish a rule of evidence, rather than of [127 U.S. 265, 292] jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re- examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Hanley v. Donoghue, 116 U.S. 1, 4 , 6 S. Sup. Ct. Rep. 242. In the words of Mr. Justice STORY, cited and approved by Mr. Justice BRADLEY speaking for this court: 'The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws in their character of foreign judgments.'S tory, Confl. Law, 609; Thompson v. Whitman, 18 Wall. 457, 462, 463. A judgment recovered in one state, as was said by Mr. Justice WAYNE, delivering an earlier judgment of this court, 'does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit.' McElmoyle v. Cohen, 13 Pet. 312, 325. The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the [127 U.S. 265, 293] technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. Louisiana v. New Orleans, 109 U.S. 285, 288 , 291 S., 3 Sup. Ct. Rep. 211; Louisiana v. St. Martin's Parish, 111 U.S. 716 , 4 Sup. Ct. Rep. 648; Chase v. Curtis, 113 U.S. 452, 464 , 5 S. Sup. Ct. Rep. 554; Boynton v. Ball, 121 U.S. 457, 466 , 7 S. Sup. Ct. Rep. 981.

The only cases cited in the learned argument for the plaintiff which tend to support the view that the courts of one state

will maintain an action upon a judgment rendered in another state for a penalty incurred by a violation of her municipal laws are Spencer v. Brockway, 1 Ohio, 259, in which an action was sustained in Ohio upon a judgment rendered in Connecticut upon a forfeited recognizance to answer for a violation of the penal laws of that state; Healy v. Root, 11 Pick. 389, in which an action was sustained in Massachusetts upon a judgment rendered in Pennsylvania in a qui tam action on a penal statute for usury; and Indiana v. Helmer, 21 Iowa, 370, in which an action by the state of Indiana was sustained in the courts of Iowa upon a judgment rendered in Indiana in a prosecution for the maintenance of a bastard child. The decision in each of those cases appears to have been mainly based upon the supposed effect of the provisions of the constitution and the act of congress as to the faith and credit due to a judgment rendered in another state, which had not then received a full exposition from this court; and the other reasons assigned are not such as to induce us to accept those decisions as satisfactory precedents to guide our judgment in the present case. From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state, or of a foreign [127 U.S. 265, 294] country, does not extend to a suit by a state to recover penalties for a breach of her own municipal law. This is shown both by the nature of the cases in which relief has been granted or sought, and by acts of congress and opinions of this court more directly bearing upon the question. The earliest controversy in this court, so far as appears by the reports of its decisions, in which a state was the plaintiff, is that of Georgia v. Brailsford. At February term, 1792, the state of Georgia filed in this court a bill in equity against Brailsford, Powell, and Hopton, British merchants and copartners, alleging that on August 4, 1782, during the Revolutionary war, the state of Georgia enacted a law confiscating to the state all the property within it (including debts due to British merchants or others residing in Great Britain) of persons who had been declared guilty or convicted, in one or other of the United States, of offenses which induced a like confiscation of their property within the states of which they were citizens, and also sequestering, and directing to be collected for the benf it of the state, all debts due to merchants or others residing in Great Britain, and confiscating to the state all the property belonging and debts due to subjects of Great Britain, and that by the operation of this law all the debts due from citizens of Georgia to persons who had been subjected to the penalties of confiscation in other states, and of British merchants and others residing in Great Britain, and of all other British subjects, were vested in the state of Georgia. The bill further alleged that one Spalding, a citizen of Georgia, was indebted to the defendants upon a bond, which by virtue of this law was transferred from the obligees, and vested in the state; that Brailsford was a citizen of Great Britain, and resided there from 1767 till after the passing of the law, and that Hopton's and Powell's property (debts excepted) had been confiscated by acts of the legislature of South Carolina; that Brailsford, Hopton, and Powell had brought an action and recovered judgment against Spalding upon this bond, and had taken out execution against him, in the circuit court of the United States for the district of Georgia, and that the parties to that [127 U.S. 265, 295] action had confederated together to defraud the state. Upon the filing of the bill, this court, without expressing any opinion upon the merits of the case, granted a temporary injunction to stay the money in the hands of the marshal of the circuit court until the title to the bond as between the state of Georgia and the defendants could be tried. 2 Dall. 402. At February term, 1793, upon a motion to dissolve that injunction, this court held that, if the state of Georgia had the title in the debt, (upon which no opinion was then expressed,) she had an adequate remedy at law by action upon the bond; but, in order that the money might be kept for the party to whom it belonged, ordered the injunction to be continued till the next term, and, if Georgia should not then have instituted her action at common law, to be dissolved. Id. 415. Such an action was brought accordingly, and was tried by a jury at the bar of this court at February term, 1794, when the court was of opinion, and so charged the jury, that the act of the state of Georgia did not vest the title in the debt in the state at the time of passing it, and that by the terms of the act the debt was not confiscated, but only sequestered, and the right of the obligees to recover it revived on the treaty of peace; and the jury returned a verdict for the defendants. 3 Dall. 1. It thus appears that in Georgia v. Brailsford the state did not sue for a penalty, or upon a judgment for a penalty, imposed by her municipal law, but to assert a title, claimed to have absolutely vested in her, not under an ordinary act of municipal legislation, but by an act of war, done by the state of Georgia as one of the United States (the congress of which had not then been vested with the power of legislating to that effect) to assist them against their common enemy by confiscating the property of his subjects; and that the only point decided by this court, except as to matters of procedure, was that the title had not vested in the state of Georgia by the act in question. In Pennsylvania v. Wheeling Bridge Co., 13 How. 518, this court, upon a bill in equity by the state of Pennsylvania against a corporation of Virginia, ordered the taking down or [127 U.S. 265, 296] heightening of a bridge built by the defendant over the Ohio river, under a statute of Virginia, which the court held to have obstructed the navigation of the river, in violation of a compact of the state, confirmed by act of congress. Id. 561. See, also, Bridge Co. v. Hatch, 125 U.S. 1, 15 , 16 S., ante, 811. All the judges who took part in the decision in the Wheeling Bridge Case treated the suit as brought to protect the property of the state of Pennsylvania. Mr. Justice MCLEAN,

delivering the opinion of the majority of the court, said: 'In the present case, the state of Pennsylvania claims nothing con ected with the exercise of its sovereignty. It asks from the court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it.' 13 How. 560, 561. So, Chief Justice TANEY, who dissented from the judgment, said: 'She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned.' Id. 589. And Mr. Justice DANIEL, the other dissenting judge, took the same view. Id. 596. Mississippi v. Johnson, 4 Wall. 475, and Georgia v. Stanton, 6 Wall. 50, were cases of unsuccessful attempts by a state, by a bill in equity against the president or the secretary of war, described as a citizen of another state, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of congress alleged to unconstitutionally affect the political rights of the state. Texas v. White, 7 Wall. 700, Florida v. Anderson, 91 U.S. 667 , and Alabama v. Burr, 115 U.S. 413 , 6 Sup. Ct. Rep. 81, were suits to protect rights of property of the state. In Texas v. White the bill was maintained to assert the title of the state of Texas to bonds belonging to her, and held by the defendants, citizens of other states, under an unlawful negotiation and transfer of the bonds. In Florida v. Anderson the suit concerned the title to a railroad, and was maintained because the state of Florida was the holder of bonds secured by a statutory lien upon the road, and had an interest in an internal improvement fund pledged to secure the payment of those bonds. In Alabama v. Burr the object of the suit was to indemnify the [127 U.S. 265, 297] state of Alabama against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendants, and upon the facts of the case the bill was not maintained. In Pennsylvania v. Quicksilver Co., 10 Wall. 553, an action brought in this court by the state of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another state. In Wisconsin v. Duluth, 96 U.S. 379 , the bill sought to restrain the improvement of a harbor on Lake Superior, according to a system adopted and put in execution under authority of congress, and was for that reason dismissed, without considering the general question whether a state, in order to maintain a suit in this court, must have some proprietary interest that has been affected by the defendant. The cases heretofore decided by this court in the exercise of its original jurisdiction have been referred to, not as fixing the outermost limit of that jurisdiction, but as showing that the jurisdiction has never been exercised, or even invoked, in any case resembling the case at bar.

The position that the jurisdiction conferred by the constitution upon this court, in cases to which a state is a party, is limited to controversies of a civil nature, does not depend upon mere inference from the want of any precedent to the contrary, but has express legislative and judicial sanction. By the judiciary act of September 24, 1789, c. 20, 13, it was enacted that 'the supreme court shall have exclusive jurisdiction of controversies of a civil nature where a state is a party, except between a state and its citizens, and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction.' 1 St. 80. That act, which has continued in force ever since, and is embodied in section 687 of the Revised Statutes, was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning. Ames v. Kansas, 111 U.S. 449, 463 , 464 S., 4 Sup. Ct. Rep. 437. [127 U.S. 265, 298] In Chisholm v. Georgia, 2 Dl l. 419, decided at August term, 1793, in which the judges delivered their opinions seriatim, Mr. Justice IREDELL, who spoke first, after citing the provisions of the original constitution, and of section 13 of the judiciary act of 1789, said: 'The constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but, in respect to the subject-matter upon which such jurisdiction is to be exercised, uses the word 'controversies' only. The act of congress more particularly mentions civil controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think was well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only are uniformly considered of a local nature, and to be decided by its particular laws.' 2 Dall. 431, 432. None of the other judges suggested any doubt upon this point; and Chief Justice JAY, in summing up the various classes of cases to which the judicial power of the United States extends, used 'demands' (a word quite inappropriate to designate criminal or penal proceedings) as including everything that a state could prosecute against citizens of another state in a national court. Id. 475. In Cohens v. Virginia, 6 Wheat. 264, (decided at October term, 1821,) Chief Justice MARSHALL, after showing that the constitution had given jurisdiction to the courts of the Union in two classes of cases, in one of which, comprehending cases arising under the constitution, laws, and treaties of the United States, the jurisdiction depended on the character of the cause, and in the other comprehending controversies between two or more states, or between a state and citizens of another state, the jurisdiction depended entirely on the character of the parties, said: 'The original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit

might be [127 U.S. 265, 299] instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and, perhaps, every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction.' Id. 398, 399. The soundness of the definition, given in the judiciary act of 1789, of the cases coming within the original jurisdiction of this court by reason of a state being a party, as 'controversies of a civil nature,' was again recognized by this court in Rhode Island v. Massachusetts, 12 Pet. 657, 722, 731, (decided at January term, 1838.)

The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now and here sued on, was, in the strictest sense, a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. Rev. St. Wis. 1920. The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. St. Wis. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, une r that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,-the compelling the offender to pay a pecuniary fine by way of punishment for the offense. [127 U.S. 265, 300] This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine. The original jurisdiction of this court is conferred by the constitution, without limit of the amount in controversy, and congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the supreme court of the United States. That cannot have been the intention of the convention in framing, or of the people in adopting, the federal constitution. Judgment for the defendant on the demurrer.

Sec. 255. - Approval of title prior to Federal land purchases; payment of title expenses; application to Tennessee Valley Authority; Federal jurisdiction over acquisitions

Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.

The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him.

Any Federal department or agency which has been delegated the responsibility to approve land titles under this section may request the Attorney General to render his opinion as to the validity of the title to any real property or interest therein, or may request the advice or assistance of the Attorney General in connection with determinations as to the sufficiency of titles.

Except where otherwise authorized by law or provided by contract, the expenses of procuring certificates of titles or other evidences of title as the Attorney General may require may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department or agency.

The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority.

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such

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cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted

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writ for the restoring of lands or goods to a debtor who is distrained above the amount of the debt.

Terris liberandis /téhrəs lìbərǽndəs/. A writ that lay for a man convicted by attaint, to bring the record and process before the king, and take a fine for his imprisonment, and then to deliver to him his lands and tenements again, and release him of the strip and waste. Also it was a writ for the delivery of lands to the heir, after homage and relief performed, or upon security taken that he should perform them.

Territorial. Having to do with a particular area; for example, territorial jurisdiction is the power of a court to take cases from within a particular geographical area.

Territorial courts. U.S. courts in each territory, such as the Virgin Islands. They serve as both Federal and state courts. Created under U.S.Const., Art. IV, Sec. 3, cl. 2.

Territorial jurisdiction. Territory over which a government or a subdivision thereof, or court, has jurisdiction. State v. Cox, 106 Utah 253, 147 P.2d 858, 861. Jurisdiction considered as limited to cases arising or persons residing within a defined territory, as, a county, a judicial district, etc. The authority of any court is limited by the boundaries thus fixed. *See also* Extraterritorial jurisdiction; Jurisdiction.

Territorial property. The land and water over which the state has jurisdiction and control whether the legal title be in the state itself or in private individuals. Lakes and waters wholly within the state are its property and also the marginal sea within the three-mile limit, but bays and gulfs are not always recognized as state property.

Territorial; territoriality. These terms are used to signify connection with, or limitation with reference to, a particular country or territory. Thus, "territorial law" is the correct expression for the law of a particular country or state, although "municipal law" is more common.

Territorial waters. Term refers to all inland waters, all waters between line of mean high tide and line of ordinary low water, and all waters seaward to a line three geographical miles distant from the coast line. C. A. B. v. Island Airlines, Inc., D.C.Hawaii, 235 F.Supp. 990, 1002. That part of the sea adjacent to the coast of a given country which is by international law deemed to be within the sovereignty of that country, so that its courts have jurisdiction over offenses committed on those waters, even by a person on board a foreign ship. *See* Three-mile limit.

Territory. A part of a country separated from the rest, and subject to a particular jurisdiction. Geographical area under the jurisdiction of another country or sovereign power.

A portion of the United States, not within the limits of any state, which has not yet been admitted as a state of the Union, but is organized, with a separate legislature, and with executive and judicial officers appointed by the president. *See* Trust territory.

An assigned geographical area of responsibility; *e.g.* salesman's territory.

Territory of a judge. The territorial jurisdiction of a judge; the bounds, or district, within which he may lawfully exercise his judicial authority. See *e.g.* 28 U.S.C.A. § 81 et seq. (territorial composition of federal district courts). *See also* Jurisdiction.

Terror. Alarm; fright; dread; the state of mind induced by the apprehension of hurt from some hostile or threatening event or manifestation; fear caused by the appearance of danger. In an indictment for riot at common law, it must have been charged that the acts done were "to the *terror* of the people."

An element of offense of aggravated kidnapping, is any act which is done to fill with intense fear or to coerce by threat or force. Rogers v. State, Tex.Cr.App., 687 S.W.2d 337, 341.

Terrorism. "Act of terrorism" means an activity that involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and appears to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by assassination or kidnapping. 18 U.S.C.A. § 3077.

Terroristic threats. A person is guilty of a felony if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. 18 U.S.C.A. § 3077; Model Penal Code, § 211.3. *See also* Terrorism.

Terry-stop. *See* Stop and frisk.

Tertia denunciatio /tə́rsh(iy)ə dənànsiyéysh(iy)ow/. Lat. In old English law, third publication or proclamation of intended marriage.

Tertius interveniens /tə́rsh(iy)əs ìntərvíyn(i)yènz/. Lat. In the civil law, a third person intervening; a third person who comes in between the parties to a suit; one who interpleads.

Test. To bring one to a trial and examination, or to ascertain the truth or the quality or fitness of a thing. Something by which to ascertain the truth respecting another thing; a criterion, gauge, standard, or norm.

In public law, an inquiry or examination addressed to a person appointed or elected to a public office, to ascertain his qualifications therefor, but particularly a scrutiny of his political, religious, or social views, or his attitude of past and present loyalty or disloyalty to the government under which he is to act.

See also Competitive civil service examination; Examination.

Discovery. Requests for permission to test tangible things in civil actions are governed by Fed.R.Civil P. 34. Requests for reports or results of examinations or tests are governed by Fed.R.Civil P. 35, and Fed.R.Crim.P. 16.

U.S. Supreme Court

BANK OF AUGUSTA v. EARLE, 38 U.S. 519 (1839)

38 U.S. 519 (Pet.)

THE BANK OF AUGUSTA, PLAINTIFFS IN ERROR,
v.
JOSEPH B. EARLE, DEFENDANT IN ERROR.

THE BANK OF THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
WILLIAM D. PRIMROSE, DEFENDANT IN ERROR.

THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY, PLAINTIFFS IN ERROR,
v.
JOSEPH B. EARLE, DEFENDANT IN ERROR.

January Term, 1839

[38 U.S. 519, 521] IN error to the Circuit Court of the United States for the southern district of Alabama. These cases were brought from the Circuit Court of the southern district of Alabama, by the plaintiffs in each case, by writs of error. The cases of the Bank of Augusta vs. Joseph B. Earle, and of the Bank of the United States vs. William D. Primrose, were argued by counsel. The case of the New Orleans and Carrollton Railroad Company was submitted by Mr. Ogden, on the argument in the other causes. In the case of the Bank of Augusta vs. Joseph B. Earle, the facts were the following:-- The Bank of Augusta, incorporated by the legislature of the state of Georgia, instituted in the Circuit Court for the southern district of Alabama, in March, 1837, an action against Joseph B. Earle, a citizen of the state of Alabama, on a bill of exchange, dated at Mobile, November 3, 1836, drawn at sixty days sight, by Fuller, Gardner, and Co., on C. B. Burland and Co., of New York, in favour of Joseph B. Earle, and by him endorsed, for six thousand dollars. The bill was accepted by the drawees, but was afterwards protested for non-payment; and was returned with protest to the plaintiffs. The following facts were agreed upon by the counsel for the plaintiffs and the defendant; and were submitted to the Circuit Court:-- 'The defendant defends this action upon the following facts that are admitted by the plaintiffs; that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, &c. That the bill sued on was

made and endorsed for the purpose of being discounted, by Thomas McGran, the agent of said bank, who had funds of the plaintiffs in his hands, for the purpose of purchasing bills, which funds were derived from bills and notes, discounted in Georgia by said plaintiffs, and payable in Mobile, and the said McGran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds; and to remit said funds to the said plaintiffs. 'If the Court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest and costs; either party to have the right of appeal or writ of error to the Supreme Court, upon the statement of facts, and the judgment thereon.' The Circuit Court gave judgment for the defendant. The Bank of the United States, incorporated by the legislature of the State of Pennsylvania, as the holders of a bill of exchange protested for non-payment, for five thousand three hundred and fifty dollars, drawn by Charles Gascoine, at Mobile, on the 14th January, 1837, at four months, on J. and C. Gascoine, of New York, in favour of W. D. Primrose, and by him endorsed, instituted in October, 1837, an action against the endorser of the bill, in the Circuit Court for [38 U.S. 519, 522] the southern district of Alabama. The agreed facts of the case, which were submitted to the Circuit Court, were as follow: 'The plaintiffs are a body corporate, existing under and by virtue of a law of the state of Pennsylvania, authorized by its charter to sue and be sued by the name of the President, Directors, and Company of the Bank of the United States, and to deal in bills of exchange, and is composed of citizens of Pennsylvania, and of states of the United States other than the state of Alabama. The defendant is a citizen of the state of Alabama. George Poe, Jr., was the agent of the plaintiffs, resident in Mobile, and in the possession of funds belonging to the plaintiffs, intrusted to him for the sold purpose of purchasing bills of exchange. The said George Poe, Jr., as such agent, on the 14th day of January, A. D. 1837, purchased at Mobile the bill declared upon, and paid for the same in notes of the branch of the Bank of the State of Alabama, at Mobile. The defendant is the payee of the bill, and endorsed it to plaintiffs, the present holders. The bill was presented at maturity to the acceptors, and duly protested for non-payment; and due and legal notice given to the defendant. The question for the opinion of the Court on the foregoing statement of facts is, whether the purchase of the said bill of exchange by the plaintiffs, as aforesaid, was a valid contract under the laws of Alabama. If the Court be of opinion that the said contract was valid, and that the said plaintiffs, as holders of the said bill, acquired the legal title thereto by the said purchase, then judgment to be rendered for the plaintiffs for the sum of 5,350 dollars, with interest at eight per cent. since 30th May, 1837, and ten per cent. damages on it. But if the Court be of opinion that the said purchase was prohibited by the laws of Alabama, and the contract was therefore invalid and void, judgment to be rendered for the defendant.' The Circuit Court gave judgment for the defendant. The action of the New Orleans and Carrollton Railroad Company, incorporated by an act of the legislature of Louisiana, was upon a bill of exchange, drawn by Fuller, Gardner, and Co., of Mobile, in favour of Joseph B. Earle, upon Fuller and Yost, of New Orleans, for five thousand two hundred and ten dollars, protested for nonpayment. The action was against the endorser of the bill, which had been purchased at Mobile by an agent of the plaintiffs, who had funds in his hands belonging to the plaintiffs, for the purpose of purchasing bills exchange, as a means of remittance to New Orleans. The Circuit Court gave judgment for the defendant. The case of the Bank of Augusta was argued by Mr. D. B. Ogden, for the plaintiffs, and by Mr. C. J. Ingersoll, for the defendant. Mr. Ogden also submitted the case of the New Orleans and Carrollton Railroad Company to the Court, on the argument in the case of the Bank of Augusta, &c. The case of the Bank of the United Statew vs. Primrose, was argued by Mr. Sergeant and Mr. Webster, [38 U.S. 519, 523] for the plaintiff in error, and by Mr. C. J. Ingersoll, and Mr. Vande Gruff, for Joseph B. Earle. A printed argument for W. D. Primrose, was also submitted by Mr. Crawford. Mr. Ogden, for the Bank of Augusta, contended that the bank had a right to become the purchaser of the bill of exchange on which the suit was brought; and they had a legal right to recover its amount against the defendant, as the endorser of the bill. The plaintiffs were the owners of a bill or bills of exchange, which they had purchased at Augusta, in Georgia, drawn on persons in Mobile, which were remitted by them to Mobile, and were there paid. The funds thus obtained, were invested in the bill of exchange which is the subject of this suit, for the purpose of a remittance. The question for the determination of this Court is, whether the plaintiff's had authority to make the purchase. The Circuit Court of Alabama decided this to be contrary to the laws of Alabama. If the decision of the Circuit Court shall be sustained by this Court, a deeper wound will be inflicted on the commercial business of the United States than it has ever sustained. The principal means by which the commercial dealing between the states of the United States and Alabama is conducted, will be at an end; and there will be no longer the facilities of intercourse for the purposes of traffic, by which alone it is prosperous and beneficial. Nor will the effect of such a decision be confined to the state of Alabama. The principles of law which forbid the dealing in exchange by a corporation established under the laws of another state, and by the terms of its charter expressly authorised to purchase bills of exchange, will prevail to the full extent of inhibiting the same purchases in other states; and thus exclude the principal operations of commerce between the states of the Union. In the state of Alabama, such a condition of things will

operate most injuriously. The purchases of bills of exchange in that state, are extensively made by the agents of corporations of other states; and thus, by the competition which is produced; the rates of exchange are kept in a due proportion to those of other states. The large productions of cotton in that state, are thus enabled to realize to the planter a proper, and an equal price to that obtained by the planters in the neighbouring states. Should the banks of Alabama and the capitalists of that state have the exclusive right to deal in exchange, the effect of such a monopoly will be felt extensively. Such operations in exchange as those out of which this controversy has arisen, have been transacted in every state of the Union. Until now, their legality has never been doubted; and in no Court of the United States, or in any state Court, has their validity been before questioned or denied. The Union has existed for more than half a century, the transactions between the states composing it, of the same character with that which is now before the Court, have, for a large portion of that period, been extensive and constant; and they have been universally found to be beneficial. No state, what [38 U.S. 519, 524] ever the power of its legislature may be to act upon the matter; a power which it is not intended to admit or deny in this argument; has attempted to interpose a prohibition and forbid such dealing. The proposition in the Circuit Court, and on which its decision is founded, is that a corporation of one state can do no commercial business, can make no contract, and can do nothing in any other state of the Union, but in that in which, by the law of the state, it has been created. This proposition is the more injurious, as in the United States associated capital is essentially necessary to the operations of commerce, and the creation and improvement of the facilities of intercourse, which can only be accomplished by large means. Associated capital here, supplies the place of the large individual accumulations which are found in Europe. The question is not on the powers of a corporation, but as to whom and to what objects those powers can be exerted. A corporation is the creature of the law, and it is clothed with all the powers of a person. The position on the other side is, that when it leaves the state which gave it existence by granting its charter, it loses its personal existence, and has no existence whatever. This is a harsh doctrine, and seems at war with the principles of those who assert and maintain state rights. It is certainly true that a corporation in one state, is not a corporation in another state, as to the full exercise of corporate powers. In Georgia, if it was brought into being by a law of that state, it may carry on any business authorized by its charter; but in Alabama it can do nothing but what the laws of Alabama authorize it to do, as a corporation, or which these laws do not forbid. It may institute suits in Alabama. If a debt is contracted in Augusta, in Georgia, and the debtor removes to Mobile, can no suit be instituted to recover the debt in Mobile? It can be sued at Alabama, as it may sue. Congress in 1825 passed an act authorizing steamboat companies to own ships and vessels, and to take out a register on the oath of the president of the company. Suppose a steamboat owned and registered in New York shall put into Mobile, and shall there be unlawfully taken possession of; could no action be brought by the company for such a trespass? Could not the company make an agreement to have the boat repaired in Mobile? Is it possible that such a construction can be given to the law? Nothing is better settled than that a corporation may institute suits in the Courts of other states and countries than those under whose laws they may have been established. 1 Roll's Abridg. 531. 2 Bulstrode, 32. Hobart, 113. 9 Vesey, 347. The Nabob of Carnatic vs. The East India Company, 1 Vesey, Jr., 371. 2 Lord Raymond, 152. 1 Strange, 612. 10 Mass. Rep., 91. 5 Cowan, 550. The King of Spain vs. Oliver, Peters' Cir. Court Rep. 276. The Society for Propagating the Gospel in foreign Parts vs. Wheeler, Gallison's Rep. 2 Randolph's Rep. 465. It is admitted by those who maintain the decision of the Circuit [38 U.S. 519, 525] Court of Alabama to be correct, that by the laws of nations, corporations of other countries may institute suits out of the states or countries in which they were created: but it is said this principle and established practice does not apply to suits which are claimed to be instituted by a corporation of one state of the United States, in the Courts of another state; that the states are not nations towards each other, and that the rules and principles of international law do not apply to them; that all the states compose one nation, and each is absorbed in the nation of the United States. This is a strange doctrine as to the states of the Union. The same governments, having similar laws, are said to owe to each other less comity than is admitted to be due to foreign nations. The contrary to this position would seem just and proper. Between the states comity is doubly due; and is an obligation of the highest influence. The states between each other are sovereign and independent. They are distinct and separate sovereignties, except so far as they have parted with some of the attributes of sovereignty by the Constitution. They continue to be nations, with all their rights, and under all their national obligations, and with all the rights of nations in every particular; except in the surrender by each to the common purposes and objects of the Union, under the Constitution. The rights of each state, when not so yielded up, remain absolute. Congress have never provided for the proof of the laws of the states when they are brought forward in the Courts of the United States, or in the Courts of the states; and they are proved as foreign laws are proved. There must be special legislation of every state as to the mode of proof of the laws of other states. New York has legislated on this subject, and a provision has been made which is applicable to it. Every principle of law which allows foreign states to sue in the Courts of other countries, applies to corporations. The laws respecting mortgages are necessarily local in their character and provisions; and yet it has been held that a

corporation of one state may become a mortgagee of lands in another state. This was decided by Chancellor Kent, in the case of The Silver Lake Bank, 4 Johns. Ch. Rep. 370. In this case the Chancellor held that corporations created by the legislature of Pennsylvania had a right to enforce a mortgage on real property in New York, by a proceeding in the Court of Chancery of New York. It is said that a right to sue and a right to contract are different; that a corporation may sue because it is a person recognised by the laws of Alabama, and may take a stand as a person in the Courts of Alabama. Thus a corporation of Georgia is considered a person in Alabama. It can give a warrant of attorney; for no suit can be sustained without such a warrant. Why is such a right allowed? It is because a corporation is recognised as having a personal existence. How can they sue to enforce a contract, and not have a right to make a contract? In principle there can be no difference. [38 U.S. 519, 526] Does not a right to sue give a right to make a compromise of the matter in controversy in the suit? This is a right to make a contract, for a compromise is a contract. He who institutes a suit may discontinue it. This is a contract. The declaration in a suit in a Court of Alabama, must aver that the contract was made in Alabama; but this is not traversable.

A chose in action is assignable only to a limited extent; but it has been held that the assignees appointed under the bankrupt laws of England may sue in the Courts of the United States. This is giving an extra- territorial existence to the laws of England. This is on the principles of the comity of nations; and such principles are essential to sustain the intercourse between nations. But if no express contract can be made in another state by a corporation, it cannot be a party to an implied contract. The law will not suffer a contract to be implied, where no express contract can be made. Look at what this would lead to. The Bank of Augusta may buy a bill on Mobile, and the bill may be sent by the bank to Mobile for collection. It may be paid in Mobile to the agent of the bank; but if a corporation cannot make a contract, no implied promise of the agent to remit the money collected to the Bank of Augusta can be raised; and he may keep the whole amount. Suppose a note given by him to the bank for the money, it would be void. The doctrine is monstrous.

The Constitution of the United States was formed to establish a national government, and this Court is a most important part of the government thus formed. The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured by establishing these on principles of reciprocity; and on the security and protection of the citizens of each state, in all the states united by the government. This Court will hesitate a long time before it will make a decision which will either break down or cripple the whole of the commercial intercourse between the states, and shake the foundations of all our internal commerce.

One of the most important objects and interests for the preservation of the Union is the establishment of railroads. Cannot the railroad corporations of New York, Pennsylvania, or Maryland, make a contract out of the state for materials for the construction of a railroad? Cannot these companies procure machinery to use on their railroads, in another state. They cannot get on without this right. These railroads often run into other states, with the permission of those states; and it never has been doubted that every contract for construction made by the corporations to which the railroads belong, although out of the state in which they were originally created, is valid.

Manufacturing corporations established in one state by the law of the state cannot sue in another state for debts due for articles made by such corporation, if the decision of the Circuit Court of [38 U.S. 519, 527] Alabama is sustained by this Court. Policies of insurance made in another state than that in which the property insured was, at the time of the insurance, will be void. The legislature of New York have by a special law prohibited insurances against fire being made in New York by foreign corporations. This shows that the legislature thought that without such a law foreign corporations had a right to make such insurances, and to sue upon contracts made in New York, or contracts flowing out of policies of insurance. Revised Laws of New York, 52. Act of March 18th, 1814. It is admitted that a corporation may not carry on the business for which it was created, out of the state whose laws gave it existence. But this does not interfere with the right claimed by the plaintiffs in this case. The Bank of Augusta cannot carry on the business of banking in Alabama, for by the laws of Alabama this is forbidden. But if not forbidden by the law of that state, it could transact the business of banking there. At common law every man has a right to become a banker, and to carry on the business of banking. The acts of Parliament in England impose restrictions on this common law right. 15 Johns. Rep. 379. The plaintiffs in this case are citizens of the state of Georgia. They are so called in the writ by which the suit was commenced; and by the Constitution of the United States they have a right to transact any business which any persons, citizens of the state of Alabama, may carry on, and which is not prohibited by the laws of the state. The laws of New

York authorize special partnerships. Have not these partnerships a right to deal in Georgia and Alabama to the same extent and in the same manner as in New York? This shows that an association under the name of one person, can do any and all acts which citizens of New York or of any other state can do. Large collections have been made by the Bank of England in the United States, on bills of exchange drawn in the United States, and returned protested for non-payment. There has not been a suggestion that the Bank of England, a foreign corporation, could not pursue such claims in the Courts of the states and of the United States, in the same manner as individuals. All those bills have been collected but a very small amount; and this after many of them had been put in suit. Large and numerous sales of the stocks of states of the United States, and of corporations established by states, have been made in other states, and in England. These would be void-on the same principle as that claimed on the part of the defendant in this case. Alabama has herself issued stock as the basis of her banking capital; and this stock has been sold out of the state of Alabama. Yet she will not be bound to pay the amount of this stock, or even to pay the interest on it, if as a corporation she cannot contract out of her territories. Mr. Ogden went into an examination of the cases which had been referred to by the Circuit Court of Alabama, and which were [38 U.S. 519, 528] considered by that Court, as sustaining the principle that the plaintiffs in error could not maintain this suit. He examined particularly the case of Head and Amory vs. the Providence Insurance Company, 2 Cranch, 127. The Dartmouth College case, 4 Wheat. 519. Goslen vs. the Corporation of Georgetown, 6 Wheat. 593. The Bank of the United States vs. Donelly, 8 Peters, 361. There is another class of cases and authorities cited in the opinion of the Circuit Court of Alabama, which go to show that a corporation has no power which is not given to it by the law which created it, and from which all its functions are derived. It is not necessary to examine these authorities, because the principle laid down by the Circuit Court is fully admitted; and because in this case, it is not a question as to the powers of the corporation, but as to the place where those powers may be executed. There is another view upon this branch of the argument, which appears worthy of the serious consideration of this Court. This is an action commenced in the Circuit Court of the United States. How does the Court acquire jurisdiction of the cause? Certainly not under the state law of Georgia, constituting the plaintiffs a corporation. A state legislature has no power to give to or take away jurisdiction from the Gourts of the United States. Again, as it regards the United States, and the Courts of the United States, a corporation created by one of the states is as much a foreign corporation as a corporation created by Georgia is a foreign corporation in Alabama, created by a different government, with different powers and different local jurisdiction. How does the Court of the United States acquire its jurisdiction in this case? From the Constitution, and the laws of Congress passed under the Constitution. Now the Constitution gives the Courts of the United States no jurisdiction where a corporation created by a state is a party, and a citizen of another state is the other party; but it does give the Courts of the United States jurisdiction in all cases between citizens of different states. In the case of The Hope Insurance Company vs. Boardman, this Court many years ago decided that the Courts of the United States had no jurisdiction in cases where a state corporation was a party; but the plaintiff must aver, in order to give the Court jurisdiction, that the stockholders and persons interested in and composing the corporation were citizens of one state, and the defendant a citizen of another state. And the practice has been uniform ever since, to make such an averment in order to bring the case within the jurisdiction of the Courts of the United States. This averment is material, and its truth must be proved if put in issue by a plea in abatement. It is manifest then that the Circuit Court had jurisdiction in this case; because it appeared on the record that the plaintiffs, or the persons interested as plaintiffs, were citizens of Georgia, and the defendant was a citizen of Alabama. [38 U.S. 519, 529] And when the Courts of the United States sustain an action in the name of a state corporation, it is only because citizens of thestate have associated together under the name and in the form of a corporation. Still it is those citizens only who are the parties before the Court, and not the corporation, quasi corporation. Upon no other hypothesis can the Courts of the United States have any jurisdiction in the cause, none other being justified or authorized by the Constitution. Now it is asked of this Court, if citizens of the state of Georgia have a right to sue in the Courts of the United States in the state of Alabama, under the name of an association called the Bank of Augusta; does not this amount to a recognition on the part of the Courts of the United States of their rights to act under that associated name? And if they may act under that name in one thing, why not in all things? If you recognise their right of acting in bringing a suit to enforce a contract, why not in making the contract itself, which is the foundation of the suit? In principle there is seen no difference. Twenty merchants in Augusta, in Georgia, may be concerned as partners in carrying on business, in the name of one of them, or they may assume any other name. Can it be contended for a moment that under that assumed name they would not have a right to make contracts, purchase cotton, bills of exchange, or do any other business not forbidden by the laws of Alabama? If this is not so, what becomes of the provision in the Constitution of the United States, which declares that a citizen of one state shall be entitled to all the rights of a citizen of the other states? It is no answer to this to say, that in an action in such a case you must bring the suit in the names of all the partners. This is a question as to the remedy; but it can in no wise affect the power of

contracting, or of suing. One is a matter of form, the other is matter of substance. There remains another point in the case to which the attention of the Court is respectfully called. By the constitution of Alabama it is declared that there shall be established a bank, to be called 'The Bank of the State of Alabama;' and that the legislature may from time to time establish as many branches of that bank, to be located in different parts of the state, as they may think proper. This constitutional provision has been construed as a prohibition on the legislature, which precludes them from establishing any other bank in the state; and upon the argument of this cause, it is presumed that it must be taken for granted that the construction given to the constitution in this particular, is the true construction. A large portion of the stock of the bank and of its branches is reserved for the state; intending, no doubt, thereby to acquire a revenue for the state by means of their interest in the bank. Now it is supposed, that to permit a bank of Georgia, or of any other state, to transact its business in Alabama, would interfere with the profits of the Bank of Alabama; and would therefore be in direct opposition to the settled policy of the state, as declared and established by the constitution. Let us examine this argument. It is readily admitted, for the [38 U.S. 519, 530] purposes of this case, that the state of Alabama has a right to pass a law declaring that no bank shall exist and do its business in that state, unless it be chartered by the legislature of the state. This is an admission as broad as can be called for: but it by no means follows that the transaction which is the subject of the present controversy is an illegal one. What is legitimate banking business? It consists of three things. First, discounting notes Second, receiving money on deposit. Third, issuing notes or bills to be circulated as money. It seems to be clear and certain that all these operations must be combined to constitute banking, as understood among us, and in the commercial world. The mere discounting notes is not of itself a banking operation. It is indeed doing one thing which banks are authorized to do, but it is not therefore banking. May not a merchant discount his own notes, without being considered a banker? The mere receiving money on deposit, to be paid out again whenever called for, is not banking. Surely a man may deposit his funds in safe keeping in the hands of a friend, without making that friend what is known in our law and in the commercial law, as a banker. Issuing a note to be put into circulation as money may, perhaps, be evidence of itself of an act of banking; and this may be the most important power which a bank possesses. Now there is no pretence that the Bank of Augusta received deposits in Alabama. It is not pretended that the Bank of Augusta ever put into circulation in Alabama one of its notes or bills to be circulated as money in that state: and it is contended, that if they had discounted a promissory note in Alabama, it would not of itself have been such a banking operation as would render the transaction illegal, if there were a law in Alabama absolutely prohibiting any bank but the bank of the state from carrying on the banking business in the state. An individual might discount a note without violating the law, and so might the plaintiffs in error. It is admitted that under a charter given by the state of Georgia, the plaintiffs could not establish a bank in the state of Alabama. No such right is claimed by the plaintiffs. But it is contended that becoming lawfully possessed of funds in the state of Alabama, common sense, common justice, and common law require that the plaintiffs should have the ordinary means of withdrawing those funds from the state of Alabama. The purchase of a bill of exchange is among the ordinary means of transmitting funds from one place to another. Again. The act complained of is the purchase of bills of exchange. Now dealing in the purchase and sale of bills of exchange is not banking. It is true the power of dealing in bills of exchange is often expressly given to banking corporations: and the fact that it is expressly given, is evidence of the general understanding that without it is so given, a bank would not have the right or power of dealing in exchange, and that is, strictly speaking, no part of the [38 U.S. 519, 531] ordinary business of a bank. Some banks have the power of making a canal; and yet it is hardly to be contended that making canals is a part of banking business. If therefore there be an express prohibition in the law and constitution of Alabama, prohibiting the business of banking in that state by any other than their own incorporated banks, it would in no wise prohibit the plaintiffs from purchasing a bill of exchange in Alabama. There remains yet another view of this question which it is thought the duty of counsel to submit to the consideration of this Court. It has heretofore been contended that the dealing in bills of exchange, being no part of the business of banking, does not come within the prohibitions of the constitution of Alabama against banking. But let us now suppose that the legislature of Alabama had passed a law prohibiting any body but one of their own incorporated banks, from dealing in bills of exchange. This would present a more important question. In the present state of the commercial world, bills of exchange are one of the great means of carrying on the commerce of the world. Our commerce with the East Indies is principally carried on by means of bills of exchange. These are now sent instead of specie to China, to Batavia, and to Calcutta. By means of bills of exchange our northern merchants are enabled to obtain funds in the south for the purchase of the cotton and tobacco, the rich productions of that portion of our country. By means of bills of exchange, the merchants of the south are enabled to purchase goods in the north. By means of bills of exchange the manufacturers of the north are enabled to receive remittances from the south, for the carriages, shoes, cabinet furniture, and numerous other articles shipped and sold there. It will not be said that no commerce can be carried on without the use and facilities of bills of exchange; but it is said, with emphasis, that without their use it would be a cramped, and

crippled, and an unproductive commerce. Our ships would be almost useless, and the trade and intercourse between the states would be prostrate. Now by the Constitution of the United States, power is given to Congress to regulate commerce with foreign nations, and among the states. This power to regulate commerce necessarily includes in it the power to regulate the means by which commerce is to be carried on. Hence the laws relative to ships or vessels. No express power is given over them by the Constitution, but they are the great means by which commerce is carried on, and therefore Congress, having the power to regulate commerce, has exercised the power of regulating them. It is submitted that the legislature of Alabama has as much right to declare that no ship or vessel shall come into the ports of that state, which does not belong to one of her own citizens, and is not registered in some office established by a law of Alabama, as she has to prohibit any but her own citizens from dealing in exchange [38 U.S. 519, 532] within her territories. She may as well say a merchant shall not sell or buy a bale of goods, as that he shall not buy or sell a bill of exchange. Sergeant, for the United States Bank. The case stated admits the right of the plaintiffs to sue in Alabama, and in the Circuit Court for that district. It admits the right to recover a judgment in such suit. It admits the right of the plaintiffs, therefore, to be, to appear, and to act as a corporation under its charter in Alabama. This concession, approved and sanctioned as it is by the judgment of the Court, would seem to make it unnecessary to consider the question whether a foreign corporation can sue in Alabama; unless it be deemed doubtful in this Court, where it is perhaps open upon the record, notwithstanding the concession. If thought necessary, it will accordingly be considered. But, first in order, it is proposed to consider the question directly presented, being the one decided by the Circuit Court, which is thus stated in the record: 'Whether the purchase of the said bill of exchange by the plaintiffs as aforesaid, was a valid contract under the laws of Alabama.' Before proceeding to the general question here presented, it is right to give some attention to the nature and state of the transaction as embraced in the words 'as aforesaid;' in order to exhibit one view of the case of itself sufficient for its decision. It is necessary only to premise, for this purpose, that the bank was authorized by its charter to purchase and to hold bills of exchange, without restriction of time or place; that the defendant had a right by law to sell the bill of exchange; and that the contract of sale was executed and at an end. It was no longer executory. The suit is not upon the contract of sale, nor to enforce that contract. It is upon the bill sold, against the defendant as endorser, and upon his contract as endorser. How does that contract arise? It consists of two parts, the endorsement, and the delivery of the bill endorsed. Neither alone would create a liability, and neither alone makes a contract as endorser. The endorsement by itself makes no contract with anybody, either to pass the bill or to create the liability. It is the delivery which effects both these ends. The ordinary form of the declaration proves this. The settled law of bills and notes establishes it. The parties on the bill make a new contract with every successive holder by the delivery. This is the law as to bills and notes payable to bearer. It is equally so as to endorsed bills. The delivery makes the contract. The time and place of endorsement, material for some purposes, are wholly immaterial for this. Whenever and wherever the name may have been written, the delivery gives it effect, whether it be to pass the bill merely, or to pass it with a liability on the part of the endorsee. The question then is, where was the delivery made? This is a [38 U.S. 519, 533] question of legal construction, and not a mere matter of fact. Suppose the transaction to have been carried on by means of correspondence, where would the delivery be considered in law to have been made? The bill being endorsed by the one party, and the full consideration paid by the other, it must surely be construed to have been made where the party is capable of receiving it. Nothing less than this would be giving the stipulated equivalent. It is indispensable to the justice of the case, and according to the intention of the parties. Upon any construction but this, the one party would get the money of the other without a consideration. An interpretation leading to such a conclusion would be a disgrace to the law. Both parties must be supposed to intend what is fair and in good faith. Does it make any difference that the transaction is conducted by means of an agent, and not by written correspondence? There is no reason why it should. Persons who are distant from each other can only treat through intermediaries; and it is of no consequence what they are. The agent acts under instructions, which are his contract, and the essence of that contract is to obtain a lawful and valid delivery. But it is superfluous to argue in favour of a position already established by the highest judicial authority in the land. Cox and Dick vs. United States, 6 Peters, 172. 202. Duncan vs. United States, 7 Peters, 435. 449. The delivery then in contemplation of law was at the bank. That delivery passed the bill to the bank, with all the rights accruing by it against the parties. But it may be alleged that admitting all this to be so, the contract created by delivery of the bill is affected by the illegality of the original contract of purchase, so as to render the endorsement also illegal. To this there are several answers. In the first place the original contract was executed and at an end by delivery of the thing bargained for. Can what was so delivered be recovered back? The full consideration has been paid. There is no offer to refund it: and there is nothing immoral in the transaction. Again: the very reverse of the allegation is the truth. This construction makes the original contract good and valid, by making its end and object lawful. In legal intendment it transfers the whole contract to Philadelphia, as the place of performance. If the delivery was to be made there, the contract arising from that delivery was also there. For this purpose it is not

material where the money was paid; it is not material where the endorser's name was written on the bill. The place of endorsement may fix the measure of liability in case of dishonour of the bill. The delivery makes the contract with the particular holder. This must especially be the case where an agent is employed. His authority is to make a lawful and valid purchase. He must do it in a lawful mode; and in favour of justice he will be intended to have done so. [38 U.S. 519, 534] Still further: it cannot be admitted that even the alleged illegality is of such a character as to defeat the claim upon the bill. To produce that result there must be a clear prohibition by statute, or by the common law; or a penalty which implies a prohibition. See the cases collected in Wheeler vs. Russell, 17 Mass. 258. In the case now under consideration there is no such prohibition. There is at most an infirmity in the contract of sale, from the want of capacity to make the purchase. Admit, for the purpose of this argument, that the contract of sale could not have been enforced at law by the buyer; it does not follow that the execution of the contract is illegal, still less that it is criminal. The bill was good before the contract. It is good after the contract. If it had been made expressly to be negotiated to a bank out of the state, that would not affect its validity; even though the policy of the state were against foreign banks carrying on business within its limits. Reese vs. Conococheague Bank, 5 Rand. 326. If this be so, the more general question does not arise. At all events, it will however receive some light from the view which has been taken. I will now proceed to consider it. That question is, whether the Bank of the United States can lawfully become the holder of a bill of exchange by purchase in Alabama. The general ground taken against the bank is, that no corporation can make such purchase, or enter into any contract out of the state in which it is chartered. A vastly important position this must be admitted to be. Its bearing is very extensive. For, observe some of its effects. 1. It will follow as an unavoidable consequence, that no corporation can buy a bill of exchange at all; unless, which rarely happens, it be strictly a domestic bill, that is, wholly within a state. There must be different parties on the bill at different places. Each makes a new contract with the holder, and each contract has its own locality. If a corporation be incapable of contracting out of the state where it is chartered, it cannot be the holder of such a bill. Nor is this all. No title can be derived through a corporation. 2. This doctrine once introduced into the law, as a principle, no one can foresee the extent of its operation. It must apply to all contracts whatever, express or implied, primary or secondary, avoiding them all. It must apply to them according to some legal determined method of fixing the locality. What that is, is a construction of law upon the facts. Is this construction to continue as heretofore, or will a new set of principles become necessary? If they continue, the contract, otherwise moral and just, may be made void by construction of law. 3. It would operate suddenly and without notice to condemn a long established usage and practice, universally understood, adopted, and approved. It operates upon the past and the present, as well as the future, so as to avoid all existing contracts to an extent which can neither be limited nor defined. The method of proceeding by [38 U.S. 519, 535] legislation is very different. It acts prospectively. It acts with precision, and with due limitation and exception. Its action is restricted to the sphere of legislative power, leaving each state free to pursue its own policy within the limits of its constitutional power; and leaving in rightful force all that is not prohibited. But a principle like that contended for, judicially established, sweeps over all the states, and embraces all cases whatsoever, even such as the true policy of the state may require should be supported. Partial legislation, forbidding certain acts of foreign corporations, has been adopted in many of the states; for example, in Pennsylvania, New York, and Virginia. Whether such acts be within the constitutional competency of the state legislatures or not, yet it is most clear that they all assume as their basis the general power of corporations to contract where there is no statutory prohibition, the continuance of that power except in the prohibited cases, and its unlimited existence where it has not been curtailed or restricted. There cannot possibly be higher or stronger proof of the law, the universal law, than this is. It is the most authoritative and conclusive evidence. To such acts, when duly passed, the common law lends its aid to give them effect. What they prohibit, the law will in no manner aid to support, but the contrary. Having stated these preliminary objections, we now come to the very question-Does the law of Alabama prohibit a corporation chartered in another state from buying a bill of exchange in Alabama? Does it, in other words, prohibit such a corporation from making a contract? The broad ground is here taken. What, then, let us inquire, is the law of Alabama? Of what does it consist? It is made up of the common law, the constitution and statutes of the state, and the Constitution and statutes of the United States where they are applicable. The common law is regularly derived to it, and is coeval with its existence. In Prince's Dig. Laws of Georgia, 551, is a declaration of the boundaries of the state of Georgia, the same as admitted for the United States by the treaty of peace with England: sec. 23, 119. In page 552 is the authority to sell to the United States a part, comprehending the present states of Alabama and Mississippi: sec. 23. This part was accordingly ceded, and the consideration received: 526. Thus ceded it retained its former laws till altered. What was that law? The common law had been adopted by the state of Georgia, by express statutory enactment, on the 25th February, 1784. Prince, 310, sec. 1. This is sufficient. But, further, the fifth section of the articles of cession, Prince, 527, refers to the ordinance of 13th January, 1787, for the government of the western territory of the United States, which provides for the common law. 1 Laws U. S., 475. 479, art. 2. And, finally, the

common law is saved by the present constitution of Alabama. Sched, sec. 5. Aik. Dig. 45. There can be no doubt therefore that the common law is in force in Alabama. The common law is said to be 'common right.' The expression [38 U.S. 519, 536] seems a quaint one, but it is true to the sense. Right is antecedent to all law. The object of law is to secure right; not so much to define as to enforce it, and to prevent wrong. When we speak of what is malum in se, we have an accurate and explicable meaning. We say at once that it is against law, referring to a standard to which all laws must be supposed to conform. So of the obligation of promises, and the like, derived from a source above the law. It is this common law, which in every state and nation protects and secures the great body of our rights, and enforces obligations founded in morality. In all civilized nations, this law is substantially the same. Even in nations not admitted to be within that description, there is a strong resemblance: for example, in the laws of the Hindoos. The reason is obvious. Whether expounded in codes, or disclosed by judicial investigation and decision, the great principles of justice are identical; and it is the aim of all law to cultivate, extend, and enforce them. Statutes are but few in comparison. They are exceptions; the common law is the great body. The legislator acts chiefly upon matters which are indifferent.

Constitutions of states are frames of government. They give no civil rights. The utmost they aim at, in this respect, is to secure some of the most important of them, (as existing things,) by a solemn assertion of them, by excepting them from the encroachments of power, or by placing around them strong and permanent guards. This is the proper office of a bill of rights. In all forms of government, these rights are the same; however they may be trodden down in arbitrary ones, where there is no independent judiciary to protect them. The common law acknowledges and aids them.

Of this common law, the law of nations is a part, and the law merchant is a part, as binding and obligatory upon Courts of justice, and upon individuals, as any other part of the common law. Surely, it cannot be necessary to quote authority for this. It is self-evident. It must be so, for the rights and interests of individuals are concerned in the law of nations; they depend upon it. No body of municipal law would be complete without it; unless the whole transactions of a community were confined within its limits, and the people never went abroad. It furnishes the only rule of decision in a vast variety of cases; there would be no rule without it. It is the common law of nations, that is, of all the inhabitants of the civilized world. It is said, with great propriety, to be the law of nature applied to nations; the unwritten law, founded upon rights. Take, for example, one of the most simple of its elements: the owner of property going abroad with it, is the owner still. If taken from him by force or by fraud, he is robbed of it. When the wrong is done by individuals, under the law of nations, he is entitled to redress. When by a state or nation, his own nation compels reparation to be made. This law is thus the rule of decision for individuals, and, between individuals, the only rule. What a sovereign may do, is another question. He is responsible as a sovereign, if he do wrong. But between individuals, it is the only rule of decision. [38 U.S. 519, 537] 'The principle of international law on the subject of co-existing commissions on the estate of a bankrupt, in concurrent operation in different countries, is a rule of decision, not a question of jurisdiction, and does not affect the right of territorial sovereignty.' Holmes vs. Remsen, 4 Johns. C. C. 466. S. C. 20 Ibid. 229. Where this rule is properly applicable, it is, for all judicial purposes, a part of the law of the land-it is the law of the land. Every judge is bound to administer it as the law of the case. He can no more disregard or disobey it, than any other part of the law. It is 'common right,' the right of every suitor. May not this rule, it will be asked, be controlled by the sovereign lawgiving power? Admit that it may-that if a statute be so made as to prohibit what the law of nations permits, the statute must be obeyed. The common law cannot do this: there is an evident contradiction, for the common law cannot repeal or overrule itself. The judge cannot do it, for he is to administer the law, and this is the law. No general notions of policy or impolicy can effect such an end; and for this plain reason, that there are considerations to be entertained by the sovereign power. To that power, the responsibility belongs. The state or nation is answerable. Upon this ground our claims on foreign nations have rested, that they have disregarded the law of nations. Upon this ground they have been acknowledged and paid. To the generality of the proposition, namely, that the law of nations is a part of the common law, or law of the land, there is no exception. Every chapter and section of the law of nations is embraced by it; it is true of the whole, and it is true of every part, no matter what its foundation. If there be a title of comity, as there certainly is, still it is a title of the law of nations; and therefore a title of the common law, as binding in the administration of justice as any other part. The name, whatever it may seem to the ear to import, does not detract from its obligatory force. The lawmaking power may have authority over it, as it has over the common law. But, in the absence of a statute plainly to the contrary, if a case arise, within the law of nations, that is the law to be applied to it in judgment. No nation has ever more implicitly acknowledged this truth than the United States. The constitution of our Courts is such as to secure an inflexible administration of justice to foreigners as well as to our own citizens. No bending to the winds of occasional doctrine. Steady, erect, and independent, they have no guide and no

teacher but the law. Even our Courts of admiralty-a description of Courts elsewhere too subject to extraneous influence-have here been furnished with no direction but the law. No nation has had more occasion to insist upon the vigorous application of the law of nations. We have felt, as every nation simllarly circumstanced must feel, that a large portion of the justice due to our fellow-citizens is to be obtained only by means of the law of [38 U.S. 519, 538] nations; and we acknowledge it, not only for its justice, but that we may have the benefit of its provisions. It is a feeble exhibition of its virtue to speak only of its regulating the intercourse of nations. Its operation is upon individuals, and upon individual rights. The position that the law of nations is part and parcel of the common law, is supported by the highest and most venerable authority. Indeed, it has never been questioned, and more especially the law merchant. 1 Black. Com. 273. 4 Ibid. 67. Magna Charta, ch. 30, contains an express provision in favour of merchant strangers; which occasioned the striking remark of Montesquieu, 1. 20, ch. 14, that the English have made the protection of foreign merchants, one of the articles of their own liberty. In Triquest vs. Bath, 3 Burr. 1480, 1481. Lord Mansfield quotes Lord Talbot as declaring a clear opinion, 'That the law of nations, in its full extent, was part of the law of England.'-'That the law of nations was to be collected from the practice of different nations, and the authority of writers.' He quotes Lord Hardwicke to the same effect, and Lord Holt. Four names being thus associated, either of them alone sufficient to establish a point; and, collectively, making a weight of authority, only surpassed by the splendour of such an assemblage of luminaries. In Respublica vs. Longchamps, 1 Dall. 111, a criminal case, the indictment was upon the law of nations. M'Kean, Chief Justice, a very learned lawyer, and a very eminent man, says, 'The laws of nations form a part of the municipal laws of Pennsylvania.'-'This law, in its full extent, is part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers.' But why accumulate authorities upon a point which is every day adopted, acted upon, and confessed? The occasions for its application are of daily occurrence, and its application is daily made-sometimes unconsciously, I admit-by every tribunal in the land, from the highest to the lowest. Why take up time in insisting upon what is so manifest, so universally conceded? Manifest and conceded though it be, yet there is not always a full sense of its force and authority. This makes it necessary to say, as the truth really is, that the authority of the law of nations is exactly the same as that of the common law-it is as binding in matters of judicature-it is imperative and of absolute power. Its principles being known, can no more be set aside, evaded, or disregarded, than a settled principle of the common law. Call it comity: still it is law, and part of the rights of individuals, who are wronged if it be denied to them. This law is a part of the law of Alabama towards foreign nations. Its authority towards the states of this Union is even greater. They are united by an association at once national and federal. To their national character belongs the faculty of regulating all their commerce, of cultivating its growth, and improving and strengthening the commercial intercourse between the different parts of the nation. The spirit of such an association, which aims at an intimate, [38 U.S. 519, 539] and easy, and equal intercourse, demands that whatever there is of comity between nations, or by the practice of nations, should be enlarged among the associates. More especially is this true, as the care of commerce is intrusted to the government of the whole; as a common concern, affecting the general welfare. If by the practice of these states, under the influence of this spirit of the Constitution of the United States, there were to be an enlarged comity; it would become among them an enlargement of that branch of the law of nations, of full authority. That practice is inquirable into, (for no formal convention is necessary,) and, if ascertained, has the effect of law. This does not at all detract from the sovereignty of the states. On the contrary, it is the work of sovereign power attesting its existence. If it has been the universal practice to acknowledge each others' charters of incorporation, in contracts, that would make the law; even though (which is by no means the case) it were not so among independent nations. Of such a practice, some of the evidences will hereafter be adverted to, not as necessary, but because they may be useful. Certainly there can be no good reason for frowning upon, or seeking to destroy a practice, which is in harmony with the spirit of the Constitution; tends to the growth of commerce; and has a kindly influence upon the intercourse of brethren of one family.

Is this in any manner derogatory, or can it be prejudicial to the sovereignty or to the policy of the states? We have heard it argued that laws have no extra-territorial force, and many authorities cited to maintain the position. Properly understood, it is as true as it is familiar. The meaning is, that, proprio vigore, they have no such power: that is, they have none by virtue of any authority in the lawgiver. He cannot make a law to govern in another territory. It is because this is so, that a law of nations is necessary; founded in mutual convenience and in common consent, to ascertain a rule in individual cases. The comity of nations has furnished the rule. It is not on this account the less a rule of binding force. Huberus says, 'Every nation, from comity, admits that the laws of each nation in force within its own territorial limits, ought to be in force in all other nations, without injury to their respective powers and rights.' De Confl. Leg. l. 1, tit. 3, 2, p. 538. The proudest nations have adopted this maxim. How, then, can its adoption be derogatory to states

closely confederated? But if at any time such a practice, however long continued, should be found derogatory, impolitic, or inconvenient, is the evil without a remedy? The lawmaking power is to apply the corrective.

And here we naturally recur to the other branch of the law of Alabama, the statutory law, the exercise of the power of the lawmaking authority. Within the limits of the Constitution, this is admitted to be plenary; there is no other restriction. The legislature is competent to decide upon both points: the evil and the remedy. Of the duty of the Courts to respect the decision, when clearly made, there is no doubt. But that it belongs to the judiciary originally [38 U.S. 519, 540] to deal with either, cannot be assented to. The Courts are to expound the laws, not to make them. They have no faculties for such an inquiry. There is still another objection. The will of the legislature, however pronounced, is binding upon the judiciary. Their enactment is a positive exercise of legislative power. Their refusal to enact, where they have power, is equally significant of their opinion. Either is the will of the community, which is paramount. The legislature, too, can precisely adapt the remedy to the evil. Courts of justice cannot. They have no power to change the law from what it has been. Here, then, is the saving of what Huberus calls 'their respective powers and rights.' It is in the sovereign lawmaking power, and not in the administration of the law, that the saving authority is lodged. Having thus established that the law of nations is part of the law of Alabama, we come to these the only remaining inquiries:-- 1. What is the law of the case, according to the laws of nations, as they exist among independent nations, and by the practice of these states? 2. Is there any statute of Alabama Which alters the law? 1. But here we are met by an objection which, if well founded, puts the law of nations and the comity of nations entirely out of the case. It is said they do not apply, because the states of this Union are confederated and not independent states. (Opinion of the judge of the Circuit Court.) These states are at once confederated and independent states. They are, to all intents and purposes, independent and sovereign, except so far as they have given up their powers to the Union. 'For all national purposes embraced by the federal Constitution, the states and their citizens are one, united under one sovereign authority. In all other respects the states are necessarily foreign and independent of each other.' Bucknor vs. Finley, 2 Peters, 586. 590. Have Congress then the power, and have they exercised it, to supply the rule in all cases, where between independent sovereignities it is furnished by the law of nations; and where, from some source, it is indispensably requisite that it should be supplied? Do the laws of the United States define the rights of the domicil in cases of intestacy and succession? Do they decide what law shall govern the construction of contracts? Do they tell us where a contract shall be deemed to have been made? Do they determine how the capacity of parties shall be ascertained? Do they provide how the ages of majority, for different purposes, shall be determined? Do they settle, or afford the means of settling, any one of the innumerable questions arising from the conflict of laws? The Constitution makes provision for the cases of fugitives from justice and fugitives from labour, and that is all. But, speaking historically, there was a time when these states (then provinces) were entirely independent of each other. There was a time, afterwards, when they were united by a very loose and inadequate confederation. What law governed at those respective [38 U.S. 519, 541] periods? When and how has it been altered? There has been no alteration. There is scarcely a volume of reports in this Union, the reports of the decisions of this Court included, which has not the title Foreign Laws, and Foreign States; and does not embrace under them these states and their laws. There is not a digest, with any pretensions to the character of completeness, but has such a title. There is not a case discussed, in which a question arises, where the law of nations is not appealed to. The learned and most useful work of Judge Story upon the conflict of laws, applies it to the states throughout. And this Court has decided, sanctioning the judgment of the Circuit Court for the district of Pennsylvania, Lonsdale vs. Brown, 4 Wash. C. C. R. 81, that a bill drawn in one state upon another states, is a foreign bill. If this be an error, there certainly never was another instance of one so pervading and deeply rooted, and which so long escaped detection. We submit, however, respectfully, but confidently, that it is not an error. A law among these states, deciding those questions of continual occurrence which fall under the title of comity of nations, is of indispensable necessity much more important among themselves, than between any one of them, and nations foreign to our Union. In proportion as intercommunication becomes more rapid and easy, or, in other words, as the great ends and objects of the Union are attained, it becomes more and more important. Precisely because these states are at once confederated and independent, because there is a union and yet these are sovereign states, we cannot dispense with a law, which is in the spirit of union, but is essential to independent sovereignties. Comity is a sovereign attribute. It would, indeed, be very singular, if it were true, that a British corporation was entitled to be acknowledged in our Courts, but a corporation of the our own states was not.

Assuming that the law of nations does apply between the states of the Union; what is the rule of that law as applied to the present question?

The rights of a corporation, that is, its corporate rights, are all conferred by its charter, are all of equal authority, and from the same source of power. What are they? To have a corporate name and style. To have a common seal. To have succession. To sue and be sued by its corporate name. To be, by that name, a person in law, capable of contracting. To make by-laws. The power to transact business is not, properly speaking, granted by the charter, but the rights of the associators, which they would have individually or collectively, are restricted by it. The grant is limited to the particular kind of business, whatever it may be, or other kinds are expressly prohibited. In either case the body cannot transcend these limits. Thus incorporated, the body becomes a person in law; and is embraced by statutes which speak of persons, as well in criminal as in civil proceedings. United States vs. Amedy, 11 Wheat. 392. The United States vs. State Bank of North Carolina, 6 Peters, 29. Farmers Bank of Delaware vs. Elkton Bank of [38 U.S. 519, 542] Maryland, 12 Peters, 134, 135. Such a recognition of state corporations by the laws of the United States, as persons, having a lawful existence, is of course a recognition of them, by the same laws, as persons possessing all the faculties and attributes conferred upon them by their charters. To acknowledge them to be persons, when they are so by creation of law, is to acknowledge all that by law constitutes the persons so created. There can be no distinction. All the corporate privileges are of equal authority, as before remarked; and are from the same source. This person, thus constituted, is not so entirely artificial as to conceal or destroy the substantial character of the individuals associated under its name; nor to take away their rights, or release them from their obligations as citizens. Thus a corporation composed of citizens of one state, with proper averments on the record, may sue a citizen of another state in the Courts of the United States. Bank United States vs. Devaux, 5 Cranch, 61. Where a corporation is sued in the Circuit Court, it is prima facie evidence to support the averment of citizenship, that it is incorporated by a law of the state where it is sued. Catlet vs. Pacific Insurance Company, Paine's C. C. R. 594. It is only prima facie evidence. A bill in equity was filed by A, a citizen of New Jersey, against B and the Lehigh Coal and Navigation Company, an incorporated body in Pennsylvania. A plea to the jurisdiction set forth that four of the corporators, naming them, were citizens of New Jersey. The plea was sustained; the corporators being the real defendants, by their corporate name, and represented by their officers. Kirkpatrick vs. White, 4 Wash. C. C. R. 595. A foreign corporation, for the purpose of jurisdiction, is an alien. Society for Propagation of Gospel vs. Wheeler, 2 Gall. 105. 8 Wheaton, 464. The very case before the Court admits the jurisdiction, and of course admits the ground upon which the jurisdiction must rest. Here then is an association of individuals, clothed by law with certain faculties, which as individuals they would not have to transact business, which as individuals they might lawfully transact. The former are their franchises or privileges. They are united, and one and all conferred by territorial legislation. The substance of the matter is, that it is an exercise of individual rights under a form authorized by law. It cannot be distinguished in principle from the case of special partnerships under the laws of Pennsylvania and New York; where one person becomes the representative of all, just as the corporate name represents the individual corporators. They all make up the one person in law. It must be very obvious (and this is the conclusion sought) that the acknowledgment of this person, for any one its legal attributes, is as full a recognition of the law which created it, as an acknowledgment of the whole. Such a recognition is equally giving effect to extra- territorial legislation. In truth, it is an acknowledgment of the whole, for it admits the person created by law. As a person, having a lawful existence, all the faculties which constitute [38 U.S. 519, 543] the person are admitted, unless there be some of them that are prohibited. This seems an unavoidable though a tedious deduction.

Of the privileges conferred by the charter, one is to sue and be sued by the corporate name. Can such a corporation, being a foreign corporation, sue and be sued by its corporate name? If it can, the law which created it is acknowledged as operating, and of course the person is acknowledged as the law has made it; and that law, it cannot be denied, does give the power to contract in the corporate name.

The right of foreign states and corporations to sue can be traced in the books of the law for more than two centuries. The earliest case is that in B. A. 531, (E. 3, tit. Court de Admiraltie,) King of Spain's case in Admiraltie. Prohibition was granted, and trover directed at common law in the name of the King of Spain. 2 Bulstr. 322. (12 Jac. 1.) 1 Roll. 133. In Hob. 113, (Jac. 1, between 1614 and 1625,) the bill was dismissed, because it was in the name of the ambassador, and not of the King of Spain. Then follows the case of the Dutch West India Company vs. Henriquez, L. Ray. 1532, 1 Str. 612. (2 Geo. 2 A. D. 1729.) The company, a foreign corporation, sued by its name of reputation. The suit was sustained; and though the case was much litigated, and carried to the House of Lords; the right to sue was never denied. This case has always been considered as having finally settled the question. The cases which have since occurred have already been brought into view in the cause last argued, (by Mr. Ogden,) excepting King of Spain vs. Mullett, 2 Bligh. 31. There is still another case, of some note, in which we were all interested, where a great political corporation was allowed to sue, without dispute, and to recover in the Courts of England. United States vs. Smithson's

Executors, for the Smithsonian legacy.

The authorities in the United States are equally uniform. There are decisions in Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Louisiana, and probably in other states. The point is so thoroughly established, as to be assumed in argument. In Bustal vs. Commonwealth Insurance Company of Boston, 15 Serg. and Rawle, 173, the question was whether a foreign corporation was liable to the process of foreign attachment, Judge Rogers, delivering the opinion of the Supreme Court of Pennsylvania, says, 'The power of corporations to sue in personal actions is not restricted to corporations created by the laws of this commonwealth. If they can sue within a foreign jurisdiction, why should they not also be liable to suit in the same manner and under the same regulations as domestic corporations?' See also Williamson vs. Smoot, 7 Mart. Louisiana R. 31. Nor is the authority of this high Court wanting. In the Society for Propagating the Gospel vs. New Haven, 8 Wheat. 464, the right of a foreign corporation to sue is admitted. In the same vs. Town of Pawlet, 4 Peters, 480, the right is sustained; and the Court further decided that the corporate capacity is [38 U.S. 519, 544] admitted by pleading the general issue. If contested, it must be by a special plea in abatement, or in bar. Innumerable cases have occurred in which the question might have been raised. Instead of this, there are rules of pleading and rules of evidence, which assume the right to sue, as unquestionable. If the charter be put in issue, the foreign law must be produced. In no one of the decided cases was the suit maintained by virtue of any special law or right. They were all upon the ground of the common law. In no one of them (unless it be in Pindall vs. Marietta Bank) was the power to contract drawn in question, denied, or doubted. In 2 Bligh, 21, Lord Eldon puts a case of contract. 'Suppose the king were to send his jewels to be set by Rundell and Bridge, and the jewellers were not to deliver them up to the king, do you think the Courts of the country would not interfere?' Lord Redesdale says, 'I conceive there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy.'-'As to the proposition that a sovereign prince cannot sue, it would be against all ideas of justice.' No learning is necessary to understand such arguments as these. The highest legal attainments are never more fully exhibited than in direct appeals to good sense and justice. This doctine, as has been seen, of the right of the corporations of one state to sue in the other, is thoroughly incorporated into our system of jurisprudence. How then can it be said there is no comity between the states? It is established, that the law of the charter is recognised though granted by another state. The corporation is clothed everywhere with the character given by the charter. The whole question is thus settled as to all corporations. Can it be necessary further to examine the principle upon which this rests? In giving corporate powers, the foreign law operates rightfully within its own territory, as it does in giving validity or construction to a contract between individuals. It is the exercise of a strictly territorial power in the one act, as it is in other. There is nothing extra-territorial in either. The question is, what respect is yielded to it in another state? And the answer is found in the fact, that it is capable of suing as a domestic corporation may, which is evidence of unbounded respect. Story's Conflict of Laws, 64, sec. 65-67. We have been told that foreign executors, administrators, and guardians are not acknowledged. If this were so, it would prove nothing but that for good reasons these cases are excepted from the general operation of comity. But they are acknowledged. They cannot sue. This is the whole extent of the exception. A voluntary payment to them is good and valid. Besides, the executorship or administration of the domicil is regarded as the principal, and any other is only ancillary to it. So that for most, perhaps for all purposes except enforcing payment by suit, they are regarded. But as to contracts the ground of the matter is that the extra- territotial effect is by comity, adopting voluntarily the law of another [38 U.S. 519, 545] state, as a rule of decision where it is the proper and natural rule. This adoption is presumed unless the contrary be made apparent. Such is the doctrine of the common law of the states of this Union. And what would be the consequences of a contrary doctrine? 1. The inconvenience, mischief, and injustice that would result from establishing that a corporation can make no valid contract beyond the limits of the state creating it. Consider the immorality of urging and aiding the breach of contracts fairly made; especially if on one side executed. Public policy may sometimes require from the tribunals to withhold their aid from parties; but they do it from necessity, and always under a sense of the individual injustice and wrong that are done. It is a casual advantage to dishonesty, which ought not to be often presented, nor unless there be a clear prohibition. What possible inducement is there here? Consider also the great injury to commerce and trade. Sales for incorporated manufacturing companies, to the amount of millions of dollars annually, are made by their agents. What possible reason can be given for declaring all such transactions illegal and void? Insurances are made by incorporated companies against fire, and against marine risks. Are the policies to be declared void? To what good end? Again: it must embrace all contracts, implied as well as express; for if it be unlawful to make an express promise, surely the law will not imply one. No two corporations, in different states, can make any contract with each other. For one of them must unavoidably contract out of the state where it is chartered. Obligations and notes of corporations, even bank notes, passed in another state, must become void, because there is a new contract with the holder. There would be no end to the enumeration of the mischiefs

which would flow from such a decision. 2. The capacity of corporations to make contracts beyond their states, and the exertion of that capacity, are supported by uniform, universal, and long-continued practice. How many of our corporations have made contracts in England, by their agents? How many have made contracts in other states? How many such contracts are now pending, where the consideration on one said has been fully paid? It surpasses all power to estimate them. What disorder and gross wrong would be caused by introducing a principle that would declare them illegal and void! And for what good purpose? To abolish a common law found convenient and just, and adopted as it were by the whole people. But of this adoption there is more authentic evidence than this; more tangible, more cognizable in a Court of justice. There is every kind of evidence. 1. Judicial. Unless it be in a single case, to be adverted to presently, which really is not an exception, there is not an instance of such an objection ever being made. This silence is not without significance, for cases have been of daily occurrence. [38 U.S. 519, 546] There is affirmative evidence too. Society for Propagating the Gospel vs. Wheeler, 8 Wheat. 464, is to the point. Pindall vs. The Marietta Bank, 2 Rand., 465, admits that what are there termed 'secondary contracts,' may be made. If it seem to go further, and question the validity of primary contracts, it is proper to remark that the action was sustained; and therefore the saying would be merely obiter, and of little weight, notwithstanding the high authority of the Court. But what is said has express reference to banking operations, and the restraints upon them by the laws of Virginia. Judge Cabell says, 'It is our policy to restrain all banking operations by corporations not established by our laws. It would not therefore be permitted to a bank in Ohio to establish an agency in this state for discounting notes, or carrying on other banking operations; nor could they sustain an action upon notes thus acquired by them.' The policy here referred to is apparent from the statutes of Virginia. Tait's Dig., 41, &c. Let the Court of Appeals however be its own expositor. In Reese vs. Conococheague Bank, 5 Rand., 326, Green, Justice, says, 'It was decided, 2 Rand., 465, that a foreign corporation may sue in our Courts, upon a contract with them, valid according to the laws of the country in which it was made; unless it was contrary to the policy of our laws: and the making a note in Virginia to be discounted at a foreign bank is not so.' Thus explained the case admits the power to make contracts by all corporations, excepting primary ones by banks for carrying on banking operations, and by banks for all others. We might therefore lawfully buy a bill of exchange in Virginia; and so the case is really an authority in our favour.

2. Legislative. The Chesapeake and Ohio Canal Company, an incorporated company, sent an agent to Europe to borrow a million of dollars, to be secured by mortgage upon the three local corporations within this district; and the United States, under an act of Congress, guarantied the payment of the interest. Was this a void contract, being made abroad? The contracts made the treasury with the state banks, about the deposit of the public moneys, were made in law, as we have seen, and probably in fact too, in the city of Washington. Were they void? The same question might be put as to the contracts the deposit banks were to make with each other; which as to one of them could not fail to be beyond the limits of its charter. Contracts of the postoffice department with railroad companies, are they all void? These are all instances of contracts with or by corporations beyond their territorial limits, and yet they are recognised by acts of Congress as good.

The methods of proceeding by state legislatures are to the same effect. In New York there is a law against banking, and a law against foreign insurance companies, (companies out of the United States,) and their agents. In Pennsylvania there are similar laws. Purd. Dig., 68. 368. In Virginia. Tate's Dig. 41. In Alabama there was a law in 1827, since repealed. And so of other states. [38 U.S. 519, 547] How far such prohibitory laws may be carried by state legislation, without violating the rights of other states and their citizens under the Constitution of the United States, is not now the question. They are adduced only as evidence of the concurrence of the state legislation with the legislation of the United States, that corporations could lawfully contract out of their territorial limits unless they were prohibited. Else why should there be prohibition? The New York law prohibited foreign insurance companies, properly so called, from insuring in New York. If there was any sense in the act, it must follow that insurance companies of other states may still insure in New York. This is high and authentic evidence of the law from the highest sources. Have the people, the legislatures, the judiciary, and the executive, all been hitherto in error from the time when the United States, in their need, made their loan in Holland up to the present time?

The answer is plain. What is not prohibited is lawful, and is under the protection of the law. A corporation has a twofold claim. It has a claim to respect for the law of its creation, and it has a claim to respect for the rights and privileges of the individuals who compose it. The former is sufficient for the present purpose. The latter need not be asserted unless there should be a prohibition, which under colour of inhibiting the exercise of corporate powers, should really assail the constitutional rights of the citizen.

It remains only to consider whether there is any law of the state of Alabama, which forbids the purchase of a bill of exchange within her limits by a corporation of another state. Mobile, it appears, is a market where bills are to be bought, and where it must be for the interest of sellers that buyers should freely come. One does not easily perceive what policy there can be to the contrary, unless it be to enable the state bank of Alabama in some measure to command the market, by excluding competition as far as possible. But whatever was thus gained by the buyer would be lost by the seller. The more buyers the better for the seller; the better for Mobile; the better for Alabama. Nor is it objectionable because the buyer is a bank. Such a purchase, though it be the operation of a bank, is not a banking operation. What is meant by banking is well understood and defined. It consists of lending or discounting, receiving on deposit, and issuing paper. Maine Bank vs. Butts, 9 Mass., 54. People vs. The Utica Insurance Company, 15 Johns. 390. New York Firemen Insurance Company vs. Ely, 5 Conn., 560. Accordingly the prohibitory laws of the states point their prohibitions and penalties against one or all of these. A banking charter would not, by giving banking privileges, authorize the dealing in bills of exchange. When such a power is deemed requisite, it is expressly given, as something superadded. A prohibition of banking would not prohibit the buying exchange by corporations or by individuals. The policy of such prohibitory statutes would not be contravened by buying bills of exchange. A company incorporated [38 U.S. 519, 548] for buying bills of exchange would not be a bank either in a popular or in a legal sense. Such would have been the clear law to be applied to the case, if there had been any legislative act against banking in Alabama at the time of this transaction. Neither the prohibition nor the policy of the act would have been encountered by the purchase of a bill of exchange. But there was none. The second section of the act of 1827 was a general law. 1 Stewart's Reports, 301, 302. In 1833 Aikin's Digest was established, and all laws of 'a general and public nature' not included in it, were repealed from and after the 1st of January then next. Dig. 301, sec. 5. This law is not included in the Digest, and therefore it is repealed. It was under this law, while it was in force, that Stebbins and others were indicted. Stewart's Rep. 300. The charge was for issuing bank notes. The case is not unlike the case of The Utica Insurance Company, in 15 Johns., though the mode of proceeding was different. The defendants were indicted as individuals, and attempted to justify themselves under a very loose and extraordinary charter; which did not define their powers, and was therefore contended to be without restriction or limitation. Towards the close of the opinion, the learned judge speaks of the issuing of bank notes, as being a franchise under the constitution of Alabama. The charter is a franchise, but it is not perceived that the acts which might be done by an individual, if not prohibited by law, can with propriety be so called, according to the legal import of the term. 10 Petersdoff, 53, (77,) note. 4 Com. Dig. 450. But be that as it may, as regards the issuing of bank notes, it cannot be pretended that the buying or holding a bill of exchange is a franchise. If it be, it would follow, according to the decision in Stebbins' case, that under the act of 1827, an individual might be indicted for buying a bill of exchange. This proves too much. The Constitution has no bearing upon the question. It provides in detail for the establishment of a state bank and branches, and limits the number of banks the legislature may establish. Aik. Dig. 55, 56. The state bank is specially authorized to purchase bills of exchange, conceding that it would not otherwise possess the power; but there is nothing to prohibit individuals or other corporations from buying them, nor from which any such prohibition can be implied. It would indeed be derogatory to the character of the state of Alabama, to suppose that she would be so wanting to her own true policy, and to the duties she owes to the citizens of her own state and of other states, as to deprive them of the use of the ordinary means of transferring their funds, for the sake of conferring an odious and unjust, and probably fruitless monopoly upon her own bank. The only effect would be, to impose upon her citizens the vexation and expense of going abroad in quest of purchasers, instead of having purchasers to come to them. It is submitted that the judgment below is erroneous; that it ought [38 U.S. 519, 549] to be reversed; and judgment on the case stated be entered for the plaintiffs. Mr. Webster, also of counsel with Mr. Sergeant for the United States Bank. The United States Bank is a corporation created by a law of the state of Pennsylvania. By that act the bank, among other functions, possesses that of dealing in bills of exchange. In the month of January, 1837, having funds in Mobile, this bank, through the instrumentality of its agent, Mr. Poe, purchased a bill of exchange to remit to New York. This bill, drawn at Mobile upon New York, and endorsed by William D. Primrose, the defendant in this case, not having been paid either at New York or by the drawer, the Bank of the United States instituted this suit in the Circuit Court of Alabama to recover the money due on the bill. In the Court below it was decided that the contract by Poe in behalf of the bank was void, on two grounds. 1. Because it was a contract made by the United States Bank, in the state of Alabama; whereas a bank incorporated by the state of Pennsyl vania can do no act out of the limits of Pennsylvania. 2. Because Alabama has a bank of her own, the capital of which is owned by the state herself, which is authorized to buy and sell exchange, and from the profits of which she derives her revenue; and the purchase of bills of exchange being a banking operation, the purchase of such bills by others, at least by any corporation, although there is no express law forbidding it, is against the policy of the state of Alabama; as it may be inferred from the provisions of the constitution of that state, and the law made in conformity

thereto. It is admitted that the parties are rightfully in Court. It is admitted also that the defendant is a citizen of Alabama, and that all the citizens who compose the corporation of the United States Bank are citizens of the state of Pennsylvania, or of some other state besides Alabama. The question is, can they as a corporation do any act within the state of Alabama? In other words, is there any thing in the constitution or laws of the state of Alabama which prohibits, or rightfully can prohibit, citizens of other states, or corporations created by other states, from buying and selling bills of exchange in the state of Alabama? In his argument for the defendant in this case, my learned friend, Mr. Vande Gruff, asked certain questions, which I propose to answer. Can this bank, said he, transfer itself into the state of Alabama? Certainly not. Can it establish a branch in the state of Alabama, there to perform the same duties and transact the same business in all respects as in the state of Pennsylvania? Certainly not. Can it exercise in the state of Alabama any of its corporate functions? Certainly it can. For my learned friend admits its right to sue in that state, which is a right that it possesses solely by the [38 U.S. 519, 550] authority of the Pennsylvania law by which the bank is incorporated. We thus clear the case of some difficulty by arriving at this point, the admission on both sides that there are certain powers which the bank can exercise within the state of Alabama, and certain others which it cannot exercise. The question is, then, whether the bank can exercise within the state of Alabama this very power of buying a bill of exchange? Our proposition is, that she can buy a bill of exchange within the state of Alabama: because there are no corporate functions necessary to the act of buying of a bill of exchange: because buying and selling exchange is a thing open to all the world, in Alabama as well as everywhere else: because, although the power to buy and sell bills of exchange be conferred upon this bank by its charter, and it could not buy or sell a bill of exchange without that provision in its charter, yet this power was conferred upon it, as were other powers conferred by its charter, to place the bank upon the same footing as an individual; to give it not a monopoly, not an exclusive privilege in this respect, but simply the same power which the members of the corporation as individuals have an unquestionable right to exercise. The banker, the broker, the merchant, the manufacturer, all buy bills of exchange as individuals. The individuals who compose a corporation may do it; and we say that they may do it, though they do it in the name of, and for the corporation. We say, undoubtedly, that they cannot acquire power under the Pennsylvania charter to do acts in Alabama which they cannot do as individuals; but we say that the corporation may do in their corporate character in Alabama, all such acts authorized by their charter as the members thereof would have a right to perform as individuals. The learned counsel on the other side was certainly not disposed to concede gratuitously any thing in this case. Yet he did admit that there might be a case in which the acts of a corporation, created by one state, if done in another state, would be valid. He supposed the case of a railroad company in one state sending an agent into another state to buy iron for the construction of the road. Without conceding expressly the point of law in that case, he admitted that it would be a case very different from the present; and he gave as a reason for this admission, that it would be a single special act, necessary to enable the corporation to execute its functions within the state to which it belonged; and in this respect differing from the case now under consideration. In what circumstance, it may well be asked, do the cases differ? One act only of the corporation of the United States Bank is set forth in this record, and that act stands singly and by itself. There is no proof before the Court that the corporation ever bought another bill of exchange than that which is the subject of this suit. Transactions of this nature must necessarily come one by one before this Court when they come at all, and must stand or fall on their individual merits, and not upon [38 U.S. 519, 551] the supposition of any policy which would recognise the legality of a single act, and deny the validity of the dealings or transactions generally of which that act is a part. Then, as to the other reason stated by my learned friend in support of the idea that such a purchase of iron might be supported, he says it is because that, in that case, the purchase being made abroad solely to enable the corporation to perform its functions at home, might be considered legal under the law of comity from one state to another. Now, said Mr. Webster, that supposed case is precisely the case before the Court. Here is the case of a corporation established in Philadelphia, one of whose lawful functions is to deal in exchange. A Philadelphia merchant, having complied with the order of his correspondent in Alabama, draws a bill upon him for the amount due in consequence, goes to the United States Bank, and sells the bill. The funds thus realized by the bank from the purchase of bills of exchange accumulate in Alabama. How are those funds to be brought back by the Philadelphia corporation within its control? The bank has unquestioned power to deal in bills of exchange. Can there be such a thing as dealing in exchange, with a power to act only on one end of the line? Certainly not. How then is the bank in Philadelphia to get its funds back from Alabama? Suppose that it were to send an agent there, and buy specie. Can the bank ship the specie? Can it sign an agreement for the freight, insurance, and charges of bringing it round? To do that would be an act of commerce, of navigation, not of exchange. A power conferred upon a bank to deal in exchange would be perfectly nugatory, unless accompanied by a power also to direct its funds to be remitted. The practical result of a contrary construction would be, that this Pennsylvania bank may carry on exchange between Philadelphia and Reading, or Philadelphia and Lancaster, but not by possibility with Mobile, or any other city or place in the south, or

even with New York, Trenton, or Baltimore. Out of Pennsylvania it could only buy and remit. It could get no return. An exchange that runs but one way! What sort of an exchange is that? Having cleared the case of some of these generalities, Mr. Webster proceeded to the exposition of what he considered a constitutional, American view of the question. The record of this case finds that these plaintiffs, the members of the corporation of the United States Bank, are citizens of other states, and that the defendant is a citizen of Alabama. Now, in the first place, to begin with the beginning of this part of the question, what are the relations which the individual citizens of one state bear to the individual citizens of any other state of this Union? How did the matter stand before the Revolution? When these states were colonies, what was the relation between the inhabitants of the different colonies? Certainly it was not that of aliens. They were not indeed all citizens of the same colony; but certainly they were fellow- subjects, and owed a common allegiance; and it was [38 U.S. 519, 552] not competent for the legislative power to say that the citizens of any one of the colonies should be alien to the other. This was the state of the case until the 4th of July, 1776, when this common allegiance was thrown off. After a short interval of two years, after the renunciation of that allegiance, the articles of confederation were adopted; and now let us see what was the relation between the citizens of the different states by the articles of confederation. The government had become a confederation. But it was something more-much more. It was not merely an alliance between distinct governments for the common defence and general welfare, but it recognised and confirmed a community of interest, of character, and of privileges, between the citizens of the several states. 'The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union,' said the fourth of the articles of confederation, 'the free inhabitants of each of these states shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce,' &c. This placed the inhabitants of each state on equal ground as to the rights and privileges which they might exercise in every other state. So things stood at the adoption of the Constitution of the United States. The article of the present Constitution, in fewer words and more general and comprehensive terms, confirms this community of rights and privileges in the following form: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' However obvious and general this provision may be, it will be found to have some particular application to the case now before the Court; the article in the confederation serving as the expounder of this article in the Constitution. That this article in the Constitution does not confer on the citizens of each state political rights in every other state, is admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that state; though, when he has acquired a residence in Virginia, and is otherwise qualified as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that state politically. But for the purposes of trade, commerce, buying, and selling, it is evidently not in the power of any state to impose any hinderance or embarrassment, or lay any excise, toll, duty, or exclusion, upon citizens of other states, to place them, coming there upon a different footing from her own citizens. There is one provision then in the Constitution, by which citizens of one state may trade in another without hinderance or embarrassment. There is another provision of the Constitution by which citizens of one state are entitled to sue citizens of any other state in the Courts of the United States. This is a very plain and clear right under the Constitution; but it is not more clear than the preceding. [38 U.S. 519, 553] Here then are two distinct constitutional provisions conferring power upon citizens of Pennsylvania and every other state, as to what they may do in Alabama or any other state: citizens of other states may trade in Alabama in whatsoever is lawful to citizens of Alabama; and if, in the course of their dealings, they have claims on citizens of Alabama, they may sue in Alabama in the Courts of the United States. This is American, constitutional law, independent of all comity whatever. By the decisions of this Court it has been settled that this right to sue is a right which may be exercised in the name of a corporation. Here is one of their rights then which may be exercised in Alabama by citizens of another state in the name of a corporation. If citizens of Pennsylvania can exercise in Alabama the right to sue in the name of a corporation, what hinders them from exercising in the same manner this other constitutional right, the right to trade? If it be the established right of persons in Pennsylvania to sue in Alabama in the name of a corporation, why may they not do any other lawful act in the name of a corporation? If no reason to the contrary can be given, then the law in the one case is the law also in the other case. My learned friend says, indeed, that suing and making a contract are different things. True; but this argument, so far as it has any force, makes against his cause; for it is a much more distinct exercise of corporate power to bring a suit, than by an agent to make a purchase. What does the law take to be true, when it says that a corporation of one state may sue in another? Why, that the corporation is there, in Court, ready to submit to the Court's decree, a party on its record. But in the case of the purchase of the bill of exchange, such as is the subject of this suit, what is assumed? No more than that George Poe bought a bill of exchange, and paid the value for it, on account of his employers in Philadelphia. So far from its being a more natural right for a corporation to be allowed to sue, it is a more natural right to be allowed to trade in a state in which the corporation does not exist. What

is the distinction? Buying a bill of exchange is said to be an act, and therefore the corporation could not do it in Alabama. Is not a suit an act? Is it not doing? Does it not, in truth, involve many acts? The truth is, that this argument against the power of a corporation to do acts beyond the territorial jurisdiction of the authority by which it is created, is refuted by all history as well as by plain reason. What have all the great corporations in England been doing for centuries back? The English East India Company, as far back as the reign of Elizabeth, has been trading all over the eastern world. That company traded in Asia before Great Britain had established any territorial government there, and in other parts of the world, where England never pretended to any territorial authority. The Bank of England, established in 1694, has been always trading and dealing in exchanges and bullion with Hamburg, Amsterdam, and other marts of Europe. Numerous other corporations have been [38 U.S. 519, 554] created in England, for the purpose of exercising power over matters and things in territories wherein the power of England has never been exerted. The whole commercial world is full of such corporations, exercising similar powers, beyond the territorial jurisdiction within which they have legal existence. I say, then, that the right, secured to the people of Pennsylvania, to sue in any other state in the name of a corporation, is no more clear than this other right of such a corporation to trade in any other state; nor even so clear: it is a farther fetched legal presumption, or a much greater extent of national courtesy or comity, to suppose a foreign corporation actually in Court, in its legal existence, with its legal attributes, and acting in its own name, than it is to allow an ordinary act of trade, done by its agent, on its own account, to be a valid transaction. Mr. Webster here referred to an opinion of this Court directly bearing on this question. It was the case of the Bank of the United States vs. Deveaux, decided in 1809. The bank here mentioned was the first Bank of the United States, which had not, like the last, express authority given in its charter, to sue in the Courts of the United States. It sued, therefore, as this plaintiff sues, in its name as a corporation; but with an averment, as here, that its members were citizens of Pennsylvania, the action being brought against a citizen of Georgia. The only question was, whether the plaintiffs might not exercise their constitutional right to sue in the Courts of the United States, although they appeared in the name of their Pennsylvania corporation; and the Court decided that they might. 'Substantially and essentially,' said Chief Justice Marshall, 'the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals.' 'That corporations composed of citizens, are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering acts. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.' The argument here is, that citizens may exercise their rights of suing, as such citizens, in the name of their corporation; because, in such a name, the law recognises them as competent to engage in transactions, hold property, and enjoy rights proper for them as citizens. If the Court agree in this language of its own opinion as far back as the year 1809, it must be admitted that the rights of the people of Pennsylvania, as citizens of the United States, are not merged in the act of incorporation by which they are associated, and under which they are parties to this suit. If there ever was a human [38 U.S. 519, 555] being that did not argue to the obscure from the more obscure, it was certainly the late Chief Justice of the United States. And what was his argument to prove that the citizens of one state may sue in another by a corporate name? It is, as I have said, that they may sue by a corporate name, because they can do acts out of Court by a corporate name; whilst, directly reversing this conclusion, it has been held in this case, in the Court below, that, whilst a corporation of one state may rightfully sue in another state, it cannot do any other act therein. In this view of the case, said Mr. Webster, I see no occasion to invoke the law of comity or international courtesy to our aid. Here our case stands, independently of that law, on American ground, as an American question. Now, as to the reason of the case. What possible difference can it make, if these citizens of Pennsylvania can trade, or buy and sell bills, in Alabama, whether the trading, or buying and selling, be under one agency or another? That Poe (the agent of the United States Bank at Mobile) could, under a power of attorney from a citizen of Philadelphia, buy and sell bills of exchange in Alabama, will not be denied. If, without an act of incorporation, several citizens of Philadelphia should form an association to buy and sell bills of exchange, with five directors or managers of its concerns, those five directors may send as many agents as they please into other states to buy bills of exchange, &c. Having thus formed themselves into this associated company, and appointed agents for the purpose of transacting their business, if they should go one step further, and obtain a charter from Pennsylvania, that their meetings and proceedings may be more regular, and the acts of the association more methodical, what would be the difference, in the eye of reason, between the acts of the members of such a corporation, and the acts of the same individuals, associated for the same purposes, without incorporation, and acting by common agents, correspondents, or attorneys! The officers of a bank are but the agents of the proprietors; and their purchases and sales are founded upon their property, and directed by their will, in the same manner as the acts of agents of

unincorporated associations or partnerships. The Girard Bank, we all know, was never incorporated until after Mr. Girard's death; yet its proprietor, during a considerable part of his life, and until his death, acted as a banker. Could he not, during his life, send an agent into Alabama, and there purchase bills of exchange? And if his neighbours over the way chose to ask for an act of incorporation from the state of Pennsylvania, are they thereby less entitled to the privileges common to all other citizens, than Stephen Girard was? I agree, certainly, generally, that a state law cannot operate exterritorially, as the phrase is. But it is a rule of law that a state authority may create an artificial being, giving it legal existence; and that that being, thus created, may legally sue in other states than that by which it is created. It follows, of course, as a consequence [38 U.S. 519, 556] of the right of suit in another state, that it may obtain judgment there. If it obtain judgment, it may accept satisfaction of that judgment. If a judgment be obtained in Alabama by the United States Bank, would not an acknowledgment of satisfaction by an agent of the bank be a satisfaction of the decree of the Court? How is the fruit of a suit to be gathered, if the bank, by its agent, cannot do this act? What benefit can it be to this bank to be allowed to sue in Alabama, if it cannot take the money sued for? But it is said by the Court below, that it cannot recover money in Alabama, because it cannot do an act there! According to this argument, although the power to appeal to law, and the power to recover judgment exist, yet the fructus legis is all dust and ashes. On the commercial branch of this question (Mr. Webster continued) he would say but little. But this much he would say: The state of Alabama cannot make any commercial regulation for her own emolument or benefit, such as should create any difference between her own citizens and citizens of other states. He did not say that the state of Alabama may not make corporations, and give to them privileges which she does not give to her citizens. But he did say, that she cannot create a monopoly to the prejudice of citizens of other states, or to the disparagement or prejudice of any common commercial right. Suppose that a person having occasion to purchase bills of exchange should not like the credit of bills sold by the Bank of Alabama; or suppose (what is within the reach of posibility) that the Bank of Alabama should fail; may not a citizen buy bills elsewhere? Or is it supposed that the state of Alabama can give such a preference to any institution of her own in the buying and selling of exchange, that no exchange can be bought and sold within her limits, but by that institution? It would be, doubtless, doing the state great injustice to suppose that she could entertain any such purpose. In conclusion of the argument upon this point, said Mr. Webster, I maintain that the plaintiffs in this case had a right to purchase this bill and to recover judgment upon it. For the same reason that they had a right to bring this suit, they had the right to do the act upon which the suit was brought. But if the rights of the plaintiffs, under this constitutional view of the case, be doubted, then what has been called the comity of nations obliges the Court to sustain the plaintiffs in this cause. The term 'comity' is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both natural and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these, is the right to sue in their Courts respectively; the right to travel in each other's dominions; the right to pursue one's vocation in trade; the right to do all things, generally, which belong to the citizens proper of each country, and which they are not precluded [38 U.S. 519, 557] from doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations. It is the usage of nations, and has become a positive obligation on all nations. I know, said Mr. Webster, that it is but a customary or voluntary law; that it is a law existing by the common understanding and consent of nations, and not established for the government of nations by any common superior. For this reason, every nation, to a certain extent, judges for itself of the extent of the obligation of this law, and puts its own construction upon it. Every other nation, however, has a right to do the same; and if, therefore, any two nations differ irreconcileably in their construction of this law, there is no resort for settling that difference but the ultima ratio regum.

The right of a foreigner to sue in the Courts of any country may be regulated by particular laws or ordinances of that country. He may be required to give security for the costs of suit in any case, or not to leave the country until the end of the controversy. He may possibly be required to give security that he will not carry his property out of the country till his debts are paid. But if, under pretence of such regulation, any nation shall impose unreasonable restrictions or penalties on the citizens of any other nation, the power of judging that matter for itself lies with that other nation. Suppose that the government of the United States, for example, should say that every foreigner should pay into the public treasury ten, twenty, or fifty per cent. of any amount which he might recover by suit in our Courts of law; would such a regulation be perfectly just and right? Or would not the practice of such extortion upon the citizens of other nations be a just ground of complaint, and, if unredressed, a ground of war, much more sufficient than most of the causes which put nations in arms against one another? What is, in fact, now the question, which has assumed so

serious an aspect, between the governments of France and Mexico? One of the leading causes of difference between the two countries, so far as I understand it, is not that the Courts of Mexico are not open to the citizens or subjects of France, but that the Courts do not do justice between them and the citizens of Mexico; in other words, that French subjects are not treated in Mexico according to the comity of the law of nations. [Mr. Webster said he did not speak of the merits of this quarrel: into that he did not enter; he spoke only of things alleged between the parties.] Look, said Mr. Webster, into Vattel, and you will find that this very right to carry away property, the proceeds of trade from a foreign friendly country, by exchange, is a well understood and positive part of the law of nations. Suppose that there existed no treaties between the United States and France or England guarantying these rights to each other's citizens: those rights would yet exist by tacit consent and permission. Suppose this government, in the absence of treaties, were to shut its Courts [38 U.S. 519, 558] against the citizens of either nation, (to do so would be only a violation of the comity of nations,) and should grant them no redress upon complaint being made: it might unquestionably be ground of war against the United States by that nation.

There are in London several incorporated insurance companies. Suppose a ship insured by one of these companies should be wrecked in the Chesapeake bay. Being abandoned she becomes the property of the corporation by which she was insured. I demand whether the insurers may not come and take this property, and bring an action for it, if necessary, in any Court in this country, state or federal? They may recover by an action of tort against the wrongdoer. They may replevy their property, if necessary, or sell it; or refit it; or send it back. Unquestionably, if any country were to debar the citizens of another country of the enjoyment of these common rights within its territorial jurisdiction, it would be cause of war. I do not mean that a single act of that sort would or should bring on a war; but it would be an act of that nature, so plain and manifest a violation of our duty under the law of nations, as to justify war. According to the judgment of the Court below in the present case, however, these insurance companies would be deprived of their rightful remedy. You let them sue, indeed; but that is all.

Mr. Webster here referred to a case tried some time ago in the Circuit Court of the Massachusetts district, in which he was counsel, in which a vessel insured in Boston was wrecked in Nova Scotia, and was abandoned to the insurers. The insurance office sent out an agent, who did that which the owner of the vessel said was an acceptance of the abandonment. On the question whether the agent of the Boston office accepted the abandonment, (said Mr. Webster,) the Court decided the case. If we had said that we sent him down, indeed, but that his agency ceased when he got to the boundary line of the state, and he could do no act when he got beyond it, and the Court had agreed with us, we might, perhaps, have gained our cause. But it never occurred to me, nor probably to the Court, that the agency of our agent terminated the moment that he passed the limits of the state.

The law of comity is a part of the law of nations; and it does authorize a corporation of any state to make contracts beyond the limits of that state.

How does a state contract? How many of the states of this Union have made contracts for loans in England? A state is sovereign, in a certain sense. But when a state sues, it sues as a corporation. When it enters into contracts with the citizens of foreign nations, it does so in its corporate character. I now say, that it is the adjudged and admitted law of the world, that corporations have the same right to contract and to sue in foreign countries, as individuals have. By the law of nations, individuals of other countries are allowed in this country to contract and sue; and we make no distinction, in the case of individuals, between the right to sue and [38 U.S. 519, 559] the right to contract. Nor can any such distinction be sustained in law in the case of corporations. Where, in history, in the books, is any law or dictum to be found (except the disputed case from Virginia) in which a distinction is drawn between the rights of individuals and of corporations to contract and sue in foreign countries in regard to things, generally, free and open to everybody? In the whole civilized world, at home and abroad, in England, Holland, and other countries of Europe, the equal rights of corporations and individuals, in this respect, have been undisputed until now, and in this case; and if a distinction is to be set up between them at this day, it lies with the counsel on the other side to produce some semblance of authority or show of reason for it. But it is argued, that though this law of comity exists as between independent nations, it does not exist between the states of this Union. That argument appears to have been the foundation of the judgment in the Court below. In respect to this law of comity, it is said, states are not nations; they have no national sovereignty; a sort of residuum of sovereignty is all that remains to them. The national sovereignty, it is said, is conferred on this government, and part of the municipal sovereignty. The rest of the municipal sovereignty belongs to the states. Notwithstanding the respect which I entertain for the learned judge who presided in that Court, I cannot follow in the

train of his argument. I can make no diagram, such as this, of the partition of national character between the state and the general governments. I cannot map it out, and say so far is national, and so far municipal; and here is the exact line where the one begins and the other ends. We have no second Laplace, and we never shall have, with his M echanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision. There is no such thing as arranging these governments of ours by the laws of gravitation, so that they will be sure to go on forever without impinging. These institutions are practical, admirable, glorious, blessed creations. Still they were, when created, experimental institutions; and if the convention which framed the constitution of the United States had set down in it certain general definitions of power, such as have been alleged in the argument of this case, and stopped there, I verily believe that in the course of the fifty years which have since elapsed, this government would have never gone into operation. Suppose that this Constitution had said, in terms, after the language of the Court below-all national sovereignty shall belong to the United States; all municipal sovereignty to the several states. I will say, that however clear, however distinct, such a definition may appear to those who use it, the employment of it in the Constitution could only have led to utter confusion and uncertainty. I am not prepared to say that the states have no national sovereignty. The laws of some of the states-Maryland and Virginia, for instance-provide punishment for treason. The power thus exercised [38 U.S. 519, 560] is certainly not municipal. Virginia has a law of alienage: that is, a power exercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy- enemy to whom? The law of escheat, which exists in all the states, is also the exercise of a great sovereign power. The term 'sovereignty' does not occur in the Constitution at all. The Constitution treats states as states, and the United States as the United States; and by a careful enumeration declares all the powers that are granted to the United States, and all the rest are reserved to the states. If we pursue, to the extreme point, the powers granted, and the powers reserved, the powers of the general and state governments will be found, it is to be feared, impinging, and in conflict. Our hope is, that the prudence and patriotism of the states, and the wisdom of this government, will prevent that catastrophe. For myself, I will pursue the advice of the Court in Deveaux's case; I will avoid nice metaphysical subtilties, and all useless theories; I will keep my feet out of the traps of general definition; I will keep my feet out of all traps: I will keep to things as they are, and go no further to inquire what they might be, if they were not what they are. The states of this Union, as states, are subject to all the voluntary and customary law of nations. [Mr. Webster here referred to, and quoted a passage from Vattel, (page 61,) which, he said, clearly showed that states connected together as are the states of this Union, must be considered as much component parts of the law of nations as any others.] If, for the decision of any question, the proper rule is to be found in the law of nations, that law adheres to the subject. It follows the subject through, no matter into what place, high or low. You cannot escape the law of nations in a case where it is applicable. The air of every judicature is full of it. It pervades the Courts of law of the highest character, and the Court of pie poudre; ay, even the constable's Court. It is part of the universal law. It may share the glorious eulogy pronounced by Hooker upon law itself: that there is nothing so high as to be beyond the reach of its power, nothing so low as to be beneath its care. If any question be within the influence of the law of nations, the law of nations is there. If the law of comity does not exist between the states of this Union, how can it exist between a state and the subjects of any foreign sovereignty? Upon all the consideration that I have given to the case, the conclusion seems to me inevitable, that if the law of comity do not exist between the states of this Union, it cannot exist between the states individually and foreign powers. It is true a state cannot make a treaty; she cannot be a party to a new chapter on the law of nations: but the law which prevails among nations-the customary rule of judicature, recognised by all nations-binds her in all her Courts. I have heard no answer to another argument. If a contract be made in New York, with the expectation that it is to be there executed, [38 U.S. 519, 561] and suit is brought upon it in Alabama, it is to be decided by the law of the state in which the contract was made. In a case now before this Court, there has been a decision by the Court of Alabama, in which that Court has undertaken to learn the law of the state of New York, and administer it in Alabama. Why take notice in Alabama of the law of New York? Because, simply, there are cases in which the Courts in Alabama feel it to be their duty to administer that law, and to enforce rights accordingly. That, said Mr. Webster, is the very point for which we contend, viz.: the Court in Alabama should have given effect to rights exercised in that state by the plaintiff in the present cause, under the authority of Pennsylvania, without prejudice to the state of Alabama. After all that has been said in argument about corporations, they are but forms of special partnerhip, in some of which the partners are severally liable. The whole end and aim of most of them, as with us, is to concentrate the means of small capitalists in a form in which they can be used to advantage. In the eastern states, manufactures, too extensive for individual capital, are carried on in this way. A large quantity of goods is manufactured and sold to the south, out of cotton bought in the south, to the amount of many millions in every year. Upon the principle of the decision in the Court below, the manufacturers of the goods and the growers of the cotton would be equally precluded from recovering their dues. What will our fellow-citizens of the

south say to this? If, after we have got their cotton, they cannot get their money for it, they will be in no great love, I think, with these new doctrines, about the comity of states and nations. Again, look at the question as it regards the insurance offices. How are all marine insurances, fire insurances, and life insurances, effected in this country, but by the agency of companies incorporated by the several states? And the insurances made by these companies beyond the limits of their particular states, are they all void? I suppose that the insurances against fire, effected for companies at Hartford, in Connecticut alone, by agents all over the northern states, may amount to an aggregate of some millions of dollars. I remember a case occurring in New Hampshire, of a suit against one of those companies for the amount of an insurance, in which a recovery was had against the company; and nothing was said, nor probably thought, of such a contract of insurance being illegal, on the ground that a corporation of Connecticut could not do an act or make a contract in New Hampshire. Are those insurances all to be held void, upon the principle of the decision from Alabama? And as to notes issued by banks: if one in Alabama hold the notes of a bank incorporated by Pennsylvania, are they void? If one be robbed there of such notes, is it no theft? If one counterfeits those notes there, is it no crime? Are all such notes mere nullities, when out of the state where issued? Reference has been made to the statute-books to show cases in [38 U.S. 519, 562] which the states have forbidden foreign insurance companies from making insurances within their limits. But no such prohibition has been shown against insurances by citizens of, or companies created in, the different states. Is not this an exact case for the application of the rule exceptio probat regulam? The fact of such prohibitory legislation shows that citizens of other states have, and that citizens of foreign powers had, before they were excluded by law, the right to make insurances in any and every one of the states. Mr. Webster next called the attention of the Court to the deposite law passed by Congress on the 23d of June, 1836. It was, said he, one of the conditions upon which, under that act, any state bank should become a depository of the public money, that it should enter into obligations 'to render to the government all the duties and services heretofore required by law to be performed by the late Bank of the United States, and its several branches or offices;' that is, to remit money to any part of the United States, transfer it from one state to another, &c. But that act required, also, something more: and it shows how little versed we in Congress were (and I take to myself my full share of the shame) in the legal obstacles to the doing of acts in one state by corporations of other states. The first section of that act provides, that 'in those states, territories, or districts, in which there are no banks,' &c., the Secretary of the Treasury 'may make arrangement with a bank or banks in some other state, territory, or district, to establish an agency or agencies in the states, territories, or districts, so destitute of banks, as banks of deposite,' &c. Here is an express recognition by Congress of the power of a state bank to create an agent for the purpose of dealing as a bank in another state or territory. It has been said, that as there is no law of comity under the law of nations between the states, it remains for the legislatures of the several states to adopt, in their conduct towards each other, as much of the principle of comity as they please. Here, then, there is to be negotiation between the states, to determine how far they will observe this law of comity. They are thus required to do precisely what they cannot do. States cannot make treaties nor compacts. A state cannot negotiate. It cannot even hold an Indian talk! And now I would ask how it happens, at this time of the day, that this Court shall be called upon to make a decision contrary to the spirit of the Constitution, and against the whole course of decisions in this country and in Europe, and the undisputed practice under this government for fifty years, overturning the law of comity, and leaving it to the states, each to establish a comity for itself? Mr. Webster here took leave of the question of the power of a corporation created by one of the states to make contracts in another. I now proceed, said Mr. Webster, to consider whether there be any thing in the law or constitution of the state of Alabama, which prevents the agent of the United States Bank, in that state, from making such a contract as that which is the foundation of this suit. [38 U.S. 519, 563] It is said that the buying of a bill of exchange by such agent is contrary to the policy of the state of Alabama; and this is inferred from the law establishing the Bank of Alabama; that bank being authorized to deal in bills of exchange, and the constitution of the state authorizing the establishment of no other than one bank in the state. This, said Mr. Webster, is a violent inference. How does the buying or selling bills of exchange in Alabama, by another purchaser than the Bank of Alabama, infringe her policy? Because, it is said, it diminishes the profits which she derives from the dealings of the bank. Profit is her policy, it is argued; gain, her end. Is it against her policy for Mr. Biddle to buy bills, because his bank is incorporated; and not against her policy for Mr. Girard to buy bills, because his is not incorporated? Or, how far does she carry this policy imputed to her? Is no one to be allowed to buy or sell bills of exchange in Alabama but a bank of her own, which may or may not be in credit, and may or may not be solvent? It would be strange, indeed, were any state in this Union to adopt such a policy as this. But, if the argument founded on this inferred policy of Alabama amounts to any thing, it proves, not that incorporated citizens of other states cannot buy or sell bills there, but that it is the policy of Alabama to prevent other citizens from buying bills at all in Alabama. I think, said Mr. Webster, that there is no just foundation for the inference of any such policy on the part of the state of Alabama. By referring to Aikins' Digest of the laws of that state, it will be found that she has carried her policy a little

farther than merely the establishing of a bank. Her public officers are authorized to receive the notes of banks of other states in payment of dues to her; and she has enacted laws to punish the forgery of notes of other banks. Now, taking their acts together, considering them as a whole, the inference which has been drawn from her establishment of a State Bank under her constitution is certainly not sustained. To consider this argument, however, more closely: it is assumed by it, first, that the state meant, by her legislation, to take to herself all the profits of banking within her territorial limits; and, secondly, that the act of buying and selling a bill of exchange belongs to banking. The profits of banking are derived more from circulation than from exchange. If the state meant, through her bank policy, to take all the profits of banking, why has she not taken all the profits of circulation? Not only has she done no such thing, but she protects the circulation of notes of banks of other states. Mr. Webster begged now to ask the particular attention of the Court to this question: What is banking? Alabama, in reference to banking, has done nothing but established a bank, and given it the usual banking powers. And when the learned counsel on the other side speak of banking, what do they mean by it? A bank deals in exchanges; and it buys or builds [38 U.S. 519, 564] houses, also; so do individuals. If there be any thing peculiar in these acts by a bank, it must be not in the nature of the acts individually, but in the aggregate of the whole. What constitutes banking, must be something peculiar. There are various acts of legislation, by different states in this country, for granting or preventing the exercise of banking privileges. But has any law ever been passed to authorize or to prevent the buying by an individual of a bill of exchange? No one has ever heard of such a thing. The laws to restrain banking have all been directed to one end; that is, to repress the unauthorized circulation of paper money. There are various other functions performed by banks; but, in discharging all these, they only do what unincorporated individuals do.

What is that, then, without which any institution is not a bank, and with which it is a bank? It is a power to issue promissory notes with a view to their circulation as money.

Our ideas of banking have been derived principally from the act constituting the first Bank of the United States, and the idea of that bank was borrowed from the Bank of England. To ascertain the character and peculiar functions of the Bank of England, Mr. Webster had referred, and referred the Court, to various authorities: to M'Culloch's Commercial Dictionary; to Smollett's continuation of Hume's England; to Godfrey's History of the Bank of England, in Lord Somers' Tracts, 11th volume, 1st article; to Anderson's History of Commerce, &c.

The project of the Bank of England was conceived, Mr. Webster said, by Mr. Paterson, a Scotch gentleman, who had travelled much abroad, and had seen somewhere (he believed in Lombardy) a small bank which issued tickets or promises of payment of money. From this he took the idea of a bank of circulation. That was in 1694. At that time neither inland bills nor promissory notes were negotiable or transferable, so as to enable the holder to bring suit thereon in his own name. There was no negotiable paper except foreign bills of exchange. Mr. Paterson's conception was that the notes of the Bank of England should be negotiable toties quoties, or transferable from hand to hand, payable at the bank in specie, either on demand or at very short sight. This conception had complete success, because there was then no other inland paper, either bills or notes, which were negotiable. The whole field was occupied by Bank of England notes. In 1698 inland bills were made negotiable by act of Parliament; and in the fourth year of Queen Anne's reign promissory notes were made negotiable. Of course after this everybody might issue promissory notes, and where they had credit enough they might circulate as money. There is not much of novelty in the inventions of mankind. Under this state of things, that took place in England which we have seen so often take place among us, and which we have put to the account of modern contrivance. Large companies were formed, with heavy amounts of capital, for purposes not professedly banking; one, especially, to carry on the mining business on a large scale. These companies [38 U.S. 519, 565] issued promissory notes, payable on demand; and these notes readily got into circulation as cash, to the prejudice of the circulation of the Bank of England. But Parliament being at this time in great want of ready money for the expenditures of the war on the Continent, the bank proposed to double its capital, and to lend this new half of it to government if government would secure to the bank an exclusive circulation of its notes. The statute of the sixth of Anne, chapter 22, was accordingly passed; which recites that other persons and divers corporations have presumed to borrow money, and to deal as a bank, contrary to former acts; and thereupon it is enacted, that 'no corporation, or more than six persons in partnership, shall borrow, owe, or take up any money on their bills and notes, payable at demand, or at less than six months from the borrowing.' This provision has been often re-enacted, and constitutes the banking privilege of the Bank of England. Competition was not feared from the circulation of individual notes. Hence individuals or partnerships of not more than six persons have been at liberty to issue small notes, payable on demand; in other words, notes for circulation. And we know that in the country such notes have

extensively circulated; but private bankers in London, in the neighbourhood of the bank, though it was lawful, have not found it useful to issue their own notes. So that the banking privilege of the Bank of England consisted simply in the privilege of issuing notes for circulation, while that privilege is forbidden, by law, to all other corporations, and all large partnerships and associations.

This privilege was restrained, in 1826, so as not to prohibit banking companies, except within the distance of sixty-five miles of London; and, at the same time, notes of the bank were made a tender in payment of all debts, except by the bank itself. This provision may be considered as a new privilege; but it does not belong to the original and essential idea of banking. Mr. M'Culloch remarks, and truly, that all that government has properly to do with banks is only so far as they are banks of issue. Upon the same principle the banks of other countries of Europe are incorporated, with the privilege to issue and circulate notes as their distinctive character. Here Mr. Webster explained the character of the banks of France, Belgium, &c.

Now, how is it in our own country? When our state legislatures have undertaken to restrain banking, the great end in view has been to prevent the circulation of notes. Mr. Webster here referred to the statute books of Massachusetts, Maine, Rhode Island, and New Hampshire, for restraining unauthorized companies from issuing notes of circulation. He then turned to the statute of Ohio, imposing a punishment for unauthorized banking. Her law defines, in the first place, what constitutes a bank, viz. the issuing of notes which pass by delivery, and intended for circulation as cash. That, said Mr. Webster, is the true definition of a bank, as we understand it, in this country. Mr. Webster referred also to the laws of other [38 U.S. 519, 566] states, Maryland, New Jersey, Missouri, Pennsylvania, Delaware, North Carolina, South Carolina, Virginia, Georgia, all to the same effect. The law of the state of Alabama herself, said he, is much more important, in this view of the case, then that of any other state. The constitution of the state of Alabama was established in 1819; the law creating the bank of Alabama was passed in 1823. The constitution and this law are all the authorities from which the inference has been drawn of the policy of the state of Alabama. Did she suppose that by this law she was establishing such a monopoly of the purchase of bills of exchange as has been contended for in this case? Certainly not. For, by a law passed afterwards, she restrained the circulation of unauthorized bank notes; that is, notes not issued by some authorized banks. But did she also restrain dealings in exchange? She did no such thing. Nor is there any thing, either in the constitution or the laws of the state of Alabama, which shows that by banking she ever meant more than the circulation of bills as currency. There is nothing therefore in any law or any policy of Alabama, against the purchase of bills of exchange by others as well as by the Bank of Alabama. She has prohibited by law other transactions which are clearly banking policy includes as she has not touched this. If even her banking policy includes as well buying exchange as circulation, and she guards against competition in the one, and leaves the other open, who can say, in the face of such evidence, that it is her policy to guard against what she leaves free and unrestrained? Is there any thing in the constitution, or any ground in the legislation of Alabama, to sustain the allegation which has been made of her policy? If not, is the existence of such a policy to be established here by construction, and that construction far-fetched? Mr. Webster here rested his argument on this case, which, he said, had been discussed by others so ably as not to justify his occupying the time of the Court by going further into it. The learned counsel on the other side had, in the course of his argument of yesterday, alluded to the newspapers, which, he said, had treated the decision of the Court below scornfully. Mr. Webster said he was sorry to hear it; for the learned judge had acted, in his decision, he had no doubt, under a high sense of duty. I have been told, said Mr. Webster, but I have not seen it, that a press in this city, since this case has been under consideration in this Court, has undertaken to speak, in a tone something approaching to that of command, of the decision upon it to be expected from this Court. Such conduct is certainly greatly discreditable to the character of the country, as well as disrespectful and injurious to the Court. A learned gentleman on the other side said, the other day, that he thought he might regard himself, in this cause, as having the country for his client. He only meant, doubtless, to express a strong opinion that the interest of the country required the case to be decided in his favour. I agree with the learned gentleman, and I go indeed far beyond him, in my estimate of the importance of this case [38 U.S. 519, 567] to the country. He did not take pains to show the extent of the evil which would result from undoing the vast number of contracts which would be affected by the affirmation here of the judgment rendered in the Court below, because his object did not require that: his object was to diminish the prospect of mischief, not to enlarge it. For myself, I see neither limit nor end to the calamitous consequences of such a decision. I do not know where it would not reach, what interests it would not disturb, or how any part of the commercial system of the country would be free from its influences, direct or remote. And for what end is all this to be done? What practical evil calls for so harsh, not to say so rash a remedy? And why now, when existing systems and established opinions, when both the law and public sentiment have concurred in what has been found practically so

safe and so useful; why now, and why here seek to introduce new and portentous doctrines? If I were called upon to may what has struck me as most remarkable and wonderful in this whole case, I would, instead of indulging in expletives, exaggerations, or exclamations, put it down as the most extraordinary circumstance, that now, within a short month of the expiration of the first half century of our existence under this Constitution, such a question should have been made; that now, for the first time, and here, for the last place on earth, such doctrines as have been heard in its support should be brought forward. With all the respect which I really entertain for the Court below, and for the arguments which have been delivered here on the same side, I must say that, in my judgment, the decision now under revision by this Court is, in its principle, anti- commercial and anti-social, new and unheard of in our system, and calculated to break up the harmony which has so long prevailed among the states and people of this Union.

It is not, however, for the learned gentleman, nor for myself, to say here that we speak for the country. We advance our sentiments and our arguments, but they are without authority. But it is for you, Mr. Chief Justice and judges, on this, as on other occasions of high importance, to speak and to decide for the country. The guardianship of her commercial interests; the preservation of the harmonious intercourse of all her citizens; the fulfilling, in this respect, of the great object of the Constitution, are in your hands; and I am not to doubt that the trust will be so performed as to sustain at once high national objects and the character of this tribunal.

Mr. Ingersoll, for the defendant, said that although distinct considerations of universal, of international, and of municipal law are involved in this case, he should not attempt to discriminate, but submit them altogether. The judgment of the Circuit Court is against the plaintiff's right of action. For that judgment two distinct reasons are given, viz.: 1. That the law of Alabama excludes banking in that state except as prescribed by its peculiar provisions; and, 2. That besides that local law, the universal law excludes corporations not authorized by the legislative power of such states as [38 U.S. 519, 568] did not charter them. The first reason is enough to support the judgment, without regard to the second, with which this Court is not bound to concern itself. The corporation question, therefore, is not necessarily in issue. It matters not what the rule of general jurisprudence may be as to corporations attempting extra-territorial transactions, if the law of Alabama be that banking is prohibited in that state, whether by corporations or individuals. The banking question rules the case by the banking interdict, without reference to the corporation question, on which the opposite argument has spent itself in political denunciation. Alabama has a sovereign right to make banking an affair of state; and an unbroken series of the uniform judgments of the Supreme Court of the United States affirms not only that state right, but the obligation of this Court to conform to it. Mr. Ingersoll then read the articles of the constitution of Alabama concerning banks, and an act of the assembly of that state in 1836, by which the profits of banks are declared to be the resource substituted for all other taxation of the state revenue; and several passages of the case of the state of Alabama vs. Stebbins et al., Stewart's Alabama Reports, voi. i. 299; which he urged as conclusive of the controversy. The constitution, legislation, and adjudication of a sovereign state all unite in declaring that even its own citizens shall not deal in banking, but agreeably to its peculiar laws. The plaintiff bank had not in any respect conformed to those laws. Consequently it cannot bank in Alabama, nor recover there on a banking transaction there. The second reason of the Circuit Court that corporations have no extra-territorial power may be erroneous, and yet the plaintiff bank must fail for the first reason; not because it is a corporation, but because it is a bank, no matter where or whether incorporated, or partnership, or individual, or even inhabitant and citizen of Alabama. It is enough that it attempted banking contrary to the local and peculiar law of Alabama. That settles the question, without involving it with corporation law. The Bank of the United States vs. Deveaux, 5 Cranch, 61, falls under this principle too, because no citizens, including those of Alabama, can bank there contrary to its laws. No comity interferes with this unquestionable principle. It is the indisputable basis of universal law, that laws have no force beyond the territories of those who make them. This is one of the few principles of universal jurisprudence universally acknowledged. United States vs. Bevans, 3 Wheaton, 386. 3 Dallas, 370, note, Huberus. Laussat's Fonblanque, book 4, chap. 1. section 6, 658, (444.) 2 Kent's Commentaries, 3d edition, part 5, lecture 39, 457. Story's Conflict of Laws, sec. 23, p. 24. Henry on Foreign Law, p. 1. United States vs. Owens, 2 Peters, 540. Bank vs. Donelly, 8 Peters, 372. Rhode Island vs. Massachusetts, 12 Peters, 736. It would be superfluous to multiply authorities for this indubitable position. In the case last cited, from 12 Peters, 740, this Court carries it so far as to declare, and with perfect propriety, that an act of Parliament during the colonial condition of this country [38 U.S. 519, 569] was not binding here. The only force allowed to laws extra-territorially is derived from international comity, which never intervenes to set aside either the written law or the common law, or even the state policy or state interest of another country. Henry, 2. Story's Conflict of Laws, page 33, sections 32, 33; page 37, section 38. Huberus, article 3. 3 Dallas, 370, in note. Bank of Marietta, 2 Randolph, 465. Pennington vs. Townshend, 7 Wendall, 276. The word in Huberus is 'potestas,' which Dallas translates rights,

meaning as it does mean any species of right by written, common, or even usage law; for no such power or right of one state can by comity be supplanted by the law of another state. Comitas inter communitates is at most a frail and evanescent substitute for law. Dallas translates it courtesy, and it is really nothing more. It is a law of reciprocal necessity, of indispensable reciprocity, of absolute charity to do as you would be done by; without which the harmony of nations would be incessantly disturbed: but which, nevertheless, is no more than the highest obligation of charity, to love our neighbours as we do ourselves, but not better than ourselves. Its philosophy is well explained by Judge Story by a classical quotation in his learned judgment in the case of Harvey vs. Richards, 1 Mason, 412; damus petimusque vicissim sub obtentu mutuae necessitatis. Unless, therefore, the state of Georgia needs such concession by comity from the state of Alabama, she is not bound to make it. One of the cases involving this question is brought here by the Carrollton Bank of Louisiana, the law of which state requires its judges to refer in their judgments to the written law of the state on which the judgments are founded, and prohibits the judges from ever leaving the state whose boundaries are established by the Constitution. How could the Courts of Alabama or any other state reciprocate with Louisiana such regulations as these? In another of the cases, the United States Bank of Pennsylvania is the plaintiff, which bank, by the law of that state conferring its charter, is closely connected with the canals, railroads, schools, and other improvements of Pennsylvania. Could any stretch of comity give such provisions force in Alabama? It is not judicial comity, but the comity of a state which its Courts of judicature award. Story's Conflict of Laws, p. 37, sec. 38. No Court therefore can allow it, but as the comity of the state, and not the Court. Comity, moreover, is international courtesy; never allowed between provinces, districts, counties, cities, or other parts of the same empire. The connexion between these United States is closer and more intimate than that of comity. Their union by federal compact expressly settles the relation of the states to each other, and leaves no room for tacit or constructive comity to operate. A national Constitution declares that no state shall enter into any treaty, alliance, or confederation, or, without the consent of Congress, into any agreement or compact with another state or foreign power. Such union, with much providence and some jealousy, has settled the powers and relations of the respective states. An article of the Constitution provides for the force and [38 U.S. 519, 570] proof of public acts of state, for the privileges and immunities of the citizens of each state in all the rest, for fugitives from justice and fugitives from labour; leaving little or nothing on this important subject to judicial construction. For certain purposes these United States are one and the same nation; for others, a quasi nation or close confederation, and a mere confederation, but still a national confederation for all powers not delegated to them by the people and the states. According to the language of this Court, in 12 Peters, 720, the states are sovereign within themselves as to all the powers not granted to the United States, and foreign to each other as to all others. The argument of the judge determining this case in the Circuit Court, denies the existence of any comity whatever between these several states whose union constitutes a nation. Whether that argument be unquestionable or not, it is certain that their union makes them a nation. In the opinion of Chancellor Kent, lately published on this subject, a doubt is intimated, whether, as the citizens of each state are entitled to all the privileges and immunities of citizens in the several states, it is competent to the state of Alabama to prevent citizens of Georgia or Pennsylvania from banking in the former state. But this Court adjudged, in the Bank of the United States vs. Devaux, 5 Cranch, 61, that no corporation is a citizen; and it cannot be doubted that citizens of Georgia and Pennsylvania are not entitled to more privileges and immunities in Alabama than that state vouchsafes to its own citizens. That full faith and credit shall be given to the acts and public proceedings of the states in each other, seems to be as yet confined to judicial acts. 3 Story's Commentaries, 174. Pennington vs. Townshend, 7 Wendall, 279. The laws of the different states are proved as foreign laws in Courts of justice: and that it would lead to intolerable confusion to make by comity the laws of any state, the laws of every other state, is demonstrated in Judge M'Kinley's argument with a force which Chancellor Kent's opinion attempts in vain to overthrow.

This is perhaps a question rather of politics than jurisprudence. It may be granted that states can re-enact each other's laws, and so adopt them, but it is submitted as clear that by no agreement whatever can this be constitutionally effected. If then no agreement of states can do it, it cannot be done by comity of Courts; otherwise construction would have more power than legislation. The question is not whether even one state, or the judicature of one state, can by comity adopt the law of another state; but it is whether this great addition to the law of a state can be made by the judiciary of the United States; not for the United States: but whether the federal judiciary can by comity incorporate the law of one of these United States with that of another. It may be questioned whether the judiciary of the United States can reciprocate comity with that of any foreign nation. All our federative law, political, civil, penal, fiscal, martial, and whatever else there is, is specific and written. There is no common law of the United States [38 U.S. 519, 571] but for principles and definitions. The admiralty law, though of large scope, is by constitutional grant, and the revenue law is settled by legislation. Could a Court of the United States reciprocate admiralty or revenue law with

England, France, or Mexico? Chancellor Kent alleges international law of merchants; but if merchants may make laws for nations, so may mariners, travellers, or borderers. If merchants by sea, why not traders ashore? Those of New York and Liverpool have no better right to supersede the treaty making authority by their own tacit understanding, than the traders who fetch peltries from the north or metals from the south. The borderers of the St. Lawrence, the Sabine, and the Arkansas may arrange rude international codes with Canada, Mexico, and Texas for the government of these United States, usurping the powers of constituted authorities, as ex parte professional opinions may usurp those of appointed judicature. There is no occasion for any such irregularities. Every state of the United States has its all-sufficient common law and frequent legislation; while the law- making power and the law-judging department of the Union are in constant being, rendering it wholly unnecessary for illegitimate usage, action, or habit, partial, personal, and selfish substitutes, to take the place of deliberate law-making. It is at least doubtful whether either the federal or even the state judiciary of these United States has the power to make laws by comity. At all events it is a perilous faculty by comity to make common law for one state from the written law of another; and granting that state Courts may exercise such jurisdiction by no means infers that the federal judiciary may do it for the states. For this Court to introduce a Georgia or Pennsylvania bank into Alabama, would be more than the legislature of that state can do for its own citizens, except as its peculiar constitutions allow. Introducing or changing law is often a serious measure. It is the direst exercise of conquest, and the most difficult. Diversities of laws, language, and local sympathies are the ways of God to man, without which all nations would strive to have but one local habitation and one name. Droit d'aubaine, British allegiance, the land exclusive law of the common law, all such seemingly severe and harsh provisions are pregnant with the philosophy of providence. A learned foreign lawyer, M. de Tocqueville, vol. i. 99, considers these United States so many foreign nations, whose whole form the Union, of which originally, even every township was a sort of independent sovereignty. Nothing like law can be more foreign than that of Massachusetts and Louisiana to each other. It may be politic, it may be wise to try to abolish or mitigate these estrangements of locality: but it is no more practicable to extirpate them than the barbarisms of war. This Court has strenuously adjudged that at any rate such is not the judicial function. It does not and will not anticipate or fabricate legislation. Furthermore: the objection to Courts extending comity for states to banks is corroborated by the consideration that banking is a sovereign privilege. Making money, or a substitute for it, is of sovereign [38 U.S. 519, 572] faculty. Wilson vs. Spence, 1 Randolph, 100. Pennington vs. Townsend, 7 Wend. 276. Mr. Ogden cites The People vs. Utica, 15 Johnson, for Chief Justice Thomson's allegation that banking was not a franchise at common law. But of what banking is that allegation made? Banking by deposite, by discount, or by circulation? If the latter, it is expressly contradicted by Judge Roane and the Virginia Court, as it is believed to be by all the authors on political economy. In the case of Drew vs. Swift, in the Pennsylvania circuit, it was adjudged by Mr. Justice Baldwin that banking by circulation is money making, and part of the public authority. Be this as it may as a general principle, Alabama has settled it by her organic law. So adjudged in The State vs. Stebbins, 1 Stewart, 299. If it were res integra, it might well be questioned whether any state can devolve on individuals this sovereign authority. It was so questioned on demurrer, in Tennessee. Peck's Reports, 269. Without now attempting that perhaps foreclosed position, it is submitted that no state Court, much less a Court of the United States, can inflict on one state the banking sovereignty of another state. No comity can do that. It would be servitude. Otherwise the taxation, hostilities, and all other exigencies of one state or nation may be adjudicated upon another. Even if there were no law of Alabama to forbid it, the flagrant impolicy is patent. Story's Conflict, 33. The banks of Europe and Asia, the laws of Mexico and Texas, the abolition acts of Pennsylvania, the English common law, which in Massachusetts, ipso facto emancipates a slave, the church laws, laws of royal prerogative and of noblemen's privileges, might all be enforced in Alabama. There must be some stop to such endless and insufferable confusion-such chaos of government. The only question is, what branch of government shall interpose: and Judge Story's valuable work on the conflict of laws is explicit that in France, England, and this country the judiciary is that branch, without awaiting written laws of direction. Story's Conflict, 24, 25. This Court has always asserted the necessity and duty of Courts to refuse their aid to acts contrary to the policy of law. Armstrong vs. Toler, 11 Wheat. 270. United States vs. Owen, 2 Peters, 527. Nor is there any inconsistency in Courts enforcing the exclusion, and yet not the comity, because the one is compliance with law, whereas the other is to make it. Finally, to doubt whether comity is due is to resolve that it is not, under such a government as ours, where the judicial power is so specific and defined. Mr. Ogden finally denies the right of Alabama to meddle with bills of exchange, which are the means of commerce, and commerce with all its regulations have been surrendered by the states to the Union. But no bill of exchange is here in question as a commercial mean, more than a ferry boat, a horse, an ass, a slave, a man or woman, or any other commercial convenience; and it will not be pretended that these are not under state regulation. New York has regulated money by a small bill law, and money, more than bills of exchange, is the medium of commerce. All the states [38 U.S. 519, 573] have by law regulated the damages on bills of exchange. The argument proves too much, and therefore nothing. As to

the ruinous consequences denounced, Mr. Ingersoll said that such had always been augured, and always would be, of measures offensive to certain political prejudices. They were abundantly disproved by the improvement and prosperity of the country. The Court, instead of being alarmed from its duty by such appeals, should feel encouraged to support the laws of state sovereignty; which, well understood, were the broad foundations of the general welfare. Neither man nor state can stand erect without these self-preserving rights; against which the pleas of comity and cries of politics are equally futile and unavailing in this Court as now constituted.

As it is impossible to foresee what may be the views of the Court, it is an advocate's duty to consider all the reasons given for the judgment below; and, therefore, the corporation question must next be examined. The Court will remark, that it is not a question of action, but of transaction. The record presents the case of an incorporated bank, by its stationary agent resident in Alabama, with the funds of the bank discounting there a bill of exchange; upon which transaction this action was instituted. It is thus no secondary contract; but a primary, actual dealing by the corporation in banking business out of the state which chartered the banking corporation. The right of suit is not to be confounded with the right of contract. They are obviously distinguishable. Perhaps American State Courts have sanctioned the right of action, which it is not intended either to concede or to draw in question. The cases of the Portsmouth Company, 10 Mass. Rep. 91; The Silver Lake Bank, 4 Johns. Chan. Reps. 370; of the New York Fireman's Insurance Company, 5 Con. Rep. 560; The Bank of Marietta, 2 Randolph, 465; The Gospel Society, 2 Gallison, 105, and 8 Wheaton, 454; Green vs. Minnis, 1 M'Cord, 80, and the various foreign authorities cited in the opposite argument; may perhaps establish the law that a corporation or sovereignty enjoys the right of suit in other Courts than those of its own state. I is nevertheless worthy of remark, that no case is to be found in the English books, of a corporation suing in England upon a contract there. All the volumes of English law may be challenged for such a case. The case of the Dutch West India Company, in Raymond and Strange, was suit upon a lawful contract, that is, a contract in the country where the company had a right to contract, so that the lex loci never came in question during the suit in England, and when an attempt was made to plead it into the suit, that attempt was frustrated by estoppel. The English chancery cases of suits by foreign sovereigns, are distinguishable from suits by foreign corporations; because the sovereign sued in them as an individual divested of the privileges of intangibility.

If suits have been brought by the Bank of England in this country, for the recovery of American debts, they must have been of rare occurrence, passing sub silentio. The case of Perkins [38 U.S. 519, 574] vs. The Washington Insurance Company, from 6 Johnson's Reports, cited to show that this question was not raised on that occasion, abounds with demonstration that it was against the interest of both parties to make it; and in the cases of the Silver Lake and Marietta Banks, the most eminent lawyers of New York and Virginia denied the right of action, which, a multo fortiori, argues contradiction of the right of transaction. Mr. Ogden's notion of the venue, at any rate, a very little technicality upon which to build so important a position, is annulled by a law of Alabama, which prohibits all special demurrers, so that no averment of venue is necessary in their declarations, and rarely occurs.

The question thus freed from mere fiction, and the right of action, is broadly whether corporations can contract and enforce their contracts by suit in foreign countries. To discriminate between right and remedy, is always matter of some difficulty, as this Court experienced in Ogden vs. Saunders, 12 Wheaton. Yet the distinction is well known and universally recognised; the right of remedy being regulated by the law of the forum, whereas, the legality of the contract is determined by the law of the place. In most of the Courts of civilized countries, there is little restriction upon the right of action. In Great Britain and this country, all Courts are open to all persons, upon principles of wise jurisprudence, well explained in the eighty-second number of the Federalist; that foreigners as well as citizens, the poor and the rich, the incorporated and the individual, have all an equal and unquestionable right to judicial redress for alleged wrong. The Courts of France will not take jurisdiction of a suit between two foreigners, but renvoy them to their own courts at home. But it is the privilege of every complainant to bring suit in any English or American Court upon all lawful contracts. The contract must be lawful, however, that is to say, must conform to the law of the place of contract. Place, therefore, settles the right, while Courts regulate the remedy.

Our question is, whether the incorporation of one state or country is such in all others? which is denied. What is a corporation? Mr. Ogden's definition is perfectly acceptable for the defendant's argument; he defines it, an artificial person created by the law of an independent state. The definition or description, accurately made, tends much to explain the reason of the thing and to elucidate the subject. It is an artificial body:-Ayliff calls it a mystical body, a mere creation of the law, with none but express powers ad hoc, or such implied powers as are strictly indispensable.

Judge M'Kinley treats the matter with exemplary accuracy, when he says, that unless the act of incorporation by Georgia, Louisiana, or Pennsylvania, can operate as strict law in Alabama, it is of no force there whatever. Such is the true starting point of the whole discussion. All the authorities of all countries and ages concur in this fundamental doctrine of corporations. Brooke, Comvn, Bacon, Ayliff, Taylor, Brown, Coke, Blackstone, Kyd, Wilcock, and it may be affirmed, all American treatises and adjudications a fee in this [38 U.S. 519, 575] 2 Kent's Com. 3 edit. 298. Ang. and Ames, 17. 59. Head vs. Amory, 2 Cranch, 167. Dartmouth College, 4 Wheat. 636. U. S. Bank vs. Daudridge, 12 Wheat. 638. Beatty vs. Knowles, 4 Peters, 167-168. It is beyond question that corporation authority is a license to be strictly construed. Chancellor Kent, in his Commentaries, says, this is modern doctrine. Yet on the same page he mentions Trajan's letter to Pliny, which strongly asserts it; and the fact is, that from Solon and Numa, whose laws on the subject he also refers to, down to Marshall, the late much honoured Chief Justice of this Court; who was a uniform and inflexible supporter of the strict construction of corporation powers; it has always been the same, and necessarily must be so, because charters take franchises or privileges from all to confer upon a few, which franchises or privileges must needs be restricted to their very capitulation. An individual power of attorney or substitution is never expanded by construction. All letters of license are taken strictly, though their interpretation is but matter of intention, whereas that of a charter presents a question of state power which Courts have no authority to enlarge constructively. It may, indeed, be asked, what is meant by modern corporation law? What is the American law of charters? Who made it? When? Where? Is it English common law? or common civil law? from which code all the law of charters proceeds. Is the American law on this subject ante-revolution or post-revolution? Do we get it from Massachusetts or Louisiana, where the common English law and the common civil law respectively prevail? OR is the modern law of Massachusetts enforced in Virginia as common law there, as was adjudged in Dandridge's case? Chancellor Kent says, 2 Com. 281, that corporations have multiplied with a flexibility and variety unknown to the common law. But what is the American common law of corporations? The United States having no common law, what is their standard? In all the states formed out of Louisiana, with the civil law as their birthright, corporators are personally answerable for corporate acts. In states inheriting the English common law, they are, perhaps, personally intangible; not by the terms of a charter or by any written law, but because it is understood that the English common law annexes such privilege of exemption. A state grants a charter, to which the common law tacitly annexes an inestimable privilege. Has this English common law been adopted in the American states? Is it consonant with their policy, or conformable to their constitutions? At the period of their independence, there were few if any corporations, and no banking corporations in America. Has that universal public sentiment, which gradually frames common law, since then engrafted this privilege upon the corporation stock, which till long after the American revolution had not begun to germinate, and only within a very few years last past has attained a growth which overshadows all our institutions? The source of this immense power it is hard to find; but, at all events, the stream has been uniform in the channel of the Supreme Court of the United States, coincident with those [38 U.S. 519, 576] principles of law; which, whether ancient or modern, are equally unquestionable in their authority and their reason. In some of the latter cases of this Court, The Columbia Bank, 7 Cranch, 299, the Bank of the United States, 8 Wheaton, 338, and the same bank, 12 Wheat. 68, in the absence of some of the judges, and Chief Justice Marshall earnestly dissentient in the last mentioned case, whose principles rule the whole doctrine, it was declared by the eminent judge who delivered the Court's opinions, that the common law of corporations has been broken in upon by modern adjudications; as it has been declared by another distinguished commentator, that the common law was found impolitic in this respect, and essentially discarded.

It is true, that in order to keep pace with the modern flood of these associations, the common law, with its characteristic adaptation to exigencies, has counteracted their intolerable privilege by holding them to personal liability. But no other change than this, it is apprehended, will be found in the modern common law of either this country or England. Power to pronounce it impolitic, to break in upon or discard it, if it exists in any Court, should be very sparingly exercised. All the English cases are in 2 Kent, 289. 292. and Angell and Ames, 128; and their uniform tendency is to keep down corporation privilege, not to exaggerate it. And the same is the result of any thorough examination of all the American cases. Corporations have not been allowed to escape suit by undue privilege; which is the substance of all that salutary change in the law, that is supposed to discard it as impolitic, or break in upon it as antiquated. It is adaptation, not alteration of the common law. No principle of corporation law is invoked for this defence, but such as the late Chief Justice of this Court always abided by. His anxious dissent in 12 Wheaton, sets forth those principles with a review of the accredited authorities from Brooke to Blackstone; while the learned judge who delivered the opinion of the majority of the Court, appeals to a recent dictum of Mr. Justice Bailey, and the still later doctrines of Chief Justice Parker, for a common law of corporations in Virginia, transported from Massachusetts.

Gradual and cautious conformity to circumstances is the merit of the common law, following the universal sense of propriety; for substantial law is eternal and identical, and what is frequently denounced as disorganization, is, in truth, restoration of first principles. The great duty of Courts is to maintain them, and it was no doubt the solemn determination of Chief Justice Marshall to uphold even those seeming formalities of corporation law, which experience had sanctioned as wise. His forecast in this is proved on this occasion. The seal, the regular vote, the record, the duly constituted agent, and other philosophical guards of this formidable imperrum in imperio, cannot be dispensed with, without enabling a vast engine of factitious wealth to crush communities. And all the law is contrary to it. Formalities have been discarded, not to break in upon but to strengthen law, while the whole substance stands unimpaired in all its original [38 U.S. 519, 577] and indispensable propriety. Legislation and adjudication have never gainsaid it. Judge M'Kinley cites Chief Justice Parsons, for a solemn warning against constructive encroachment. Even granting the policy, where is the judicial power? No corporation is created, in contemplation of law, but for the public good. Charters are intended to benefit the unincorporated more than the incorporated. Legislatures and states organize them on no other principle; and Courts carry it into practice by restricting the grant to its letter, and, if indispensable, moulding common law to countervail privilege. Hence Coke's Institute, and the case in Cowper, declare corporations to be inhabitants that they may not evade taxation; while this Court denies that they are citizens, in order to prevent undue privilege of suit. 5 Cranch, 61. Hence numerous adjudications, individuating corporations for suit, not one of which designs to extend intangibility. U. States vs. Amedy, 11 Wheat. 392. Farmers' Bank of Delaware, 12 Peters, 135.

Any judicial extension of charter exemption by construction, would not be in harmony with common law, which is general assent; while every sound judicial limitation of such exemption effectuates the common will. A few may contend otherwise; but it is impossible that they can make law. All its established principles limit corporation power, and facilitate common right. Even the formalities of law are often its necessary solemnities. It might be sometimes convenient to suitors and judges for the latter to adjudicate at their meals, or in bed; but open Courts and formal proceedings are obviously essential. The great attempt of those who deny and would discard the settled laws of corporations is, first, to assimilate them to persons, and, secondly, to partners, or other associations of persons not incorporated. But they are neither for aggravation of exemption: they may resemble either for personal liability. This Court has adjudged that they are not persons. 12 Peters, 99, 100. And the very reverse is the reason of the law. Whenever impersonated it is to restrain, not to license them. A corporation cannot, like a person insolvent, make an assignment of its affairs. 12 Peters, 138. Even if so authorized by charter, it cannot assign them to foreign trustees. Williams vs. Maus, 6 Watts, 278. Can a corporation do any act of humanity? Certainly not, though the munificence of such acts daily stifles the sense of their illegality. It is as much a devastavit for the trustees or directors of a corporation to spend its means generously, as it would be for an executor or administrator. It is not the law that a corporation is a person capable like an individual of action and transaction. 2 Kent, 267. 299. 279. 1 Kyd, 225. Persons go anywhere. Corporations are localised and stationary. They cannot go abroad but by agents; and how they are to be constituted, or whether they can be at all, is the very question. 16 Johns. 6. Personal rights are original and unlimited. Corporate franchises are derivative and specific. A person, like a state may do whatever is not prohibited. A corporation like this confederation can do only what is expressly allowed by charter. [38 U.S. 519, 578] An American person is a sovereign, restrained by no fetters but of his own making. A corporation is his creature, bound by strict obligation. Persons may traffic everywhere: but why? Because they become subjects wherever they are. But corporations are amenable only to the state creating them. The European, Asiatic, or African, is an American, in America; whereas the perverse argument of corporation license is to be a citizen without being a subject; while all natural persons are subjects, even though not citizens. Personal identity, corporeal being, and powers of motion, are the attributes of persons, but not of corporations. They are personal for legal responsibility, but plural for the enjoyment of privilege. Still less is the attempted resemblance of corporations to partners. In the Law Reporter, 59, this resemblance is strongly asserted. But the want of it is so palpable that a single reference to the distinction is enough. Ang. and Am. 23. Corporations are neither persons nor partners, but artificial bodies politic, created by act of state, always ad hoc, and their franchises are granted for public good, of which they are the supposed instruments. Charter elements are artificial creations, with none but express or severely indispensable power, indispensable to existence, without existence till allowed by the state, mostly assigned to a place, always confined to defined purposes. Whether, and how agencies for corporations can be constituted is questionable. 2 Kent, 291, 292, in note. But an inflexible and fundamental doctrine prevents their extra- territorial transactions, by requiring the permission of the state wherever such transaction is; in which doctrine the question of agency is merged and disappears. In this plain principle all authorities agree. 2 Kent, 268, 269. 276. Ang. and Am. 27. 37, 38. The civil law, the common law, American law, all law coincides in it. Not a case or sentence

can be cited against it. A corporation must be authorized by the sovereignty where it acts as such, otherwise it is what is called an adulterine corporation. Ang. and Am. 38. Mr. Ogden's definition acknowledges this; and he conceded that it cannot perform corporate acts beyond the state creating it. This is the explanation of Chief Baron Manwood's quaint notion, that corporations have no souls because they are created by the king. They are creations of law, and do not share in government or any political power. Per Marshall, Chief Justice, 4 Wheat. 636. No corporation is such, it has no creation or legal being, till authorized by the government of the state where it is to act as a corporate body. Greystock College case, Jenk. 205. Dyer, 3. 60. 6 Vin. Abr. 287. Ang. and Am. 38, note 5. This ancient judgment contains the germ of the whole self-protecting principle of sovereignties against corporations. The pope founded Greystock College, and it existed for a long time. But the English Courts, as soon as it appeared before them, annulled it for want of lawful beginning. Such is the universal law applicable to these bodies politic. Sutton's Hospital, Jenk. 270. Courts may have suffered them to sue abroad on contracts at home which are lawful; but hever to contract and sue abroad without authority of state [38 U.S. 519, 579] there. Whenever this position against them is taken in a Court, it is insuperable. A charter, if required, must be proved before any corporate act can be even given in evidence. United States vs. Johns, 4 Dal. 415. Bul. N. P. 107. 10 Mass. 91. 8 Johns. 295. 1 Hal. 211. 1 kyd, 292, 293. 10 Wend. 269. 3 Conn. 199. Ang. and Am. 377. The universal common law of all sovereign states requires and uniformly asserts this self-protecting principle. It is a state right of indispensable recognition. None but the state can legitimate a corporation. In Pennsylvania, the legislature have authorized the Supreme Court to create charitable, religious, and literary corporate bodies, on certain terms, as in England the king deputes persons to grant charters. Ang. and Am. 44. But state agency, sovereignty permission, is sine qua non. But it is said that sovereigns may sue abroad. True, they do, but not as sovereigns. When the King of Spain sued in the Circuit Court of Pennsylvania, he was liable to costs, or to nonsuit; and when his minister, Don Onis waived his privilege as a foreign ambassador to become a witness on the trial, he might have been prosecuted for perjury, or committed for contempt. When a sovereign sues abroad, he becomes subject to the foreign jurisdiction, which corporations never do; and when sovereigns sue in equity, especially, the fullest reaction and reciprocity of responsibility necessarily ensue. It will not be pretended that a monarch of England brings his privilege of irresponsibility, or the Sultan of Turkey his despotic power, when condescending to sue in this country. As monarchs they have no power here whatever; and they sue, like all others subject to our Courts. It has been made a question, too, whether upon the principles contended for, the American states, being, as was alleged, corporations, can, as they constantly do, borrow money, sell stocks, and otherwise transact business in foreign countries; to which the obvious answer is, that on all such occasions they deal as sovereign states, and not mere corporations. Chancellor Kent, in his published opinion, relies on the United States Bank having been permitted to sue in state Courts. But this right was denied in Virginia, and this Court has determined that that bank had no right to the federal forum but by express act of Congress. 5 Cranch, 61. Right of suit, at any rate, is not right of contract. It being thus shown indisputably that no corporation can exist but by express permission of that state in which it acts as such, it follows, as a matter of course, that it is no corporation at all until allowed by the state in which it acts. Chancellor Kent perverts this principle, by asserting that a corporation may contract abroad until forbidden there; the true principle being, as asserted by Chief Justice Marshall in the case of the Providence Bank, that the act creating a corporation is an enabling act, by which alone it is enabled to contract. 2 Cranch, 167-169. This simple and incontestable position covers the whole ground. It is part of universal jurisprudence, and parcel of all politics. Corporations [38 U.S. 519, 580] are creations of municipal law, having no existence or power to contract whatever, until enabled so to do by a law, or other legitimate permission of the sovereignty wherever acting. Especially is this conservative principle indispensable as an undelegated right of these United States. Otherwise the smallest member of this Union may legislate for, and govern all the rest. In the case of the Marietta Bank, 2 Rand. 465, the Court explained this principle with great force of argument; much more, it is apprehended, than is displayed by the contrary view, in Chancellor kent's opinion, or has been urged in this Court. These United States, as such, can have no private corporation; and if, upon false notions of commercial intimacy, they are to be consolidated by traders, corporations, and professional dogmas, contrary to the true spirit of our political institutions, not only the rights of all the states, but the federal Constitution itself will be at an end. Upon the plea of international commercial law, a bank of the United States might branch, not only in every state, but every county of every state in the Union; and, indeed, so may every state bank. It is confidently submitted to this Court, that it will best fulfil its duties by holding the states united by sovereign ties, by the states remaining sovereign, and corporations remaining subject; not by sovereign corporations and subject states. The state of Alabama cannot apply the common law of Georgia or of Pennsylvania to determine controversies such as this. It cannot ascertain, by any accredited rules of interpretation, what may have been the intention of another state in creating a corporation which is responsible for misconduct only to the state creating it and cannot be reached in the foreign state where it contracts. Every charter involves questions of political advantage,

regarding which no state looks beyond itself, but simply to its own good, of which no foreign Court can judge. All a Court can do is to ascertain the will of its own government; and if it finds that that government has not sanctioned the corporation, by express authority for that state, then such corporation cannot be acknowledged by the Court. It is no corporation before that Court. Its charter may be proved there, as it must be, before it is in evidence there. But, when proved, even though it may have a right of action there, it has no right of contract in that state, till authorized by it to contract there. If Courts are bound by common law to restrict corporations to the specific purposes of their creation, they are bound by the same common law to prevent their wandering out of place, as much as out of purpose. 2 Kent, 299, note E. Charters are special and untransferible trusts, to be executed as when and where prescribed, which trusts have no extra-territorial existence. If they act by agent beyond the chartering state, the trust is defrauded and annulled, without responsibility of the agent to the chartering state, or of the corporation to the foreign state. No state can, even by act of assembly, raise an executor, administrator, or other trustee in another state. The states of Georgia, Louisiana, and Pennsylvania, could not intend by these bank charters to make laws [38 U.S. 519, 581] for the state of Alabama. It is impossible in legal contemplation so to consider it. Can then the interposition of a questionable agency supply a power, which not only never was intended to be given, but which could not be given even if intended? Otherwise, all corporations may by agencies act everywhere. The colleges of New England may make masters of arts in the southern states, and the southern states may introduce societies for establishing slavery in the north. Not only so, but Europe, Asia, Africa, even Australasia, Mexico, or Texas, may regulate the United States of America. In Dandridge's case, 12 Wheat., Chief Justice Marshall, after explaining the supposed changes of the common law respecting corporations, denies that what he calls the talisman of construction has yet quite dissolved the whole fabric of deep-rooted and venerable jurisprudence. The old rule, for which on that occasion he fell into a minority of this Court, if preserved, as he insisted, would prevent all extra-territorial corporation power; and the confusion which if suffered it will be sure to inflict on the nationality of the country. The legal analogies are abundant and unquestionable. Executors, administrators, and guardians have no authority beyond the states creating them. 1 Cranch, 92. 1 Dallas, 456. 2 Mass. 384. 3 Mass. 514. 11 Mass. 313. 3 Cranch, 319-323. 5 Mass. 7. 11 Mass. 256. 9 Cranch, 151. 1 Johns. Ch. Rep. 153. 7 Johns. Ch. Rep. 45. 6 Johns. Ch. Rep. 353. 1 Hayward's Rep. 354. 3 Day's Rep. 74. 305. 2 Root's Rep. 462. 7 Cow. Rep. 68. 9 Wend. 426. 1 Pick. Rep. 81. 2 Pick. Rep. 18. 8 Wheat. 671. 9 Wheat. Rep. 565-569. 12 Wheat. 169. 3 Mason, 469. Coxe's Dig. p. 16, pl. 53. 5 Monroe's Rep. 49. 6 Monroe's Rep. 59. 4 Littel's Rep. 277. 1 Cameron and Norwood's (North Car.) Rep. 68. 1 Marsh. Rep. 88. Stephens vs. Swartz, 1 Carolina Law Rep. 471. It is in vain to say that executors, administrators, and guardians have charge of property, and are therefore obliged to give security for its safe management in each state where it may happen to be. So have corporations charge of property. Their franchises are property. Insolvent and bankrupt assignees have no power extra-territorially. Harrison vs. Sterry, 5 Cranch, 289. Dickson and Ramsey, 4 Wheat. 269. When merchants draw bills of exchange over the boundaries of states, across the rivers Delaware, Ohio, Hudson, Connecticut, Potomac, and Savannah, or even the insignificant creeks, and sometimes mere ideal confines, which separate the various conterminous states of this Union, they are foreign bills of exchange. It is the law of this Court, that the states are foreign to each other for all but federal purposes. 12 Peters, 720. Even a state judgment, notwithstanding its constitutional protection, requires legal provision for its full faith and credit. And foreign judgments, even in rem-on questions of international law, are tested so far at least as to ascertain that they were pronounced with jurisdiction over both thing and person. Rose vs. Himely, 4 Cranch, 294. Persons, whether aliens or citizens, are not allowed right of suit in the federal Courts without some preliminary proof of it; and corporations, [38 U.S. 519, 582] though inhabitants, are not citizens with right of suit. 5 Cranch, 61. It has been adjudged that foreign property of non-residents is not attachable under state attachment laws, notwithstanding a practice of more than a hundred years in some of the states. Toland vs. Sprague, 12 Peters, 300. Corporations are municipal creations of states and creatures of common law. But, a has already been questioned, what is that law? If English, it is adopted only as adapted here; and what is that in Alabama-a state not yet twenty years old? This is, probably, the first occasion when the elements of corporation law in that state have come to be ascertained. Is it Roman, English, or American? No instance has occurred, probably, before of a foreign corporation attempting by resident agency to deal in Alabama. We are brought then at last to the question, whether an incorporated bank can enjoy there privileges and immunities denied to the citizens of that state. The only adjudications in point are, Beattie vs. Knowler, 4 Peters, 167, 168; and The Marietta Bank, 2 Rand. 465; the argument of the Virginia Court in the latter; the judgment, as well as the argument of this Court in the former. The act of the state of Ohio is likewise full to the point, as a practical recognition of the law. The cases sustaining suits on contracts in the states creating the corporations are no contradictions of these two cases. The only pertinent English case, in Lord Raym. and Strange, has been explained. The case of the Propagation Society vs. Wheeler, in 8 Wheat. 464, was no more than a question of suit. The Greystock College case, that of The Bank of Marietta, and Beatty vs. Knowler, are coincident acknowledgments of the great principle, that a corporation has no

corporate power beyond the state to which it owes being. In the earnest and sincere advocacy of that principle of universal, international, and municipal law, Mr. Ingersoll said he felt cheered by the assurance that his country is his client. Mr. Vande Gruff, for J. B. Earle, one of the defendants in error; stated that the act of the legislature of Alabama, which declared the statutes of the state in force as they are contained in Aikin's Digest, provides that all statutes, laws, and parts of laws, not included in the Digest, are repealed. This repealed the act of 1827 relative to banking; and other laws on the same subject. This act was passed in 1832. Aikin's Digest, 301. There is another act of the legislature of Alabama, which makes bills of exchange and promissory notes negotiable, and declares them to be prima facie evidence of consideration. Aikin's Digest, 327. Two questions have been agitated in these causes. One may not be necessary to their decision. The question of comity may be one which on general principles may embarrass. It is believed that comity between nations is as necessary to their intercourse, as our breath is to our existence; but it is not understood how it is to be limited. Is a law of Pennsylvania to be applied over the whole world? The rule that corporations have not an extraterritorial [38 U.S. 519, 583] existence is established: but the principles which are claimed on the part of the plaintiffs in error, would give a universal existence and unlimited privileges to such institutions. The general rule is, that the laws of a particular state have authority only within the territory of the state; and the exception to the rule prevails only, when the laws have been adopted in a foreign, or another state or country. I this principle is correct, it will be the duty of the counsel for the plaintiff in error, to show that the law of Pennsylvania incorporating the United States Bank is a law which has been adopted in the state of Alabama. A railroad company may buy iron abroad, for the purpose of constructing their railroad at home. This appears to be a contract which will be sustained by the comity of nations. It presents a different question from this; which is, whether the United States Bank of Pennsylvania can go abroad to do acts which are only authorized in the state. It would be disastrous to say a corporation cannot go out of Alabama to buy paper to be used in its operations at home. But this is a different case from authorizing a corporation to carry on the business for which it was incorporated in Pennsylvania, out of that state. Could a bank of the state of Pennsylvania go to Mobile, and carry on the business of banking there, to the injury of the domestic banks? The rule of comity has never been applied so as to allow it to interfere with all the laws of a state: its application has ever and only been to particular cases. If a Court has declared that the rule of comity does not apply in a particular case, there is a final adjustment of the question as to the force of the foreign law in that case; and the question is settled by the decision of the Court. No cases which have been cited for the plaintiffs in error, show that by the laws or the decisions of the Courts of Alabama, corporations have extra-territorial powers or privileges. The case of the Marietta Bank, decided in Virginia, and reported in 2 Rand. Rep., shows that comity in favour of corporations does not exist. This is evidence that there is no general law which allows the existence of corporations, out of the state in which they are chartered. All the questions of the rights of corporations to go abroad to borrow money, do not apply to the case before the Court. Those corporations borrow money to enable them to transact and carry on the business for which they were incorporated at home. The inquiry is, whether the United States Bank of the state of Pennsylvania could go into Alabama, and there carry on the business of banking. The legislature of Alabama would, in positive terms, have refused this privilege, if it had been applied for. A judge in Alabama Knowing this, should have felt himself bound by his judicial duties to apply a principle which would have been applied by the legislature. Is it reasonable, that if large profits are to be made in Alabama, that a part of these profits should not be paid to the state of Alabama, for the privilege of carrying on banking? This is just, and it has [38 U.S. 519, 584] been the course of legislation in all the states to receive a bonus from banking corporations, or to claim a portion of the profits of their operations on granting charters of incorporation. In England corporations can only exist by prescription, or be established by grants from the king, or legislative enactment. Could a foreign corporation go to England, and carry on its business there, until it should be expressly excluded by the decision of a Court, or by an act of Parliament? Another point in this case is to be regarded. The act of the legislature of Pennsylvania establishes the United States Bank at Philadelphia, and authorizes branches in the state. The law gives it no powers to be exercised out of the state. This is a sufficient evidence of the restriction of its existence to the state of Pennsylvania. As to that feature in the case before the Court, which depends on the existing constitution and laws of Alabama, prohibiting banking, the Court will be obliged to decide what banking is. The agreed case shows that a part of the capital of the bank was transferred to Alabama to buy bills of exchange; and the question is whether buying bills of exchange is banking. Discounting bills and notes, and receiving money on deposit, are not exclusively banking. Every bank, at the time of the incorporation of the State Bank of Alabama, dealt in bills of exchange. The object of the charter of the bank was to include the discounting and purchase of bills of exchange, as a part of the operations of the bank. The bank was to have every opportunity of making profits which any other bank possessed. It is not necessary to go into the question of the rights of individuals to purchase bills of exchange. The question before the Court is, whether foreign corporations have such rights. Speculations on the rights of individuals only embarrass the case. To show that the dealing in bills of exchange

is banking, Mr. Vande Gruff cited Postlethwait's Universal Dictionary of Trade and Commerce, titles Discount, Banking. 15 Johns. Rep. 390. Tomlin's Law Dictionary, title Bank. How can the plaintiff say the purchase of bills of exchange is not banking, when the law of their existence gives them no other powers but those of a bank. They are here found remitting their funds of the bank to Alabama to buy bills. Can they say this is not a banking operation? It was the object of the act incorporating the bank to give it the advantages of buying bills of exchange, which composes a large part of the profits of banking operations; and this is precisely what they have done in the case before the Court. The constitution of Alabama on this subject should receive a liberal construction, as the whole support of the government of Alabama is derived from the banking operations of the state banks.

Mr. Chief Justice TANEY delivered the opinion of the Court. These three cases involve the same principles, and have been [38 U.S. 519, 585] brought before us by writs of error directed to the Circuit Court and southern district of Alabama. The two first have been fully argued by counsel; and the last submitted to the Court upon the arguments offered in the other two. There are some shades of difference in the facts as stated in the different records, but none that can affect the decision. We proceed therefore to express our opinion on the first case argued, which was the Bank of Augusta va. Joseph B. Earle. The judgment in this case must decide the others. The questions presented to the Court arise upon a case stated in the Circuit Court in the following words:-- 'The defendant defends this action upon the following facts, that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, &c. That the bill sued on was made and endorsed, for the purpose of being discounted by Thomas M'Gran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile; and the said M'Gran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs. If the Court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon.' Upon this statement of facts the Court gave judgment for the defendant; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the state of Alabama; and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money. It will at once be seen that the questions brought here for decision are of a very grave character, and they have received from the Court an attentive examination. A multitude of corporations for various purposes have been chartered by the several states; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular state by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid, or not. And if, as has been argued at the bar, a corporation, from its nature and character, if incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the states in which they are made, they cannot be enforced in the Courts of justice. [38 U.S. 519, 586] Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation; and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended that a corporation composed of citizens of other states are entitled to the benefit of that provision in the Constitution of the United States which declares that 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;' that the Court should look behind the act of incorporation, and see who are the members of it; and, if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the state of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the state of Alabama: and as the citizens of Alabama may unquestionably purchase bills of exchange in that state, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the Constitution or laws of the state. The case of the Bank of the United States vs. Deveaux, 5 Cranch, 61, is relied on to support this position.

It is true, that in the case referred to, this Court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the Courts of the United States. But in this case the Court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision; and it has ever

since been recognised as authority in this Court. But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extent to contracts made by a corporation; especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent [38 U.S. 519, 587] of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state: and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another state; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties. The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this Court. In the case of Head and Amory vs. the Providence Insurance Company, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the Court, said, 'without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of Dartmouth College vs. Woodward, 4 Wheat. 636, the same principle was again decided by the Court. 'A corporation,' said the Court, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.' And in the case of the Bank of the United States vs. Dandridge, 12 Wheat. 64, where the questions in relation to the powers of corporations and their mode of action, were very carefully considered; the Court said, 'But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute, must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself.' It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a corporation, does not, by [38 U.S. 519, 588] the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honoured by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction. But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra- territorial operation; and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be

incapable of making a contract in another place. It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the coporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognised as such by the decisions of this Court. It was so held in the case of The United States vs. Amedy, 11 Wheat. 412, and in Beaston vs. The Farmer's Bank of Delaware, 12 Peters, 135. Now, natural persons through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, [38 U.S. 519, 589] by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? The corporation must no doubt show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognised by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed. Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognised and executed in another, where the right of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and Courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong; that Courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 37, that 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the Courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.' Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. [38 U.S. 519, 590] It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its Courts; since the case Henriquez vs. The Dutch West India Company, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this Court are bound to notice, that corporations, created in this country, have been in the open practice for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts, by any Court or any jurist. It is impossible to imagine that any Court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the Courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that

it acknowledges any rights but those which are secured by the Constitution of the United States. The Court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced [38 U.S. 519, 591] in by the states, that the Court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitualate in this opinion; that it has been decided in many of the state Courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the Courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the Courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power; why should not its existence be recognised for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty-where the last mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extent to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

We turn in the next place to the legislation of the states.

So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the state, unless restricted by statute. Thus a law was passed by the state of Pennsylvania, March 10, 1810, which prohibited foreigners and foreign corporations from making contracts of insurance against fire, and other losses mentioned in the law. In New York, also, a law was passed, March 18, 1814, which prohibited foreigners and foreign corporations from making in that state insurances against fire; and by another law, passed April 21, 1818, corporations chartered by other states are prohibited from keeping any office of deposit for the purpose of discounting promissory notes, or carrying on any kind of business which incorporated banks are authorized by law to carry on. The prohibition of certain specified contracts by corporations in these laws, is by necessary implication an admission that other contracts may be made by foreign corporations in Pennsylvania, and New York; and that no legislative permission is necessary to give them validity. And the language of these prohibitory acts most [38 U.S. 519, 592] clearly indicates that the contracts forbidden by them might lawfully have been made before these laws were passed. Maryland has gone still farther in recognising this right. By a law passed in 1834, that state has prescribed the manner in which corporations not chartered by the state, 'which shall transact or shall have transacted business' in the state, may be sued in its Courts upon contracts made in the state. The law assumes in the clearest manner, that such contracts were valid, and provides a remedy by which to enforce them. In the legislation of Congress, also, where the states and the people of the several states are all represented, we shall find proof of the general understanding in the United States, that by the law of comity among the states, the corporations chartered by one were permitted to make contracts in the others. By the act of Congress of June 23, 1836, (4 Story's Laws, 2445,) regulating the deposites of public money, the Secretary of the Treasury was authorized to make arrangements with some bank or banks, to establish an agency in the states and territories where there was no bank, or none that could be employed as a public depository, to receive and disburse the public money which might be directed to be there

deposited. Now if the proposition be true that a corporation created by one state cannot make a valid contract in another, the contracts made through this agency in behalf of the bank, out of the state where the bank itself was chartered, would all be void, both as respected the contracts with the government and the individuals who dealt with it. How could such an agency, upon the principles now contended for, have performed any of the duties for which it was established? But it cannot be necessary to pursue the argument further. We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well known, and long continued usages of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of Congress; all concur in proving the truth of this proposition. But we have already said that this comity is presumed from the silent acquiscence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favour of its adoption can no longer be made. And it remains to inquire, whether there is any thing in the constitution or laws of Alabama, from which this Court would be justified in concluding that the purchase of the bill in question was contrary to its policy. The constitution of Alabama contains the following provisions in relation to banks 'One state bank may be established, with such number of [38 U.S. 519, 593] branches as the General Assembly may from time to time deem expedient, provided that no branch bank shall be established, nor bank charter renewed, under the authority of this state, without the concurrence of two- thirds of both houses of the General Assembly; and provided also that not more than one bank or branch bank shall be established, nor bank charter renewed, but in conformity to the following rules:

'1. At least two-fifths of the capital stock shall be reserved for the state.

'2. A proportion of power, in the direction of the bank, shall be reserved to the state, equal at least to its proportion of stock therein.

'3. The state and individual stockholders shall be liable respectively for the debts of the bank, in proportion to their stock holden therein.

'4. The remedy for collecting debts shall be reciprocal, for and against the bank.

'5. No bank shall commence operations until half of the capital stock subscribed for be actually paid in gold and silver; which amount shall, in no case, be less than one hundred thousand dollars.' Now from these provisions in the constitution, it is evidently the policy of Alabama to restrict the power of the legislature in relation to bank charters, and to secure to the state a large portion of the profits of banking, in order to provide a public revenue; and also to make safe the debts which should be contracted by the banks. The meaning too in which that state used the word bank, in her constitution, is sufficiently plain from its subsequent legislation. All of the banks chartered by it, are authorized to receive deposits of money, to discount notes, to purchase bills of exchange, and to issue their own notes payable on demand to bearer. These are the usual powers conferred on the banking corporations in the different states of the Union; and when we are dealing with the business of banking in Alabama, we must undoubtedly attach to it the meaning in which it is used in the constitution and laws of the state. Upon so much of the policy of Alabama, therefore, in relation to banks as is disclosed by its constitution, and upon the meaning which that state attaches to the word bank, we can have no reasonable doubt. But before this Court can undertake to say that the discount of the bill in question was illegal, many other inquiries must be made, and many other difficulties must be solved. Was it the policy of Alabama to exclude all competition with its own banks by the corporations of other states? Did the state intend, by these provisions in its constitution, and these charters to its banks, to inhibit the circulation of the notes of other banks, the discount of notes, the loan of money, and the purchase of bills of exchange? Or did it design to go still further, and forbid the banking corporations of other states from making a contract of any kind within its territory? Did it mean to prohibit its own banks from keeping mutual accounts with the banks of other states, and from entering into any contract with [38 U.S. 519, 594] them, express or implied? Or did she mean to give to her banks the power of contracting within the limits of the state with foreign corporations, and deny it to individual citizens? She may believe it to be the interest of her citizens to permit the competition of other banks in the circulation of notes, in the purchase and sale of bills of exchange, and in the loan of money. Or she may think it to be her interest to prevent the circulation of the notes of other banks; and to prohibit them from sending money there to be employed in the

purchase of exchange, or making contracts of any other description.

The state has not made known its policy upon any of these points. And how can this Court, with no other lights before it, undertake to mark out by a definite and distinct line the policy which Alabama has adopted in relation to this complex and intricate question of political economy? It is true that the state is the principal stockholder in her own banks. She has created seven; and in five of them the state owns the whole stock; and in the others two-fifths. This proves that the state is deeply interested in the successful operation of her banks, and it may be her policy to shut out all interference with them. In another view of the subject, however, she may believe it to be her policy to extend the utmost liberality to the banks of other states; in the expectation that it would produce a corresponding comity in other states towards the banks in which she is so much interested. In this respect it is a question chiefly of revenue, and of fiscal policy. How can this Court, with no other aid than the general principles asserted in her constitution, and her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the Courts of the United States. Every sovereignty would without doubt choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the Courts of the United States, from a few general principles, which might very naturally be misunderstood or misapplied by the Court. It would hardly be respectful to a state for this Court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savour more of legislation than of judicial interpretation.

If we proceed from the constitution and bank charters to other acts of legislation by the state, we find nothing that should lead us to a contrary conclusion. By an act of Assembly of the state, passed January 12th, 1827, it was declared unlawful for any person, body corporate, company, or association, to issue any note for circulation as a bank note, without the authority of law; and a fine was imposed upon any one offending against this statute. Now this act protected the privileges of her own banks; in relation to bank notes only; and contains no prohibition against the purchase of bills of exchange, or against any other business by foreign banks, which [38 U.S. 519, 595] might interfere with her own banking corporations. And if we were to form our opinion of the policy of Alabama from the provisions of this law, we should be bound to say that the legislature deemed it to be the interest and policy of the state not to protect its own banks from competition in the purchase of exchange, or in any thing but the issuing of notes for circulation. But this law was repealed by a subsequent law, passed in 1833, repealing all acts of Assembly not comprised in a digest then prepared and adopted by the legislature. The law of 1827 above mentioned was not contained in this digest, and was consequently repealed. It has been said at the bar, in the argument, that it was omitted from the digest by mistake, and was not intended to be repealed. But this Court cannot act judicially upon such an assumption. We must take their laws and policy to be such as we find them in their statutes. And the only inference that we can draw from these two laws, is, that after having prohibited under a penalty any competition with their banks by the issue of notes for circulation, they changed their policy, and determined to leave the whole business of banking open to the rivalry of others. The other laws of the state, therefore, in addition to the constitution and charters, certainly would not authorize this Court to say, that the purchase of bills by the corporations of another state was a violation of its policy. The decisions of its judicial tribunals lead to the same result. It is true that in the case of The State vs. Stebbins, 1 Stewart's Alabama Reports, 312, the Court said that since the adoption of their constitution, banking in that state was to be regarded as a franchise. And this case has been much relied on by the defendant in error. Now we are satisfied, from a careful examination of the case, that the word franchise was not used, and could not have been used by the Court in the broad sense imputed to it in the argument. For if banking includes the purchase of bills of exchange, and all banking is to be regarded as the exercise of a franchise, the decision of the Court would amount to this-that no individual citizen of Alabama could purchase such a bill. For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state. But it cannot be supposed that the constitution of Alabama intended to prohibit its merchants and traders from purchasing or selling bills of exchange; and to make it a monopoly in the hands of their banks. And it is evident that the Court of Alabama, in the case of The State vs. Stebbins, did not mean to assert such a principle. In the passage relied on they are speaking of a paper circulating currency, and asserting the right of the state to regulate and to limit it. The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law; and it is [38 U.S. 519, 596] very clear that at common law, the right of banking in all of its ramifications, belonged to individual citizens; and might be exercised by

them at their pleasure. And the correctness of this principle is not questioned in the case of The State vs. Stebbins. Undoubtedly, the sovereign authority may regulate and restrain this right: but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature, in relation to banking corporations; and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances; and the prosecution against Stebbins was not founded on the provisions contained in the constitution, but was under the law of 1827 above mentioned, prohibiting the issuing of bank notes. We are fully satisfied that the state never intended by its constitution to interfere with the right of purchasing or selling bills of exchange; and that the opinion of the Court does not refer to transactions of that description, when it speaks of banking as a franchise. The question then recurs-Does the policy of Alabama deny to the corporations of other states the ordinary comity between nations? or does it permit such a corporation to make those contracts which from their nature and subject matter, are consistent with its policy, and are allowed to individuals? In making such contracts a corporation no doubt exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence is a franchise. Now it has been held in the Court of Alabama itself, in 2 Stewart's Alabama Reports, 147, that the corporation of another state may sue in its Courts; and the decision is put directly on the ground of national comity. The state therefore has not merely acquiesced by silence, but her judicial tribunals have declared the adoption of the law of international comity in the case of a suit. We have already shown that the comity of suit brings with it the comity of contract; and where the one is expressly adopted by its Courts, the other must also be presumed according to the usages of nations, unless the contrary can be shown. The cases cited from 7 Wend. 276, and from 2 Rand. 465, cannot influence the decision in the case before us. The decisions of these two state Courts were founded upon the legislation of their respective states, which was sufficiently explicit to enable their judicial tribunals to pronounce judgment on their line of policy. But because two states have adopted a particular policy in relation to the banking corporations of other states, we cannot infer that the same rule prevails in all of the other states. Each state must decide for itself. And it will be remembered, that it is not the state of Alabama which appears here to complain of an infraction of its policy. Neither the state, nor any of its constituted authorities, have interfered in this controversy. The objection is taken by persons who were parties to those contracts; and [38 U.S. 519, 597] who participated in the transactions which are now alleged to have been in violation of the laws of the state. It is but justice to all the parties concerned to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them that these engagements could not be enforced. Money was paid on them by one party, and received by the other. And when we see men dealing with one another openly in this manner, and making contracts to a large amount, we can hardly doubt as to what was the generally received opinion in Alabama at that time, in relation to the right of the plaintiffs to make such contracts. Every thing now urged as proof of her policy, was equally public and well known when these bills were negotiated. And when a Court is called on to declare contracts thus made to be void upon the ground that they conflict with the policy of the state; the line of that policy should be very clear and distinct to justify the Court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests; and is not supported by any positive legislation. There is no law of the state which attempts to define the rights of foreign corporations. We, however, do not mean to say that there are not many subjects upon which the policy of the several states is abundantly evident, from the nature of their institutions, and the general scope of their legislation; and which do not need the aid of a positive and special law to guide the decisions of the Courts. When the policy of a state is thus manifest, the Courts of the United States would be bound to notice it as a part of its code of laws; and to declare all contracts in the state repugnant to it, to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States, which a corporation might claim under peculiar circumstances, in a state other than that in which it was chartered. The reasoning, as well as the judgment of the Court, is applied to the matter before us; and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained. The judgment of the Circuit Court in these cases, must therefore be reversed with costs. Mr. Justice BALDWIN delivered an opinion assenting to the judgment of the Court, on principles which were stated at large in the opinion. This opinion was not delivered to the reporter.

Mr. Justice M'KINLEY delivered an opinion, dissenting from the judgment of the Court. I dissent from so much of the opinion of the majority of the Court as decides that the law of nations furnishes a rule by which validity can be given to the contracts in these cases; and from so much as [38 U.S. 519, 598] decides that the contracts, which were the subjects of the suits, were not against the policy of the laws of Alabama. This is the first time since the adoption of the Constitution of the United States, that any federal Court has, directly or indirectly, imputed national power to any of the states of the Union; and it is the first time that validity has been given to such contracts, which, it is acknowledged,

would otherwise have been void, by the application of a principle of the necessary law of nations. This principle has been adopted and administered by the Court as part of the municipal law of the state of Alabama, although no such principle has been adopted or admitted by that state. And whether the law of nations still prevails among the states, notwithstanding the Constitution of the United States; or the right and authority to administer it in these cases are dervied from that instrument; are questions not distinctly decided by the majority of the Court. But whether attempted to be derived from one source or the other, I deny the existence of it anywhere, for any such purpose. Because the municipal laws of nations cannot operate beyond their respective territorial limits, and because one nation has no right to legislate for another; certain rules founded in the law of nature and the immutable principles of justice have, for the promotion of harmony and commercial intercourse, been adopted by the consent of civilized nations. But no necessity exists for such a law among the several states. In their character of states they are governed by written constitutions and municipal laws. It has been admitted by the counsel, and decided by the majority of the Court, that without the authority of the statutes of the states chartering these banks, they would have no power whatever to purchase a bill of exchange, even in the state where they are established. If it requires the exertion of the legislative power of Pennsylvania, for instance, to enable the United States Bank to purchase a bill of exchange in that state; why should it not require the same legislative authority to enable it to do the same act in Alabama? It has been contended in argument, that the power granted to the bank to purchase a bill of exchange at Philadelphia, in Pennsylvania, payable at Mobile, in Alabama, would be nugatory, unless the power existed also to make contracts at both ends of the line of exchange. The authority to deal in exchange may very well be exercised by having command of one end of the line of exchange only. To buy and sell the same bill at the bank is dealing in exchange, and may be exercised with profit to the bank; but not perhaps as conveniently as if it could make contracts in Alabama as well as at the bank. But if it has obtained authority to command but one end of the line of exchange, it certainly has no right to complain that it cannot control the other; when that other is within the jurisdiction of another state, whose authority or consent it has not even asked for. The bill of exchange which is the subject of controversy between the Bank of Augusta and Earle, and that which is the subject of controversy between the United States Bank and Primrose. [38 U.S. 519, 599] were both drawn at Mobile, and made payable at New York. Neither of the banks had authority from any state, to make a contract at either end of the line of exchange here established. Here, then, they claim, and have exercised, all the rights and privileges of natural persons, independent of their charters; and claim the right, by the comity of nations, to make original contracts everywhere, because they have a right, by their charters, to make like contracts in the states where they were created, and have 'a local habitation and a name.'

It is difficult to conceive of the exercise of national comity, by a state having no national power. Whatever national power the old thirteen states possessed previous to the adoption of the Constitution of the United States, they conferred, by that instrument, upon the federal government. And to remove all doubt upon the question, whether the power thus conferred was exclusive or concurrent, the states are, by the tenth section of the first article of the Constitution, expressly prohibited from entering into any treaty, alliance, or confederation; and, without the consent of Congress, from entering into any argeement or compact with another state, or with a foreign power. By these provisions, the states have, by their own voluntary act, and for wise purposes, deprived themselves of all national power, and of all the means of international communication; and cannot even enter into an agreement or compact with a sister state, for any purpose whatever, without the consent of Congress. The comity of nations is defined by Judge Story, in his Conflict of Laws, to be the obligations of the laws of one nation in the territories of another, derived, altogether from the voluntary consent of the latter. And in the absence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. Conflict of Laws, 37.

Now, I ask again, what is the necessity for such a rule of law as this? Have not the states full power to adopt or reject what laws of their sister states they please? And why should the Courts interfere in this case, when the states have full power to legislate for themselves, and to adopt or reject such laws of their sister states as they think proper? If Alabama had adopted these laws, no difficulty could have arisen in deciding between these parties. This Court would not then have been under the necessity of resorting to a doubtful presumption for a rule to guide its decision. But when the Court have determined that they have the power to presume that Alabama has adopted the laws of the states chartering these banks, other difficult questions arise. How much of the charter of each bank has been adopted? This is a question of legislative discretion, which, if submitted to the legislature of the state, would be decided upon reasons of policy, and public convenience. And the question of power, to pass such a law under the Constitution of Alabama, would have to be considered and decided. These are [38 U.S. 519, 600] very inconvenient questions for a judicial

tribunal to determine. As the majority of the Court have not expressly stated whether Alabama has adopted the whole charters of the banks, or what parts they have adopted, there is now no certainty what the law of Alabama is on the subject of these charters. But these are not all the difficulties that arise in the exercise of this power by the judiciary. Many questions very naturally present themselves in the investigation of this subject, and the first is, To what government does this power belong? Secondly, Has it been conferred upon the United States? or has it been reserved to the states by the tenth amendment of the Constitution? If it be determined that the power belongs to the United States, in what provision of the Constitution is it to be found? And how is it to be exercised? By the judiciary, or by Congress? The counsel for the banks contended, that the power of Congress to regulate commerce among the several states, deprives Alabama of the power to pass any law restraining the sale and purchase of a bill of exchange; and, by consequence, the whole power belongs to Congress. The Court, by the opinion of the majority, does not recognise this doctrine, in terms. But if the power which the Court exercised, is not derived from that provision of the Constitution, in my opinion it does not exist. If ever Congress shall exercise this power to the broad extent contended for, the power of the states over commerce, and contracts relating to commerce, will be reduced to very narrow limits. The creation of banks, the making and endorsing of bills of exchange and promissory notes, and the damages on bills of exchange, all relate, more or less, to the commerce among the several states. Whether the exercise of these powers amounts to regulating the commerce among the several states, is not a question for my determination on this occasion. The majority of the Court have decided that the comity of nations gives validity to these contracts. And what are the reasons upon which this doctrine is now established? Why, the counsel for the banks say: We are obliged to concede that these banks had no authority to make these contracts in the state of Alabama, in virtue of the laws of the states creating them, or by the laws of Alabama. Therefore, unless this Court will extend to them the benefit of the comity of nations, they must lose all the money now in controversy, they will be deprived hereafter of the benefit of a very profitable branch of their business as bankers, and great public inconvenience will result to the commerce of the country. And besides all this, there are many corporations in the north, which were created for the purpose of carrying on various branches of manufactures, and particularly that of cotton. Those engaged in the manufacture of cotton will be unable to send their agents to the south to sell their manufactured articles, and to purchase cotton to carry on their business: and may lose debts already created. This is the whole amount of the argument, upon which the benefit of this doctrine is claimed. Because banks cannot make money in places and by means not authorized by their charters; [38 U.S. 519, 601] because they may lose by contracts made in unauthorized places; because the commerce of the country may be subjected to temporary inconvenience; and because corporations in the north, created for manufacturing purposes only, cannot, by the authority of their charters, engage in commerce also; this doctrine, which has not heretofore found a place in our civil code, is to be established. Notwithstanding, it is conceded that the states hold ample legislative power over the same subject, it is deemed necessary, on this occasion, to settle this doctrine by the supreme tribunal. The majority of the Court having, in their opinion, conceded that Alabama might make laws to prohibit foreign banks to make contracts, thereby admitted, by implication, that she could make laws to permit such contracts. I think it would have been proper to have left the power there, to be exercised or not, as Alabama, in her sovereign discretion, might judge best for her interest or her comity. The majority of the Court thought and decided otherwise. And here arises the radical and essential difference between them and me.

They maintain a power in the federal government, and in the judicial department of it, to do that which in my judgment belongs, exclusively, to the state governments; and to be exercised by the legislative and not the judicial departments thereof. A difference so radical and important, growing out of the fundamental law of the land, has imposed on me the unpleasant necessity of maintaining, single handed, my opinion, against the opinion of all the other members of the Court. However unequal the conflict, duty impels me to maintain it firmly; and, although I stand alone here, I have the good fortune to be sustained, to the whole extent of my opinion, by the very able opinion of the Court of Appeals of Virginia, in the case of the Marietta Bank vs. Pendell and others, 2 Ran. Rep. 465. If Congress have the power to pass laws on this subject, it is an exclusive power; and the states would then have no power to prohibit contracts of any kind within their jurisdictions. If the government of the United States have power to restrain the states, under the power to regulate commerce, whether it be exerted by the legislative or the judicial department of the government is not material; it being the paramount law, it paralyses all state power on the same subject. And this brings me to the consideration of the second ground on which I dissent.

It was contended by the counsel for the banks, that all the restraints imposed by the constitution of Alabama, in relation to banking, were designed to operate upon the legislature of the state, and not upon the citizens of that or any othe state. To comprehend the whole scope and intention of that instrument, it will be necessary to ascertain from the

language used, what was within the contemplation and design of the convention. The provision in the constitution on the subject of banking is this: 'One state bank may be established, with such number of branches as the General Assembly may, from time to time, deem expedient; provided, that no branch bank shall be established, nor bank charter renewed, under [38 U.S. 519, 602] the authority of this state, without the concurrence of two-thirds of both houses of the General Assembly; and provided, also, that not more than one bank nor branch bank shall be established, nor bank charter renewed, at any one session of the General Assembly, nor shall any bank or branch bank be established, or bank charter renewed, but in conformity with the following rules: 1. At least two-fiths of the capital stock shall be reserved for the state. 2. A proportion of power in the direction of the bank shall be reserved to the state, equal at least to its proportion of stock therein. 3. The state, and the individual stockholders, shall be liable, respectively, for the debts of the bank, in proportion to their stock holden therein. 4. The remedy for collecting debts shall be reciprocal for and against the bank. 5. No bank shall commence operations until half of the capital stock subscribed for shall be actually paid in gold or silver, which amount shall in no case be less than one hundred thousand dollars.' There are a few other unimportant rules laid down, but they are not material to the present inquiry. The inquiry naturally suggests itself to the mind, Why did Alabama introduce into her constitution these very unusual and specific rules? If they had not been deemed of great importance, they would not have been found there. Can any one say, therefore, that this regularly organized system, to which all banks within the state of Alabama were to conform, did not establish for the state, her legislature, or other authorities a clear and unequivocal policy on the subject of banking? It has been conceded in the argument, and by the opinion of the majority of the Court, that these constitutional provisions do restrict and limit the power of the legislature of the state. Then the legislature cannot establish a bank in Alabama, but in conformity with the rules here laid down. They have established seven banks; five of them belonging exclusively to the state, and two-fifths of the stock of the other two, with a proportionate power in the direction, reserved to the state. Each of these banks is authorized to deal in exchange. It is proper to stop here, and inquire whether the subject of exchange is proper to enter into the policy of the legislation of a state; and whether it is a part of the customary and legitimate business of banking. All the authorities on the subject show that in modern times it is a part of the business of banking. See Postlethwaite's Commercial Dictionary, title Bank; Tomlin's Law Dictionary, title Bank; Rees' Cyclopaedia, title Bank; Vatt. 105. This last author quoted, after showing that it is the duty of the sovereign of a nation to furnish for his subjects a sufficiency of money for the purposes of commerce, to preserve it from adulteration, and to punish those who counterfeit it, proceeds to say, 'There is another custom more modern, and of no less use to commerce, than the establishment of money, namely, exchange, or the business of the bankers; by means of whom a merchant remits immense sums from [38 U.S. 519, 603] one end of the world to the other with very little expense, and if he pleases, without danger. For the same reasons that sovereigns are obliged to protect commerce, they are obliged to protect this custom by good laws, in which every merchant foreigner, or citizen may find security.' From these authorities it appears that exchange is a part of modern banking, or at least to intimately connected with it that all modern banks have authority to deal in it. And it also appears that it is as much the duty of a state to provide for exchange, as for money or a circulating medium, for its subjects or citizens. When the state of Alabama reserved to herself, by her fundamental law, at least two-fifths of the capital and control of all banks to be created in the state, and, by her laws, has actually appropriated to herself the whole of the capital, management, and profits of five out of seven banks, and two-fifths of the other two; had she not the same right to appropriate the banking right, to deal in exchange, to herself, to the same extent? While performing her duty, under the constitution, by providing a circulating medium for the citizens, she was not unmindful of her duty in relation to exchange, and that is also provided for. Has she not provided increased security and safety to the merchant by making herself liable for the payment of every bill of exchange sold by the five banks belonging to her, and for two-fifths of all sold by the other two? And has she not also provided by law, that all the profits derived from thus dealing in bills of exchange shall go into the public treasury, for the common benefit of the people of the state? And has she not, by the profits arising from her banking, including the profits on exchange, been enabled to pay the whole expenses of the government, and thereby to abolish all direct or other taxation? See Aikin's Digest, 651. It was not the intention of the legislature, by conferring the power upon these banks to purchase and sell bills of exchange, to deprive the citizens of the state, or any other natural person, of the right to do the same thing. But it was the intention to exclude all accumulated bank capital which did not belong to the state, in whole or in part, according to the constitution, from dealing in exchange; and such is the inevitable and legal effect of those laws. Let us test this principle. It is admitted by the majority of the Court, in their opinion, that these constitutional provisions were intended as a restraint upon the legislature of the state. If so intended, the legislature can pass no law contrary to the spirit and intention of the constitution; or contrary to the spirit and intention of the charters of the banks, created in pursuance of its provisions. Now were the laws chartering the banks which are parties to this suit, contrary to the spirit and intention of the

constitution and laws of Alabama? That is the precise question. It must be borne in mind that these were banks, and nothing but banks that made the contracts in Alabama; and in that character, and that only, have they been considered in the opinion of the majority of the Court. Were those banks chartered by the legislature of Alabama, two-thirds of both houses concurring? Was, at least, two-fifths of the capital stock, and of the management of these [38 U.S. 519, 604] banks reserved to the state? Did the profits arising from the purchase of these bills of exchange go into the treasury of Alabama? All these questions must be answered in the negative. Then these are not constitutional banks in Alabama, and cannot contract there? The majority of the Court have decided these causes upon the presumption that Alabama had adopted the laws of Georgia, Louisiana, and Pennsylvania chartering these banks. And this presumption rests for its support upon the fact that there is nothing in the laws or the policy of the laws of Alabama to resist this presumption. I suppose it will not be contended that the power of this Court, to presume that Alabama had adopted these laws, is greater than the power of Alabama to adopt the laws for herself. Suppose these banks had made a direct application to the legislature of Alabama to pass a law to authorize them to deal in bills of exchange in that state, could the legislature have passed such a law without violating the constitution of the state?

An incorporated bank in Alabama is not only the mere creature of the law creating it, as banks are in other states; but it is the creature of a peculiar fundamental law; and if its charter is not in conformity to the provisions of the fundamental law, it is void. It must be recollected that the banks, which are the plaintiffs in these suits, when they present themselves to the legislature, asking permission to use their corporate privileges there, are not demanding a right, but asking a favour, which the legislature may grant or refuse as it pleases. If it should refuse, it would violate no duty, incur no responsibility. If, however, the Court exercise the power, it is upon the positive obligation of Alabama, that the presumption must arise, or the right does not exist. A positive rule of law cannot arise out of an imperfect obligation, by presumption or implication. But to put it on the foot of bare reqpugnance of the law, presumed to be adopted, to the laws of the country adopting, if there be any repugnance the Court ought not to presume the adoption. Story's Conflict of Laws, 37. The charter of every bank not created in conformity with the constitution of Alabama, must, at least, be repugnant to it. The presumption is, that the charters of all these banks were repugnant, there being no reason or inducement to make them conform in the states where they were created. The power of the Court to adopt the laws creating these banks, as they actually existed, and the power of the legislature of Alabama to adopt them in a modified form, or to grant the banks a mere permission to do a specified act, present very different questions, and involve very different powers. If, therefore, the legislature could not adopt the charters in the least objectionable form, nor authorize the banks to deal in exchange, without violating the constitution of Alabama, how can it be said that the contracts in controversy are not against the policy of the laws of Alabama? And by what authority does the majority of this Court presume that Alabama has adopted those laws? The general rule is, that slight evidence and circumstances shall defeat a mere legal presumption of law. This case will be a sigual exception to that rule. [38 U.S. 519, 605] In the case of Pennington vs. Townsend, 7 Wend. Rep. 278, the Protection and Lombard Bank, chartered by New Jersey, by agents, undertook to do banking business in New York, and there discounted the check which was the subject of the suit, in violation of the restraining acts of 1813 and 1818; the first of which enacts that no person unauthorized by law shall become a member of any association for the purpose of issuing notes or transacting any other business which incorporated banks may or do transact. The act of 1818 enacts that it shall not be lawful for any person, association, or body corporate to keep any office of deposit for discounting, or for carrying on any kind of banking business, and affixes a penalty of $1000, to be recovered, &c. Under these laws the contract between the parties was held to be void; and the Court says, 'The protection against the evil intended to be remedied, to wit, preventing banking without the authority of the legislature of the state, is universal in its application within the state, and without exception; unless qualified by the same power which enacted it, or by some other paramount law. Such is not the law incorporating this bank.'

Is there any thing in these laws which more positively prohibits banking in New York, without the authority of the legislature of that state, than there is in the constitution of Alabama, prohibiting all banking except in the manner prescribed by the constitution? Can it be believed that she intended to protect herself against the encroachments of her own legislature only, and to leave herself exposed to the encroachments of all her sister states? Does the language employed in these provisions of the constitution justify any such construction? It is general, comprehensive, and not only restrictive, but expressly prohibitory. Whatever is forbidden by the constitution of Alabama, can be done by no one within her jurisdiction; and it was sufficient for her to know that no bank could do any valid banking act there without violating her constitution. It was contended, by the counsel for the banks, that no law could be regarded as declaring the policy of the state, unless it was penal; and inflicted some punishment for its violation. This doctrine is as

novel as it is unfounded in principle. I know of no such exclusive rule by which to reach the mind and intention of the legislature. If the language used shows clearly that particular acts were intended to be prohibited, and the act is afterwards done, it is against the policy of the law and void. Suppose the legislature of Alabama were to establish a bank, disregarding all the conditions and restrictions imposed by the constitution: would it not violate that instrument, and therefore the act be void? And can Georgia, Louisiana, or Pennsylvania, by their respective legislatures, do in Alabama what her own legislature cannot do? The relations which these states hold towards each other, in their individual capacity of states, under the Constitution of the United States, is that of perfect independence. In the case of Buckner vs. Finley and Van Lear, 2 Peters' Rep. 590, Chief Justice Marshall said, 'For all national purposes embraced by the federal Constitution, the states and the citizens thereof are one [38 U.S. 519, 606] united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to, and independent of each other.' It is in this foreign and independent relation that these four states stand before this Court in these cases. The condition of Alabama, taken with a view to this relation, cannot be worse than that of an independent nation, in like circumstances. What that would be we will see from authority. 'Nations being free and independent of each other in the same manner as men are naturally free and independent, the second general law of their society is that each nation ought to be left in the peaceable enjoyment of that liberty it has derived from nature. The natural society of nations cannot subsist, if the rights which each has received from nature are not respected. None would willingly renounce its liberty: it would rather break off all commerce with those that should attempt to violate it. From this liberty and independence it follows that every nation is to judge of what its conscience demands, of what it can or cannot do, of what is proper or improper to be done; and consequently to examine and determine whether it can perform any office for another without being wanting in what it owes to itself. In all cases, then, where a nation has the liberty of judging what its duty requires, another cannot oblige it to act in such or such a manner. For the attempting this would be doing an injury to the liberty of nations. A right to offer constraint to a free person can only be invested in us in such cases where that person is bound to perform some particular thing for us, or from a particular reason that does not depend on his judgment; or, in a word, where we have a complete authority over him.' Vatt. 53, 54. Now apply these just and reasonable principles to Alabama, in her relation of a foreign and independent state, reposing upon the rights reserved to her by the tenth amendment of the Constitution of the United States; and then show the power that can compel her to pass penal laws to guard and protect those perfect, ascertained, constitutional rights from the illegal invasion of a bank created by any other state. If this power exists at all, it can be shown, and the authority by which it acts. But not even a reasonable pretence for any such power or authority has been shown. The conclusion must therefore be, that Alabama, as an independent foreign state; owing no duty, nor being under any obligation to either of the states, by whose corporations she was invaded; was the sole and exclusive judge of what was proper or improper to be done; and consequently had a right to examine and determine whether she could grant a favour to either of those states without injury to herself; unless indeed there be a controlling power in this Court, derived from some provision of the Constitution of the United States. As none such has been set up, or relied upon in the opinion of the majority of the Court; for the present I have a right to conclude that none such exists. And without considering any of the minor points discussed in the argument, or noticed in the opinion, I dismiss the subject.

U.S. Supreme Court

ELK v. WILKINS, 112 U.S. 94 (1884)

112 U.S. 94

ELK
v.
WILKINS.

November 3, 1884

A. J. Poppleton and J. L. Webster, for plaintiff in error.

G. M. Lamberton, for defendant in error.

GRAY, J.

This is an action brought by an Indian, in the circuit court of the United States for the district of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter therein. The petition was as follows: [112 U.S. 94, 95] 'John Elk, plaintiff, complains of Charles Wilkins, defendant, and avers that the matter in dispute herein exceeds the sum of five hundred dollars, to-wit, the sum of six thousand dollars, and that the matter in dispute herein arises under the constitution and laws of the United States; and, for cause of action against the defendant, avers that he, the plaintiff, is an Indian, and was born within the United States; that more than one year prior to the grievances hereinafter complained of he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the fourteenth amendment to the constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States. That on the sixth day of April, 1880, there was held in the city of Omaha (a city of the first class, incorporated under the general laws of the state of Nebraska, providing for the incorporation of cities of the first class) a general election for the election of members of the city council and other officers for said city. That the defendant, Charles Wilkins, held the office of and acted as registrar in the Fifth ward of said city, and that as such registrar it was the duty of such defendant to register the names of all persons entitled to exercise the elective franchise in said ward of said city at said general election. That

this plaintiff was a citizen of and had been a bona fide resident of the state of Nebraska for more than six months prior to said sixth day of April, 1880, and had been a Bona fide resident of Douglas county, wherein the city of Omaha is situate, for more than forty days, and in the Fifth ward of said city more than ten days prior to the said sixth day of April, and was such citizen and resident at the time of said election, and at the time of his attempted registration, as hereinafter set forth, and was in every way qualified, under the laws of the state of Nebraska and of the city of Omaha, to be registered as a voter, and to cast a vote at said election, and complied with the laws of the city and state in that behalf. [112 U.S. 94, 96] That on or about the fifth day of April, 1880, and prior to said election, this plaintiff presented himself to said Charles Wilkins, as such registrar, at his office, for the purpose of having his name registered as a qualified voter, as provided by law, and complied with all the provisions of the statutes in that regard, and claimed that, under the fourteenth and fifteenth amendments to the constitution of the United States, he was a citizen of the United States, and was entitled to exercise the elective franchise, regardless of his race and color; and that said Wilkins, designedly, corruptly, willfully, and maliciously, did then and there refuse to register this plaintiff, for the sole reason that the plaintiff was an Indian, and therefore not a citizen of the United States, and not, therefore, entitled to vote, and on account of his race and color, and with the willful, malicious, corrupt, and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights, and all other Indians of their rights, under said fourteenth and fifteenth amendments to the constition of the United States, on account of his and their race and color. That on the sixth day of April this plaintiff presented himself at the place of voting in said ward, and presented a ballot, and requested the right to vote, where said Wilkins, who was then acting as one of the judges of said election in said ward, in further carrying out his willful and malicious designs as aforesaid, declared to the plaintiff and to the other election officers that the plaintiff was an Indian, and not a citizen, and not entitled to vote, and said judges and clerks of election refused to receive the vote of the plaintiff, for that he was not registered as required by law. Plaintiff avers the fact to be that by reason of said willful, unlawful, corrupt, and mailcious refusal of said defendant to register this plaintiff, as provided by law, he was deprived of his right to vote at said election, to his damage in the sum of $6,000. Wherefore, plaintiff prays judgment against defendant for $6,000, his damages, with costs of suit.'

The defendant filed a general demurrer for the following causes: (1) That the petition did not state facts sufficient to [112 U.S. 94, 97] constitute a cause of action; (2) that the court had no jurisdiction of the person of the defendant; (3) that the court had no jurisdiction of the subject of the action. The demurrer was argued before Judge McCRARY and Judge DUNDY, and sustained; and, the plaintiff electing to stand by his petition, judgment was rendered for the defendant, dismissing the petition, with costs. The plaintiff sued out this writ of error.

By the constitution of the state of Nebraska, art. 7, 1, 'every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States; second, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.' By the statutes of Nebraska, every male person of the age of 21 years or upward, belonging to either of the two classes so defined in the constitution of the state, who shall have resided in the state 6 months, in the county 40 days, and in the precinct, township, or ward 10 days, shall be an elector; the qualifications of electors in the several wards of cities of the first class (of which Omaha is one) shall be the same as in precincts; it is the duty of the registrar to enter in the register of qualified voters the name of every person who applies to him to be registered, and satisfies him that he is qualified to vote under the provisions of the election laws of the state; and at all municipal, as well as county or state elections, the judges of election are required to check the name, and receive and deposit the ballot, of any person whose name appears on the register. Comp. St. Neb. 1881, c. 26, 3; c. 13, 14; c. 76, 6, 13, 19. [112 U.S. 94, 98] The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;' and on the fifteenth article of amendment, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.' This being a suit at common law in which the matter in dispute exceeds $500, arising under the constitution of the United States, the circuit court had jurisdiction of it under the act of March 3, 1875, c. 137, 1, even if the parties were citizens of the same state. 18 St. 470; Ames v. Kansas, 111 U.S. 449 ; S. C. 4 SUP. CT. REP. 437. The judgment of that court, dismissing the action with costs, must have proceeded upon the merits, for if the dismissal had been for want of jurisdiction, no costs could have been awarded. Mayor v. Cooper, 6 Wall. 247; Mansfield, C. & L. M. Ry. v. Swan, 111 U.S. 379 ; S. C. 4 SUP. CT. REP. 510. And the only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action. The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the fourteenth amendment of the constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to-wit: The plaintiff is an Indian, and was born in the United States,

and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a bona fide resident of the state of Nebraska and city of Omaha. The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he 'is [112 U.S. 94, 99] an Indian, and was born within the United States,' and that 'he had severed his tribal relations to the Indian tribes,' clearly implies that he was born a member of one of the Indian tribes within the limits of the United States which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he 'had fully and completely surrendered himself to the jurisdiction of the United States,' he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed [112 U.S. 94, 100] by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Const. art. 1, 2, 8; art. 2, 2; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; U. S. v. Rogers, 4 How. 567; U. S. v. Holliday, 3 Wall. 407; Case of the Kansas Indians, 5 Wall. 737; Case of the New York Indians, Id. 761; Case of the Cherokee Tobacco, 11 Wall. 616; U. S. v. Whisky, 93 U.S. 188 ; Pennock v. Commissioners, 103 U.S. 44 ; Crow Dog's Case, 109 U.S. 556 ; S. C. 3 SUP. CT. REP. 396; Goodell v. Jackson, 20 Johns. 693; Hastings v. Farmer, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, (7 St. 159, 211, 236, 335, 483, 488; Wilson v. Wall, 6 Wall. 83; Opinion of Atty. Gen. TANEY, 2 OP. Attys. Gen. 462;) in 1855 with the Wyandotts, (10 St. 1159; Karrahoo v. Adams, 1 Dill. 344, 346; Gray v. Coffman, 3 Dill. 393; Hicks v. Butrick, Id. 413;) in 1861 and in March, 1866, with the Pottawatomies, (12 st. 1192; 14 st. 763;) in 1862 with the Ottawas, (12 St. 1237;) and the Kickapoos, (13 St. 624;) and acts of congress of March 3, 1839, c. 83, 7, concerning the Brothertown Indians; and of March 3, 1843, c. 101, 7, August 6, 1846, c. 88, and March 3, 1865, c. 127, 4, concerning the Stockbridge Indians, (5 St. 351, 647; 9 St. 55; 13 St. 562.) See, also, treaties with the Stockbridge Indians in 1848 and 1856, (9 St. 955; 11 St. 667; 7 Op. Attys. Gen. 746.)

Chief Justice TANEY, in the passage cited for the plaintiff [112 U.S. 94, 101] from his opinion in Scott v. Sandford, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They' (the Indian tribes) 'may without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.' But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution, by which 'no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of

this constitution, shall be eligible to the office of president;' and 'the congress shall have power to establish an uniform rule of naturalization.' Const. art. 2, 1; art. 1, 8. By the thirteenth amendment of the constitution slavery was prohibited. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, (Scott v. Sandford, 19 How. 393;) and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside. Slaughter-House Cases, 16 Wall. 36, 73; Strauder v. West Virginia, 100 U.S. 303 , 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared [112 U.S. 94, 102] to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that 'representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. So the further provision of the second section for a propor- [112 U.S. 94, 103] tionate reduction of the basis of the representation of any state in which the right to vote for presidential electors, representatives in congress, or executive or judicial officers or members of the legislature of a state, is denied, except for participation in rebellion or other crime, to 'any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States,' cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.

It is also worthy of remark that the language used, about the same time, by the very congress which framed the fourteenth amendment, in the first section of the civil rights act of April 9, 1866, declaring who shall be citizens of the United States, is 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' 14 St. 27; Rev. St. 1992. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being 'naturalized in the United States,' by or under some treaty or statute. The action of the political departments of the government, not only after the proposal of the amendment by congress to the states in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of states, accords with this construction. While the amendment was pending before the legislatures of the several states, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 St. 794, 796; 15 St. 513, 532, 533, 637.

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe. That treaty not only provided for the naturalization of mem- [112 U.S. 94, 104] bers of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the district court of the United States, of their intention to become citizens, (15 St. 517, 520, 521;) but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were 'unfitted for the responsibilities of citizenship,' and enacting that a register of the whole people of this tribe, resident in Kansas or elsewhere, should be taken, under the direction of the secretary of the interior, showing the names of 'all who declare their desire to be and remain Indians and in a tribal condition,' and of incompetents and orphans as described in the treaty of 1855, and that such persons, and those only, should thereafter constitute the tribe, it provided that 'no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the

agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge.' 15 St. 514, 516.

Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States. By the act of July 15, 1870, c. 296, 10, for instance, it was provided that if at any time thereafter any of the Winnebago Indians in the state of Minnesota should desire to become citizens of the United States, they should make application to the district court of the United States for the district of Minnesota, and in open court make the same proof, and take the same oath of allegiance as is provided by law for the naturalization of aliens, and should also make proof, to the satisfaction of the court, that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for at least five years before been able to support themselves and their families; and there- [112 U.S. 94, 105] upon they should be declared by the court to be citizens of the United States, the declaration entered of record, and a certificate thereof given to the applicant; and the secretary of the interior, upon presentation of that certificate, might issue to them patents in fee-simple, with power of alienation, of the lands already held by them in severalty, and might cause to be paid to them their proportion of the money and effects of the tribe held in trust under any treaty or law of the United States; and thereupon such persons should cease to be members of the tribe; and the lands so patented to them should be subject to levy, taxation, and sale in like manner with the property of other citizens. 16 St. 361. By the act of March 3, 1873, c. 332, 3, similar provision was made for the naturalization of any adult members of the Miami tribe in Kansas, and of their minor children. 17 St. 632. And the act of March 3, 1865, c. 127, before referred to, making corresponding provision for the naturalization of any of the chiefs, warriors, or heads of families of the Stockbridge Indians, is re-enacted in section 2312 of the Revised Statutes.

The act of January 25, 1871, c. 38, for the relief of the Stockbridge and Munsee Indians in the state of Wisconsin, provided that 'for the purpose of determining the persons who are members of said tribes, and the future relation of each to the government of the United States,' two rolls should be prepared under the direction of the commissioner of Indian affairs, signed by the sachem and councilors of the tribe, certified by the person selected by the commissioner to superintend the same, and returned to the commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, 'as signify their desire to separate their relations with said tribe and to become citizens of the United States,' and the other to be denominated the Indian roll, of the names of all such 'as desire to retain their tribal character and continue under the care and guardianship of the United States;' and that those rolls, so made and returned, should be held as a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or considered as members of the tribe, or to be interested [112 U.S. 94, 106] in any provision made or to be made by the United States for its benefit, 'and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States.' 16 St. 406.

The pension act exempts Indian claimants of pensions for service in the army or navy from the obligation to take the oath to support the constitution of the United States. Act of March 3, 1873, c. 234, 28, (17 St. 574; Rev. St. 4721.) The recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribe. The act of March 3, 1875, c. 131, 15, allowed to 'any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations,' the benefit of the homestead acts, but only upon condition of his 'making satisfactory proof of such abandonment, under rules to be prescribed by the secretary of the interior;' and further provided that his title in the homestead should be absolutely inalienable for five years from the date of the patent, and that he should be entitled to share in all annuities, tribal funds, lands, and other property, as if he had maintained his tribal relations. 18 St. 420. And the act of March 3, 1884, c. 180, 1, while it allows Indians 'located on public lands' to 'avail themselves of the homestead laws as fully, and to the same extent, as may now be done by citizens of the United States,' provides that the form and the legal effect of the patent shall be that the United States does and will hold the land for twenty-five years in trust for the Indian making the entry, and his widow and heirs, and will then convey it in fee to him or them. 23 St. 96. The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are [112 U.S. 94, 107] and whose citizens they seek to become, and not by each Indian for himself. There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the fourteenth amendment, and of the condition of the Indians at the time of its proposal and ratification.

The act of July 27, 1868, c. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting

that 'in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another without being naturalized under its authority. 15 St. 223; Rev. St. 1999. The provision of the act of congress of March 3, 1871, c. 120, that 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,' is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 St. 566; Rev. St. 2079.

In the case of U. S. v. Elm, 23 Int. Rev. Rec. 419, decided by Judge WALLACE in the district court of the United States for the Northern district of New York, the Indian who was held to have a right to vote in 1876 was born in the state of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that state; and by a statute of the state it had been enacted that any native Indian might purchase, take, hold, and convey lands, and, whenever he should have become a freeholder to the value of $100, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. St. 1843, c. 87. The condition of the tribe from which he [112 U.S. 94, 108] derived his origin, so far as any fragments of it remained within the state of New York, resembled the condition of those Indian nations of which Mr. Justice JOHNSON said in Fletcher v. Peck, 6 Cranch, 87, 146, that they 'have totally extinguished their national fire, and submitted themselves to the laws of the states;' and which Mr. Justice MCLEAN had in view when he observed in Worcester v. Georgia, 6 Pet. 515, 580, that in some of the old states 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.' See, also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities, Danzell v. Webquish, 108 Mass. 133; Pells v. Webquish, 129 Mass. 469; Mass. St. 1862, c. 184; 1869, c. 463.

The passages cited as favorable to the plaintiff, from the opinions delivered in Ex parte Kenyon, 5 Dill. 385, 390, in Ex parte Reynolds, 5 Dill. 394, 397, and in U. S. v. Crook, 5 Dill. 453, 464, were obiter dicta. The Case of Reynolds was an indictment, in the circuit court of the United States for the Western district of Arkansas, for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge PARKER in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dill. 397, 404. Each of the other two cases was a writ of habeas corpus; and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. Case of the Hottentot Venus, 13 East, 195; Case of Dos Santos, 2 Brock. 493; In re Kaine, 14 How. 103. In Kenyon's Case, judge PARKER held that the court in which the prisoner had been convicted had no jurisdiction of the subject- matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, 'this alone would be conclusive of this case.' 5 Dill. [112 U.S. 94, 109] 390. In U. S. v. Crook, the Ponca Indians were discharged by Judge DUNDY because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority, (5 Dill. 468;) and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

The law upon the question before us has been well stated by Judge DEADY in the district court of the United States for the district of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: 'Being born a member of 'an independent political community'-the Chinook-he was not born subject to the jurisdiction of the United States-not born in its allegiance.' McKay v. Campbell, 2 Sawy. 118, 134. And in a later case he said: 'But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.' U. S. v. Osborne, 6 Sawy. 406, 409. Upon the question whether any action of a state can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the state of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See Chirac v. Chirac, 2 Wheat. 259; Fellows v. Blacksmith, 19 How. 366; U. S. v. Holliday, 3 Wall. 407, 420; U. S. v. Joseph, 94 U.S. 614 , 618. The plaintiff, not being a citizen of the United States under the fourteenth amendment of the constitution, has been deprived of no right secured by the fifteenth amendment, and cannot maintain this action. Judgment affirmed. [112 U.S. 94, 110]

HARLAN, J., dissenting.

Mr. Justice WOODS and myself feel constrained to express our dissent from the interpretation which our brethren give to that clause of the fourteenth amendment which provides that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' The case, as presented by the record, is this: John Elk, the plaintiff in error, is a person of the Indian race. He was born within the territorial limits of the United States. His parents were, at the time of his birth, members of one of the Indian tribes in this country. More than a year, however, prior to his application to be registered as a voter in the city of Omaha, he had severed all relations with his tribe, and, as he alleges, fully and completely surrendered himself to the jurisdiction of the United States. Such surrender was, of course, involved in his act of becoming, as the demurrer to the petition admits that he did become, a bona fide resident of the state of Nebraska. When he applied in 1880 to be registered as a voter, he possessed, as is also admitted, the qualifications of age and residence in state, county, and ward, required for electors by the constitution and laws of that state. It is likewise conceded that he was entitled to be so registered if, at the time of his application, he was a citizen of the United States; for, by the constitution and laws of Nebraska, every citizen of the United States, having the necessary qualifications of age and residence in state, county, and ward, is entitled to vote. Whether he was such citizen is the question presented by this writ of error.

It is said that the petition contains no averment that Elk was taxed in the state in which he resides, or had ever been treated by her as a citizen. It is evident that the court would not have held him to be a citizen of the United States, even if the petition had contained a direct averment that he was taxed; because its judgment, in legal effect, is that, although born within the territorial limits of the United States, he could not, if at his birth a member of an Indian tribe, acquire national citizenship [112 U.S. 94, 111] by force of the fourteenth amendment, but only in pursuance of some statute or treaty providing for his naturalization. It would, therefore, seem unnecessary to inquire whether he was taxed at the time of his application to be registered as a voter; for, if the words 'all persons born ... in the United States and subject to the jurisdiction thereof' were not intended to embrace Indians born in tribal relations, but who subsequently became bona fide residents of the several states, then, manifestly, the legal status of such Indians is not altered by the fact that they are taxed in those states. While denying that national citizenship, as conferred by that amendment, necessarily depends upon the inquiry whether the person claiming it is taxed in the state of his residence, or has property therein from which taxes may be derived, we submit that the petition does sufficiently show that the plaintiff was taxed, that is, belongs to the class which, by the laws of Nebraska, are subject to taxation. By the constitution and laws of Nebraska all real and personal property, in that state, are subject to assessment and taxation. Every person of full age and sound mind, being a resident thereof, is required to list his personal property for taxation. Const. Neb. art. 9, 1; Comp. St. Neb. c. 77, pp. 400, 401. Of these provisions upon the subject of taxation this court will take judicial notice. Good pleading did not require that they should be set forth, at large, in the petition. Consequently, an averment that the plaintiff is a citizen and bona fide resident of Nebraska implies, in law, that he is subject to taxation, and is taxed, in that state. Further: The plaintiff has become so far incorporated with the mass of the people of Nebraska that being, as the petition avers, a citizen and resident thereof, he constitutes a part of her militia. Comp. St. Neb. c. 56. He may, being no longer a member of an Indian tribe, sue and be sued in her courts. And he is counted in every apportionment of representation in the legislature; for the requirement of her constitution is that 'the legislature shall apportion the senators and representatives according to the number of inhabitants, excluding Indians not taxed, and soldiers and officers of the United States army.' Const. Neb. art. 3, 1. [112 U.S. 94, 112] At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, 3, which requires, in the apportionment of representatives and direct taxes among the several states 'according to their respective numbers,' the exclusion of 'Indians not taxed.' This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country. The same provision is retained in the fourteenth amendment; for, now, as at the adoption of the constitution, Indians in the several states, who are taxed by their laws, are counted in establishing the basis of representation in congress. By the act of April 9, 1866, entitled 'An act to protect all persons in the United States in their civil rights, and furnish means for their vindication,' (14 St. 27,) it is provided that 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.' This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. Numerous statutes and treaties previously provided for all the individual members of particular Indian tribes becoming, in certain contingencies, citizens of the United States. But the act of 1866 reached Indians not in tribal relations. Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race, (excluding only 'Indians not taxed,') who were born within the territorial limits of the United States, and were not subject to any foreign power. Surely every one must

admit that an Indian residing in one of the states, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, al- [112 U.S. 94, 113] though he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the state of their residence. Language could not express that purpose with more distinctness than does the act of 1866. Any doubt upon the subject, in respect to persons of the Indian race residing in the United States or territories, and not members of a tribe, will be removed by an examination of the debates, in which many distinguished statesmen and lawyers participated in the senate of the United States when the act of 1866 was under consideration.

In the bill as originally reported from the judiciary committee there were no words excluding 'Indians not taxed' from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations, with governments of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States, Mr. Trumbull, who reported the bill, modified it by inserting the words 'excluding Indians not taxed.' What was intended by that modification appears from the following language used by him in debate: 'Of course we cannot declare the wild Indians who do not recognize the government of the United States, who are not subject to our laws, with whom we make treaties, who have their own laws, who have their own regulations, whom we do not intend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The constitution of the United States excludes them from the enumeration of the population of the United States when it says that Indians not taxed are to be excluded. It has occurred to me that, perhaps, the amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding [112 U.S. 94, 114] Indians not taxed, and not subject to any foreign power, shall be deemed citizens of the United States.' Cong. Globe, (1st Sess. 39th Congress,) p. 527. In replying to the objections urged by Mr. Hendricks to the bill even as amended, Mr. Trumbull said: 'Does the senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States-persons that are not to be counted, in our government? If he does not, let him not object to this amendment that brings in even [only] the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen.' Id. 528.

The entire debate shows, with singular clearness, indeed, with absolute certainty, that no senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill as passed admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations and became residents of one of the states or territories, within the full jurisdiction of the United States. It was so interpreted by President Johnson, who, in his veto message, said: 'By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific states, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States.'

It would seem manifest, from this brief review of the history of the act of 1866, that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country-such of them, at least, as resided in one of the states or territories, and were subject to taxation and other public burdens. And it is to be observed that, whoever was included within the terms of the grant contained in that act, became citizens of the United States without any record of [112 U.S. 94, 115] their names being made. The citizenship conferred was made to depend wholly upon the existence of the facts which the statute declared to be a condition precedent to the grant taking effect. At the same session of the congress which passed the act of 1866, the fourteenth amendment was approved and submitted to the states for adoption. Those who sustained the former urged the adoption of the latter. An examination of the debates, pending the consideration of the amendment, will show that there was no purpose on the part of those who framed it, or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes and were residents of one of the states or territories outside of any reservation set apart for the exclusive use and occupancy of Indian tribes.

Prior to the adoption of the fourteenth amendment, numerous statutes were passed with reference to particular bodies of Indians, under which the individual members of such bodies, upon the dissolution of their tribal relations, or upon the division of their lands derived from the government, became, or were entitled to become, citizens of the United States by force alone of the statute, without observing the forms required by the naturalization laws in the case of a foreigner becoming a citizen of the United States. Such was the statute of March 3, 1839, (5 St. 349,) relating to the Brothertown Indians in the then territory of Wisconsin. Congress consented that the lands reserved for their use might be partitioned among the individuals composing the

tribe. The act required the petition to be evidenced by a report and map to be filed with the secretary of the interior, by whom it should be transmitted to the president; whereupon the act proceeded: 'The said Brothertown Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens,' etc. Similar legislation was enacted with [112 U.S. 94, 116] reference to the Stockbridge Indians. 5 St. 646, 647. Legislation of this character has an important bearing upon the present question, for it shows that prior to the adoption of the fourteenth amendment it had often been the policy of congress to admit persons of the Indian race to citizenship upon their ceasing to have tribal relations, and without the slightest reference to the fact that they were born in tribal relations. It shows, also, that the citizenship thus granted was not, in every instance, required to be evidenced by the record of a court. If it be said that the statutes prior to 1866, providing for the admission of Indians to citizenship, required in their execution that a record be made of the names of those who thus acquired citizenship, our answer is that it was entirely competent for congress to dispense, as it did in the act of 1866, with any such record being made in a court, or in any department of the government. And certainly it must be conceded that except in cases of persons 'naturalized in the United States,' (which phrase refers only to those who are embraced by the naturalization laws, and not to Indians,) the fourteenth amendment does not require the citizenship granted by it to be evidenced by the record of any court, or of any department of the government. Such citizenship passes to the person, of whatever race, who is embraced by its provisions, leaving the fact of citizenship to be determined, when it shall become necessary to do so in the course of legal inquiry, in the same way that questions as to one's nativity, domicile, or residence are determined.

If it be also said that, since the adoption of the fourteenth amendment, congress has enacted statutes providing for the citizenship of Indians, our answer is that those statutes had reference to tribes, the members of which could not, while they continued in tribal relations, acquire the citizenship granted by the fourteenth amendment. Those statutes did not deal with individual Indians who had severed their tribal connections and were residents within the states of the Union, under the complete jurisdiction of the United States. There is nothing in the history of the adoption of the fourteenth amendment which, in our opinion, justifies the conclu- [112 U.S. 94, 117] sion that only those Indians are included in its grant of citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States. As already stated, according to the doctrines of the court, in this case,-if we do not wholly misapprehend the effect of its decision,-the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment even had he been, at the time it was adopted, a permanent resident of one of the states, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same state.

When the fourteenth amendment was pending in the senate of the United States, Mr. Doolittle moved to insert after the words 'subject to the jurisdiction thereof,' the words 'excluding Indians not taxed.' His avowed object in so amending the measure was to exclude, beyond all question, from the proposed grant of national citizenship, tribal Indians who-since they were, in a sense, subject to the jurisdiction of the United States- might be regarded as embraced in the grant. The proposition was opposed by Mr. Trumbull and other friends of the proposed constitutional amendment, upon the ground that the words 'Indians not taxed' might be misconstrued, and also because those words were unnecessary, in that the phrase 'subject to the jurisdiction thereof' embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations. But it was distinctly announced by the friends of the amendment that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the states, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. Said Mr. Trumbull: 'It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.' Cong. Globe, pt. 4, (1st Sess. 39th Cong.) pp. 2890-2893. Alluding to the phrase 'Indians not taxed,' he remarked that the language of the proposed constitutional amendment was [112 U.S. 94, 118] better than that of the act of 1866 passed at the same session. He observed: 'There is a difficulty about the words 'Indians not taxed.' Perhaps one of the reasons why I think so is because of the persistency with which the senator from Indiana himself insisted that the phrase 'Indians not taxed,' the very words which the senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax; that that was the meaning of it; we must take it literally. The senator from Maryland did not agree to that, nor did I; but, if the senator from Indiana was right, it would receive a construction which, I am sure, the senator from Wisconsin would not be for, for if these Indians come within our limits and within our jurisdiction and are civilized, he would just as soon make a citizen of a poor Indian as of the rich Indian.' Id. 2894.

A careful examination of all that was said by senators and representatives, pending the consideration by congress of the fourteenth amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that, in the form in which it was approved by congress, it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good

faith, outside of Indian reservations and within one of the states or territories of the Union. This fact is, we think, entitled to great weight in determining the meaning and scope of the amendment. Lithographic Co. v. Sarony, 111 U.S. 57 ; S. C. 4 SUP. CT. REP. 279. In this connection we refer to an elaborate report made by Mr. Carpenter, to the senate of the United States, in behalf of its judiciary committee, on the fourteenth of December, 1870. The report was made in obedience to an instruction to inquire as to the effect of the fourteenth amendment upon the treaties which the United States had with various Indian tribes of the country. The report says: 'For these reasons your committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the [112 U.S. 94, 119] fourteenth amendment, 'subject to the jurisdiction' of the United States, and therefore that such Indians have not become citizens of the United States by virtue of that amendment; and, if your committee are correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment.' The report closes with this significant language: 'It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, when the members of any Indian tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States.'

The question before us has been examined by a writer upon constitutional law whose views are entitled to great respect. Judge COOLEY, referring to the definition of national citizenship as contained in the fourteenth amendment, says: 'By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either state or territorial, are extended, they are protected by, and, at the same time, held amenable to, those laws in all their intercourse with the body politic, and with the individuals composing it; but they are also, as a quasi foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights-or, on the other [112 U.S. 94, 120] hand, subjected to the full responsibilities-of American citizens. It would not for a moment be contended that such was the effect of this amendment. When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and, as his case is then within the terms of this amendment, it would seem that his right to protection, in person, property, and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native-born inhabitant.' 2 Story, Const. (Cooley's Ed.) 1933, p. 654. To the same effect are Ex parte Kenyon, 5 Dill. 390; Ex parte Reynolds, Id. 397; U. S. v. Crook, Id. 454; U. S. v. Elm, Dist. Ct. U. S., N. D. N. Y. 23 Int. Rev. Rec. 419.

It seems to us that the fourteenth amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. There were, in some of our states and territories at the time the amendment was submitted by congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. Is it conceivable that the statesmen who framed, the congress which submitted, and the people who adopted that amendment intended to confer citizenship, national and state, upon the entire population in this country of African descent, (the larger part of which was shortly before held in slavery,) and, by the same constitutional provision, to exclude from such citizenship Indians [112 U.S. 94, 121] who had never been in slavery, and who, by becoming bona fide residents of states and territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life, and become a part of the people of the United States? If this question be answered in the negative, as we think it must be, then we are justified in withholding our assent to the doctrine which excludes the plaintiff from the body of citizens of the United States upon the ground that his parents were, when he was born, members of an Indian tribe; for, if he can be excluded upon any such ground, it must necessarily follow that the fourteenth amendment did not grant citizenship even to Indians who, although born in tribal relations, were, at its adoption, severed from their tribes, subject to the complete jurisdiction as well of the United States as of the state or territory in which they resided.

Our brethren, it seems to us, construe the fourteenth amendment as if it read: 'All persons born subject to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the state in which they reside;' whereas the amendment, as it is, implies in respect of persons born in this country that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States. This would not include the children born in this country of a foreign minister, for the reason that, under the fiction of extraterritoriality as recognized by international law, such minister, 'though actually in a foreign country, is considered still to remain within the territory of his own state,' and, consequently, he continues 'subject to the laws of his own country, both with respect to his personal status and his rights of property; and his children, though born in a foreign country, are considered as natives.' Halleck, Int. Law, c. 10, 12. Nor was plaintiff born without the jurisdiction of the United States in the same sense that the subject of a foreign state, born within the territory of that state, may be said to have been born without the jurisdiction of our government. For, according to the decision in Cherokee [112 U.S. 94, 122] Nation v. Georgia, 5 Pet. 17, the tribe of which the parents of plaintiff were members was not 'a foreign state, in the sense of the constitution,' but a domestic dependent people, 'in a state of pupilage,' and 'so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered an invasion of our territory and an act of hostility.' They occupied territory which the court, in that case, said composed 'a part of the United States,' the title to which this nation asserted independent of their will. 'In all our intercourse with foreign nations,' said Chief Justice MARSHALL in the same case, 'in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our citizens. ... They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.' And, again, in U. S. v. Rogers, 4 How. 572, this court, speaking by Chief Justice TANEY, said that it was 'too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' The Cherokee Tobacco, 11 Wall. 616. Born, therefore, in the territory, under the dominion and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the states, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the states, subject to the complete jurisdiction of the United States, then the fourteenth amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons with no nationality whatever, who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the states, to all the burdens of govern- [112 U.S. 94, 123] ment, are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

United States.[93] The term "outlying possessions of the United States" means American Samoa and Swains Island.[94]

b. Citizenship by Birth in United States [§§ 2688-2698]

§ 2688. Doctrine of jus soli

Both the Fourteenth Amendment to the U.S. Constitution[95] and the INA[96] provide that persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States. This provision is declaratory of the pre-existing common-law principle of jus soli, under which a person's nationality is determined by his or her place of birth, and which was the law of the United States even prior to the adoption of the Fourteenth Amendment.[97]

§ 2689. —Who is born in United States and subject to United States jurisdiction

A person is born subject to the jurisdiction of the United States, for purposes of acquiring citizenship at birth, if his or her birth occurs in territory over which the United States is sovereign, even though another country provides all governmental services within the territory, and the territory is subsequently ceded to the other country.[98] Using secondary evidence, including the defendant's mother's baptismal record from a U.S. church, a Czechoslovak census for the defendant's childhood household, and post-World War II documents signed by the defendant's mother, the defendant proved by a preponderance of the evidence that his mother was born in the United States, and was thus a U.S. citizen by birth.[99] However, a child who is conceived in the United States, but born in another country is not a child born in the United States.[1]

A child born on a merchant vessel of American registry, on the high seas, of alien parents who are domiciled in the United States is not a child born in the United States.[2]

◆ *Practice guide:* The case of a child born in the United States whose citizenship may be doubtful because his or her parent was an ambassador, envoy, or minister of a foreign country, should be resolved in consultation with the Citizenship and Passport Section of the Diplomatic or Consular Office to determine whether any claim to citizenship exists.[3]

§ 2690. Persons born in United States to member of aboriginal tribe

A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe is a national and citizen of the United States

93. 8 USCA § 1101(a)(38).

94. 8 USCA § 1101(a)(29).

95. US Const, Amend 14 § 1.

96. 8 USCA § 1401(a).

97. U.S. v. Wong Kim Ark, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890 (1898).

98. Matter of Cantu, 17 I. & N. Dec. 190, I. & N. Interim Dec. No. 2748, 1978 WL 36395 (B.I.A. 1978).

99. U.S. v. Brever, 841 F. Supp. 679 (E.D. Pa. 1993), aff'd, 41 F.3d 884 (3d Cir. 1994), reh'g and reh'g in banc denied, (Dec. 13, 1994).

1. Montana v. Rogers, 278 F.2d 68 (7th Cir. 1960), cert. granted, 364 U.S. 861, 81 S. Ct. 102, 5 L. Ed. 2d 84 (1960) and judgment aff'd, 366 U.S. 308, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961).

2. Lam Mow v. Nagle, 24 F.2d 316 (C.C.A. 9th Cir. 1928).

3. U.S. v. Wong Kim Ark, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890 (1898).

at birth.[4] However, the granting of citizenship to persons born in the United States to members of aboriginal tribes does not in any manner impair or otherwise affect the right of persons granted such citizenship to tribal or other property.[5] Therefore, such a grant does not affect the right of Indians to allotments under the General Allotment Act[6] and is not violated by a requirement of that Act that applicants for allotment file certificates of eligibility.[7]

§ 2691. Persons of unknown parentage

Under the INA, a person of unknown parentage found in the United States while under the age of five years is until shown, prior to having attained the age of 21 years, not to have been born in the United States, a national and citizen of the United States at birth.[8]

§ 2692. Persons born in Puerto Rico

All persons born in Puerto Rico on or after April 11, 1899, and before January 13, 1941, who are subject to the jurisdiction of the United States, who resided on January 13, 1941, in Puerto Rico or other territory over which the United States exercised the right of sovereignty, and who are not citizens of the United States under any other statute, are citizens of the United States as of January 13, 1941.[9] All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.[10]

In order to attain U.S. citizenship by virtue of residing in Puerto Rico on January 13, 1941, an alien must have had a general abode in Puerto Rico on that date and may not attain citizenship by virtue of a mere sojourn in Puerto Rico on that date.[11] However, a person born in Puerto Rico prior to 1941, who was taken to another country by his parents prior to 1941, apparently for a temporary visit, but who could not return to Puerto Rico until late 1941, because of the confusion of the Spanish Civil War, has been held to have attained U.S. citizenship by virtue of the statute.[12] On the other hand, a person who abandoned his residence in Puerto Rico prior to 1941 with the intent and actual effect of taking up permanent abode in another country, who was not prevented from returning to Puerto Rico, did not have any constructive residence in Puerto Rico, and who resided in the foreign country until a date after 1941, has been held not to have attained U.S. citizenship.[13]

◆ *Observation:* Although the rights, privileges, and immunities of citizens of the United States are required to be respected in Puerto Rico to the same extent as though Puerto Rico were a state and subject to the provi-

4. 8 USCA § 1401(b).

5. 8 USCA § 1401(b).

6. 25 USCA §§ 331 et seq.

7. Witt v. U. S., 681 F.2d 1144 (9th Cir. 1982).

8. 8 USCA § 1401(f).

9. 8 USCA § 1402.

10. 8 USCA § 1402.

11. Caolo v. Dulles, 115 F. Supp. 125 (D. P.R. 1953).

12. Puig Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958).

13. In the Matter of M_____, 6 I. & N. Dec. 660, I. & N. Interim Dec. No. 709, 1955 WL 8724 (B.I.A. 1955).

U.S. Constitution: Article I

Article Text | Annotations

Article I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse

their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other

Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of

its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other

Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten

Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for

governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion

the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money;

emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Annotations

Article I - Legislative Department

- **Section 1. Legislative Powers**
- **Separation of Powers and Checks and Balances**
  - The Theory Elaborated and Implemented
  - Judicial Enforcement
- **Bicameralism**
- **Enumerated, Implied, Resulting, and Inherent Powers**

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CITES BY TOPIC: comity

Black's Law Dictionary, Sixth Edition, page 267:

comity. Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens. Nowell v. Nowell, Tex.Civ.App., 408 S.W.2d 550, 553. In general, principle of "comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect. Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689, 695. See also Full faith and credit clause.

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U.S. Supreme Court

LEISY v. HARDIN, 135 U.S. 100 (1890)

135 U.S. 100

LEISY et al.
v.
HARDIN. 1

April 28, 1890

Christiana Leisy, Edward Leisy, Lena and Albert Leisy, composing the firm of Gus. Leisy & Co., citizens of Illinois, brought their action of replevin against A. J. Hardin, the duly elected and qualified marshal of the city of Keokuk, Iowa, and ex officio constable of Jackson township, Lee county, Iowa, in the superior court of Keokuk, in said county, to recover 122 one-quarter barrels of beer, 171 one-eighth barrels of beer, and 11 sealed cases of beer, which had been seized by him in a proceeding on behalf of the state of Iowa against said defendants, under certain provisions of the Code of the state of Iowa; and upon issue joined, a jury having been duly waived by the parties, the case was submitted to the court for trial, and, having been tried, the court, after having taken the case under advisement, finally 'rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to- wit:

> '(1) That plaintiffs, Gus. Leisy & Co., are a firm of that name and style, residing in the state of Illinois, with principal place of business at Peoria, Ill.; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as [135 U.S. 100, 101] brewers in the manufacture of beer in the said city of Peoria, Ill., selling same in the states of Illinois and Iowa.
>
> '(2) That the property in question, to-wit, 122 one-quarter barrels of beer, of the value of $300, 171 one-eighth barrels of beer, value $215, and 11 sealed cases of beer, value of $25, was all manufactured by said Leisy & Co. in the city of Peoria, Ill., and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Ill.; that each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said cases were substantially made of wood, each one of them containing 24 quart bottles of bee, each bottle of beer corked, and the cork fastened in with a metallic cap, sealed and covered with tin foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put up into said kegs and cases as aforesaid by

the manufacturers, to-wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to be broken.

'(3) That the property herein described was transported by said Gus. Leisy & Co. from Peoria, Ill., by means of railways, to Keokuk, Iowa, in said sealed kegs and cases, as same was manufactured and put up by them in the city of Peoria, Ill.

'(4) That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus. Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case as manufactured and put up by said Gus. Leisy & Co., and imported by them into the state of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus. Leisy & Co., residing in and being a citizen of Peoria, Ill.; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

'(5) That on the 30th day of June, 1888, the defendant, as [135 U.S. 100, 102] constable of Jackson township, Lee county, Iowa, by virtue of a search- warrant issued by J. G. Garrettson, an acting justice of the peace of said Jackson township, upon an information filed charging that in premises occupied by said John Leisy there were certain intoxicating liquors, etc., seized the property therein described, and took same into his custody.

'(6) And the court finds that said intoxicating liquors thus seized by the defendant in his official capacity as constable were kept for sale in the premises described in the search-warrant in Keokuk, Lee county, Iowa, and occupied by Gus. Leisy & Co. for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void, as herein stated.

'(7) That on the 2d day of July, 1888, plaintiffs filed in this court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law under which said warrant was issued was unconstitutional and void, being in violation of section 8 of article 1 of the constitution of the United States, and having filed a proper bond a writ of replevin issued, and the possession of said property was given to plaintiffs.

'From the foregoing facts the court finds the following conclusions: That plaintiffs are the sole and unqualified owners of said property, and entitled to the possession of same, and judgment for $1.00 damages for their detention, and costs of suit; that so much of chapter 6, tit. 11, Code 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by plaintiffs, is unconstitutional, being in contravention of section 8 of article 1 of the constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this court, involving the same question, in the case of Collins v. Hills, decided prior to the commencement of this suit, and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted.'

Judgment was thereupon rendered as follows: 'This cause coming on for hearing, plaintiffs appearing by [135 U.S. 100, 103] Anderson & Davis, their attorneys, and the defendant by H. Scott Howell & Son and Wm. B. Collins, his attorneys, and the cause coming on for final hearing on the pleadings on file and the evidence introduced, the court makes the special finding offacts and law herewith ordered to be made or record, and finds that plaintiffs aret he sole and unqualified owners and entitled to possession of the following described personal property, to- wit: 122 one-quarter (1/4) barrels of beer, of the value of $300.00; 171 one-eighth (1/8) barrels of beer, of the value of $215.00; and eleven (11) sealed cases of beer, of the value of $25.00. That, paintiffs being in possession of said property by virtue of a bond heretofore given, said possession in plaintiffs is confirmed. The court further finds that the writ issued by J. G. Garrettson, a justice of the peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law of Iowa that are unconstitutional and void. That plaintiff is entitled to one dollar damages for the wrongful detention of said property. It is therefore ordered and considered by the court that the plaintiffs have and recover of defendant the sum of one dollar damages, and costs of this action, taxed at

$_____. To which findings, order, and judgment of court the defendant at the time excepts, and asks until the 31st day of October, 1888, to prepare and file his bill of exceptions, which request is granted, and order hereby made.'

A motion for new trial was made and overruled, and the cause taken to the supreme court of Iowa by appeal, and errors therein assigned as follows: '(1) The court erred in finding that the plaintiffs were the sole and unqualified owners, and were entitled to the possession of the intoxicating liquors seized and held by appellant. (2) In finding that the plaintiffs were entitled to one dollar damages for their detention, and for costs of suit. (3) The court erred in holding that the sales of beer in 'original packages,' by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful. (4) The court erred in tis conclusions and finding that so [135 U.S. 100, 104] much of the law of the state of Iowa embraced in chapter 6, tit. 11, Code 1873, and the amendments thereto, as prohibits such sales of beer in the state of Iowa, was unconstitutional, being in contravention of section 8, art. 1, of the constitution of the United States. (5) The court erred in rendering a judgment for plaintiffs, and awarding them the intoxicating liquors in question, and damages and costs against defendant. (6) The court erred in overruling the defendant's motion for a new trial.'

The supreme court reversed the judgment of the superior court, and entered judgment against the plaintiffs and their sureties on the relevin bond in the amount of the value of the property, with costs. The judgment thus concluded: 'And it is further certified by this court, and hereby made a part of the record, that in the decision of this suit there is drawn in question the validity of certain statutes of the state of Iowa, namely, chapter 6 of title 11 of the Code of Iowa of 1873 and the amendments thereto, on the ground of their being repugnant to and in contravention of section 8 of article 1 of the constitution of the United States, said appellees, Gus. Leisy & Co., claiming such statutes of the state of Iowa are invalid, and the decision in this cause is in favor of the validity of said statutes of the state of Iowa.' To review this judgment, a writ of error was sued out from this court. The opinion of the supreme court, not yet reported in the official series, will be found in 43 N. W. Rep. 188.

The seizure of the beer in question by the constable was made under the provisions of chapter 6, tit. 11, Code 1873, and amendments thereto. Code 1873, p. 279; Laws 1884, c. 8, p. 8; c. 143, p. 146; Laws 1888, c. 71, p. 91; 1 McClain, Ann. Code, 2359-2431, p. 603.

Section 1523 of the Code is as follows: 'No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof,' [135 U.S. 100, 105] or any person acting under his authority, or by his permission, to sell the same within h is state, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafer provided.'

Chapter 71, Laws 22d Gen. Assem., is an act approved April 12, 1888, (Laws Iowa 1888, p. 91,) of which the first section is as follows: 'That after this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter, or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue, unless revoked according to law, or until application for renewal is disposed of, if such application is made before the year expires: provided, that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have, during the preceding year, complied with the provisions of this act, and execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits.'

Section 2 provides for notice of application for permit, and section 3 reads thus: 'Applications for permits shall be made by petition signed and sworn to by the applicant, and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term; which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for [135 U.S. 100, 106] two

years previous to filing petition; the place, particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the state of Iowa; that he is a registered pharmacist, and now is, and for the last six months has been, lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and, as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant, or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not, within the last two years next preceding his application, been directly or indirectly engaged, employed, or interested in the unlawful manufacture, sale, or keeping for sale, of intoxicating liquors; and that he desires a permit to purchase, keep, and sell such liquors for lawful purposes only.'

Various sections follow, relating to giving bond; petition as to the good moral character of applicant; hearing on the application; oath upon the issuing of permit; keeping of record; punishment by fine, imprisonment, etc.

By section 20, sections 1524, 1526, and other sections of the Code, were, in terms, repealed. The Code provided for the seizure of intoxicating liquors unlawfully offered for sale, and no question in reference to that arises here, if the law in controversy be valid.

By section 1, c. 8, Laws 1884, p. 8, ale, beer, wine, spirituous, vinous, and malt liquors are defined to be intoxicating liquors.

Section 1524, Code 1873, p. 279, was as follows: 'Nothing in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicatingl iquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws: provided, that the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantites [135 U.S. 100, 107] not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages, and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this state liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes.' This section is substantially identical with section 2 of chapter 45 of the Acts of the Fifth General Assembly of Iowa, approved January 22, 1855, (Laws Iowa 1854-55, p. 58;) and it was carried into the revision of 1860 as section 1560, (Revision 1860, c. 64, p. 259.) It was repealed by section 20 of the act of April 12, 1888, as before stated.

Section 1553 of the Code, as amended by the act of April 5, 1886, (Laws Iowa, 1886, p. 83,) forbade any common carrier to bring within the state of Iowa, for any person or persons or corporation, any intoxicating liquors from any other state or territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee, or person to whom such liquor was to be transported, conveyed, or delivered, was authorized to sell intoxicating liquors in such county. This was held to be in contravention of the federal constitution, in Bowman v. Railway Co., 125 U.S. 465 , 8 Sup. Ct. Rep. 689, 1062.

GRAY, HARLAN, and BREWER, JJ., dissenting.

James C. Davis, for plaintiffs in error.

H. Scott Howell, Wm. B. Collins, and John Y. Stone, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court. [135 U.S. 100, 108] The power vested in congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common

mass of property within the territory entered. Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419. And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action. Henderson v. Mayor, 92 U.S. 259 ; Railroad Co. v. Husen, 95 U.S. 465 ; Walling v. Michigan, 116 U.S. 446 , 6 Sup. Ct. Rep. 454; Robbins v. Taxing Dist., 120 U.S. 489 , 7 Sup. Ct. Rep. 592. The power to regulate commerce among the states is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and higha ys, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject- [135 U.S. 100, 109] -matter requires a uniform system as between the states, the power controlling it is vested exclusively in congress, and cannot be encroached upon by the states; but where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of congress in effectuation of the general power. Cooley v. Board of Wardens, 12 How. 299.

It was stated in the thirty-second number of the Federalist that the states might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal constitution; second, where it was given to the United States and prohibited to the states; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that congress may assert an authority, under one of the granted powers, which would exclude the exercise by the states upon the same subject of a different, but similar, power, between which and that possessed by the general government no inherent repugnancy existed. Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will [135 U.S. 100, 110] that such commerce shall be free and untrammeled. County of Mobile v. Kimball, 102 U.S. 691 ; Brown v. Houston, 114 U.S. 622, 631 , 5 S. Sup. Ct. Rep. 1091; Railroad Co. v. Illinois, 118 U.S. 557 , 7 Sup. Ct. Rep. 4; Robbins v. Taxing Dist., 120 U.S. 489, 493 , 7 S. Sup. Ct. Rep. 592.

That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and tariff, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad or from a sister state? or, when imported, prohibit their sale by the importer? If the importation cannot be prohibited without the consent of congress, when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?

In Brown v. Maryland, supra, the act of the state legislature drawn in question was held invalid, as repugnant to the prohibition of the constitution upon the states to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down, by the great magistrate who presided over this court for more than a third of a century, that the point o time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already

incorporated with that mass by the act of the importer; that, as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system than* [135 U.S. 100, 111] the deep and general conviction that commerce ought to be regulated by congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states; that that power was complete in itself, acknowledged no limitations other than those prescribed by the constitution, was co-extensive with the subject on which it acts, and not to be stopped at the external boundary of a state, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister state. Manifestly this must be so, for the same public policy applied to commerce among the states as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story, Const. 1066. And although the precise question before us was not ruled in Gibbons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman v. Railway Co., 125 U.S. 465 , 8 Sup. Ct. Rep. 689, 1062. In the latter case, section 1553 of the Code of the state of Iowa, as amended by chapter 66 of the Acts of the Twenty- first General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the state from any other state or territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the states, and not sanctioned by the authority, express or implied, of congress. The opinion of the court, delivered by Mr. Justice MATTHEWS, the concurring opinion of Mr. Justice FIELD, and the dissenting opinion by Mr. Justice HARLAN, on behalf of Mr. Chief Justice WAITE, Mr. Justice GRAY, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority [135 U.S. 100, 112] conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states; that the power to prevent embarrassing restrictions by any state was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the state of the buyer, or from the place of production to the market, was not contemplated, for without that there could be noc onsummated trade, either with foreign nations or among the states. It is explained that, where state laws alleged to be regulations of commerce among the states have been sustained, they were laws which related to bridges or dams across streams, wholly within the state, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one state to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one state could directly of indirectly tax persons or property passing through it, or prohibit particular property from entrance into the state, that the power of regulating commerce among the states was conferred upon the federal government.

> 'If in the present case,' said Mr. Justice MATTHEWS, 'the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states;' and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of congress on the subject of interstate commerce by means of railroads, designed to remove trammels [135 U.S. 100, 113] upon transportation between different states, and upon the subject of the transportation of passengers and merchandise, (Rev. St. 4252-4289, inclusive,) including the transportation of nitro-glycerine and other similar explosive substances, with the proviso that, as to them, 'any state, territory, district, city, or town within the United States' should not be prevented by the language used 'from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein,' is referred to as indicative of the intention of congress that the transportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by states in particular cases by the express permission of congress. It is said that the law in question was not an inspection law, the object of which 'is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be for domestic use,' (Gibbons v. Ogden, 9 Wheat.

1,203; Turner v. Maryland, 107 U.S. 38, 55 , 2 S. Sup. Ct. Rep. 44;) nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the state of diseases, contagious, infectious, or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the constitution; and the observations of Mr. Justice CATRON in the License Cases, 5 How. 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the state, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within the police power 'any article [135 U.S. 100, 114] of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real o supposed extravagance in food and clothing.' And Mr. Justice MATTHEWS thus proceeds: 'For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors. It may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign counties. It may punish those who sell them in violation of its laws. It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to congress under the constitution. It cannot, without the consent of congress, express or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be. ... Can it be supposed that, by omitting any express declaration on the subject, congress has intended to submit to the several states the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each state, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any state, and sought to be introduced as an article of commerce into any other. If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any [135 U.S. 100, 115] dscription, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states.'

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others, the License Cases, 5 How. 504, wherein laws passed by Massachusetts, New Hampshire, and Rhode Island, in reference to the sale of spirituous liquors, came under review, and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them. That of Peirce v. New Hampshire is perhaps the most important to be referred to here. In that case the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston, and brought coastwise to Portsmouth, and there sold in the same barrel, and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice TANEY is in these words: 'Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one; for, although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.'

Referring tot he cases of Massachusetts and Rhode Island, [135 U.S. 100, 116] the chief justice, after saying that if the

laws of those states came in collision with the laws of congress authorizing the importation of spirits and distilled liquors, it would be the duty of the court to declare them void, thus continues: 'It has, indeed, been suggested that, if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may therefore admit or not, as it shall deem best, the importation of ardent spirits. And, inasmuch as the laws of congress authorize their importation, no state has a right to prohibit their introduction. ... These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But, although a state is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or [135 U.S. 100, 117] diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.'

The New Hampshire case, the chief justice observed, differs from Brown v. Maryland, in that the latter was a case arising out of commerce with foreign nations, which congress had regulated by law; whereas, the case in hand was one of commerce between two states, in relation to which congress had not exercised its power. 'But the law of New Hampshire acts directly upon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is whether a state is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another state, although such regulation is confined to its own territory and made for its own convenience or interest, and does not come in conflict with any law of congress. In other words, whether the grant or power to congress is of itself a prohibition to the states, and renders all state laws upon the subject null and void.' He declares it to appear to him very clear 'that the mere grant of power to the general government cannot, upon any just principles of consr uction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law [135 U.S. 100, 118] of congress.' He comments on the omission of any prohibition in terms and concludes that if, as he thinks, 'the framers of the constitution (knowing that a multitude of minor regulations must be necessary, which congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the states, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of congress, in cases of collision with state laws, is secured in the article which declares that the laws of congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate.' And he considers that the legislation of congress and the states has conformed to this construction from the foundation of the government, as exemplified in state laws in relation to pilots and pilotage, and health and quarantine laws. But, conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids, rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open

to re- examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns. The authority of Peirce v. New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid because congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases herein after referred to. [135 U.S. 100, 119] The doctrine now firmly established is, as stated by Mr. Justice FIELD, in Bowman v. Railway Co., 125 U.S. 507 , 8 Sup. Ct. Rep. 689, 1062, 'that where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it, and provide the needed regulations. The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is cop leted, and the property imported is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.'

The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from state to state, (Case of the State Freight Tax, 15 Wall. 232;) a statute imposing a burdensome condition [135 U.S. 100, 120] on ship-masters as a prerequisite to the landing of passengers, (Henderson v. Mayor, etc., 92 U.S. 259 ;) a statute prohibiting the driving or conveying of any Texas, Mexican, or Indian cattle, whether sound or diseased, into the state between the 1st day of March and the 1st day of November in each year, (Railroad Co. v. Husen, 95 U.S. 465 ;) a statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, (Cook v. Pennsylvania, 97 U.S. 566 ;) a statute intended to regulate or tax, or to impose any other restriction upon, the transmission of persons or property, or telegraphic messages, from one state to another, (Railway Co. v. Illinois, 118 U.S. 557 , 7 Sup. Ct. Rep. 4;) a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares, or merchandise by sample, manufactured or belonging to citizens of other states, (Robbins v. Taxing Dist., 120 U.S. 489 , 7 Sup. Ct. Rep. 592.)

On the other hand, we have decided in County of Mobile v. Kimball, 102 U.S. 691 , that a state statute providing for the improvement of the river, bay, and harbor of Mobile, since what was authorized to be done was only as a mere aid to commerce, was, in the absence of action by congress, not in conflict with the constitution; in Escanaba Co. v. Chicago, 107 U.S. 678 , 2 Sup. Ct. Rep. 185, that the state of Illinois could lawfully authorize the city of Chicago to deepen, widen, and change the channel of, and construct bridges over, the Chicago river; in Transportation Co. v. Parkersburg, 107 U.S. 691 , 2 Sup. Ct. Rep. 732, that the jurisdiction and control of wharves properly belong to the states in which they are situated, unless otherwise provided; in Brown v. Houston, 114 U.S. 622 ,2 that a general state tax, laid alike upon all property, is not unconstitutional, because it happens to fall upon goods which, though not then intended for exportation, are subsequently exported; in Morgan's S. S. Co. v. Board of Health, 118 U.S. 455 , 6 Sup. Ct. Rep. 1114, that a state law requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition, and the ports from which she came, was a rightful exercise [135 U.S. 100, 121] of police power; in Smith v. Alabama, 124 U.S. 465 , 8 Sup. Ct. Rep. 564, and in Railway Co. v. Alabama, 128 U.S. 96 , 9 Sup. Ct. Rep. 28, that a state statute requiring locomotive engineers to be examined and obtain a license was not in its nature a regulation of commerce; and in Kimmish v. Ball, 129 U.S. 217 , 9 Sup. Ct. Rep. 277, that a statute providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional.

We held also in Welton v. State, 91 U.S. 275 , that a state statute requii ng the payment of a license tax from persons dealing in goods, wares, and merchandise, which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state, and requiring no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is an unconstitutional regulation; and to the same effect in Walling v. Michigan, 116 U.S. 446 , 6 Sup. Ct. Rep. 454, in relation to a tax upon non-resident sellers of intoxicating liquors to be shipped into a state from places without it. But it was held in Patterson v. Kentucky, 97 U.S. 501 , and in Webber v. Virginia, 103 U.S. 344 , that the right conferred by the patent laws of the United States did not remove the tangible property in which an invention might take form from the operation of the laws of the state, nor restrict the power of the latter to protect the community from direct danger inherent in particular articles.

In Mugler v. Kansas, 123 U.S. 623 , 8 Sup. Ct. Rep. 273, it was adjudged that 'state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, or by the amendments thereto.' And this was in accordance with our decisions in Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. [135 U.S. 100, 122] 25; and Foster v. Kansas, 112 U.S. 201 , 5 Sup. Ct. Rep. 8. So in Kidd v. Pearson, 128 U.S. 1 , 9 Sup. Ct. Rep. 6, it was held that a state statute which provided (1) that foreign intoxicating liquors may be imported into the state, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the state, and (2) that intoxicating liquors may be manufactured and sold within the state for mechanical, medicinal, culinary, and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the state, was not an undertaking to regulate commerce among the states. And in Eilenbecker v. District Court, 134 U. S. -- ante, 424, we affirmed the judgment of the supreme court of Iowa, sustaining the sentence of the district court of Plymouth, in that state, imposing a fine of $500 and costs and imprisonment in jail for three months, if the fine was not paid within 30 days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine, and beer, in Plymouth county. Mr. Justice MILLER there remarked: 'If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of a court to prevent the evil, as to punish the offense as a crime after it has been committed.'

These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national [135 U.S. 100, 123] government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receit of an imported commodity, or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In Mugler v. Kansas, supra, the court said that it could not 'shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the county are, in some degree at least, traceable to this evil.' And that 'if in the judgment of the legislature [of a state] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. ... Nor can it be said that goverment interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage.' Undoubtedly it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for congress to determine what measures a state may properly adopt as appropriate or needful for the protection of the public morals,

the public health, or the public safety; but, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon congress, so far as the [135 U.S. 100, 124] regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the supreme court of Iowa in Pearson v. Distillery, 72 Iowa, 354, 34 N. W. Rep. 1, to be 'intended to conform the statute to the doctrine of the United States supreme court, announced in Brown v. Maryland, 12 Wheat. 419, and License Cases, 5 How. 504, so that the statute should not conflict with the laws and authority of the United States. But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the state of Iowa, who are registered pharmacists, and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in Bowman v. Railway Co., supra, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the com on mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign [135 U.S. 100, 125] or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in congress and its possession by the latter was considered essential to that more perfect Union which the constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accomodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice JOHNSON in Gibbons v. Ogden, 9 Wheat. 1, 238, in 'a frank and candid co-operation for the general good.' The legislation in question is to the extent indicated repugnant to the third clause of section 8, art. 1, of the constitution of the United States, and therefore the judgment of the supreme court of Iowa is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

GRAY, J. Mr. Justice HARLAN, Mr. Justice BREWER, and myself are unable to concur in this judgment.

As our dissent is based on [135 U.S. 100, 126] the previous decisions of this court, the respect due to our associates, as well as to our predecessors, induces us to state our position, as far as possible, in the words in which the law has been heretofore declared from this bench. The facts of the case, and the substance of the statutes whose validity is drawn in question, may be briefly stated. It was an action of replevin of sundry kegs and cases of beer, begun in an inferior court of the state of Iowa against a constable of Lee county, in Iowa, who had seized them at Keokuk, in that county, under a search-warrant issued by a justice of the peace pursuant to the statutes of Iowa, which prohibit the sale, the keeping for sale, or the manufacture for sale, of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under an annual license granted by the district court of the proper county, upon being satisfied that the applicant is a citizen of the United States and of the state of Iowa, and a resident of the county, and otherwise qualified. The plaintiffs were citizens and residents of the state of Illinois, engaged as brewers in manufacturing beer at Peoria, in that state, and in selling it in the states of Illinois and

Iowa. The beer in question was manufactured by them at Peoria, and there put up by them in said kegs and cases; each keg being sealed, and having upon it, over the plug at the opening, a United States internal revenue stamp; and each case being substantially made of wood, containing two dozen quart bottles of beer, and sealed with a metallic seal, which had to be broken in order to open the case. The kegs and cases owned by the plaintiffs, and so sealed, were transported by them from Peoria by railway to Keokuk, and there sold and offeredf or sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases. The supreme court of Iowa having given judgment for the defendant, the question presented by this writ of error is whether the statutes of Iowa, as applied to these facts, contravene section 8 of article 1, or section 2 of article 4, of the constitution of the United States, or section 1 of article 14 of the amendments to the constitution. [135 U.S. 100, 127] By section 8 of article 1 of the constitution, 'the congress shall have power,' among other things, 'to regulate commerce with foreign nations, and among the several states,' and 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' By section 2 of article 4, 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' By section 1 of the fourteenth amendment, 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' By the tenth amendment, 'the powers not delegated to the United States by he constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.' Among the powers thus reserved to the several states is what is commonly called the 'police power,'-that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty, and crime. 'The police power belonging to the states in virtue of their general sovereignty,' said Mr. Justice STORY, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the states, and has never been conceded to the United States.' Prigg v. Pennsylvania, 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire test is beyond the constitutional power of congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any state; but that it is within the constitutional power of a state to pass such a statute, even as to oils manufactured under letters patent from the United States. U. S. v. Dewitt, 9 Wall. 41; Patterson v. Kentucky, 97 U.S. 501 . [135 U.S. 100, 128] The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets. Slaughter-House Cases, 16 Wall. 36, 62, 87; Fertilizing Co. v. Hyde Park, 97 U.S. 659 ; Phalen v. Virginia, 8 How. 163, 168; Stone v. Mississippi, 101 U.S. 814 . This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice WAITE, referring to earlier decisions to the same effect: 'No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' Stone v. Mississippi, 101 U.S. 814 , 819. See, also, Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U.S. 746, 753 , 4 S. Sup. Ct. Rep. 652; New Orleans Gas Co. v Louisiana Light Co., 115 U.S. 650, 672 , 6 S. Sup. Ct. Rep. 252; New Orleans v. Houston, 119 U.S. 265, 275 , 7 S. Sup. Ct. Rep. 198.

The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health, or the morals of the people. Gunpowder, for instance, is a subject of commerce, and of lawful use; yet, because of its explosive and dangerous quality, all admit that the state may regulate its keeping and sale. And there is no article the right of the state to control or to prohibit the sale or manufacture of which within its limits is better established than [135 U.S. 100, 129] intoxicating liquors. License Cases, 5 How. 504; Downham v. Alexandria Council, 10 Wall. 173; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U.S. 25 ; Tiernan v. Rinker, 102 U.S. 123 ; Foster v. Kansas, 112 U.S. 201 , 5 Sup. Ct. Rep. 8; Mugler v. Kansas and Kansas v. Ziebold, 123 U.S. 623 , 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U.S. 1 , 9 Sup. Ct. Rep. 6; Eilenbecker v. District Court, 134 U.S. 31 , ante, 424.

In Beer Co. v. Massachusetts, above cited, this court, affirming the judgment of the supreme judicial court of

Massachusetts, reported in 115 Mass. 153, held that a statute of the state, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the state had long before chartered, and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this court for its judgment were the following: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Since we have already held, in the case of Bartemeyer v. Iowa, that as a measure of police regulation, looking to the [135 U.S. 100, 130] preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the supreme court of Massachusetts.' 97 U.S. 32 , 33.

In Mugler v. Kansas and Kansas v. Ziebold, above cited, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage, and declaring all places where such liquors were manufactured or sold in violation of the statute to be common nuisances, and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the state, even as applied to persons who, long before the passage of the statute, had constructed buildings specially adapted to such manufacture. It has also been adjudged that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such liquors under the internal revenue laws of the United States, affords any defense to an indictment by a stt e for selling the same liquors contrary to its statutes. License Tax Cases, 5 Wall. 462; Pervear v. Com., Id. 475. The clause of the constitution, which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,' has no bearing upon this case. The privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship. Conner v. Elliott, 18 How. 591, 593; CURTIS, J., in Scott v. Sandford, 19 How. 393, 580; Paul v. Virginia, 8 Wall. 168, 180; McCready v. Virginia, 94 U.S. 391 , 395. As observed by the court in Bartemeyer v. Iowa: 'The right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States.' 18 Wall. 133. Nor is the case affected by the fourteenth amendment of the constitution. As was said in the unanimous opinion of this court in Barbier v. Connolly, after stating the true scope of that amendment: 'But neither the amendment,-broad and comprehensive as it is,-nor any other amendment, was [135 U.S. 100, 131] designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.' 113 U.S. 27, 31 , 5 S. Sup. Ct. Rep. 357. Upon that ground, the amendment has been adjudged not to apply to a state statute prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose, or the sale of oleomargarine lawfully manufactured before the passage of the statute. Mugler v. Kansas, 123 U.S. 623, 663 , 8 S. Sup. Ct. Rep. 273; Powell v. Pennsylvania, 127 U.S. 678, 683 , 687 S., 8 Sup. Ct. Rep. 992, 1257.

The remaining and the principal question is whether the statute of Iowa, as applied to the sale within that state of intoxicating liquors in the same cases or kegs, unbroken and unopened, in which they were brought by the seller from another state, is repugnant to the clause of the constitution granting to congress the power to regulate commerce with foreign nations and among the several states. In the great and leading case of Gibbons v. Ogden, 9 Wheat. 1, the point decided was that acts of the legislature of New York, granting to certain persons for a term of years the exclusive navigation by steam-boats of all waters within the jurisdiction of the state, were, so far as they affected such navigation by vessels of other persons licensed under the laws of the United States, repugnant to the clause of the constitution empowering congress to regulate foreign and interstate commerce. Chief Justice MARSHALL, in delivering judgment, after speaking of the inspection laws of the states, and observing that they had a remote and considerable influence on commerce, but that the power to pass them was not derived from a power to regulate commerce, said: 'They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government,-all which can be most advantageously exercised by the states themselves. Inspection laws,

quarantine laws, health laws of every description, as well as laws for regulating [135 U.S. 100, 132] the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.' Pages 203, 204. Again, he said that quarantine and health laws 'are considered as flowing from the acknowledged power of a state to provide for the health of its citizens,' and that the constitutionality of such laws hd never been denied. Page 205. Mr. Justice JOHNSON, in his concurring opinion, said: 'It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and, while frankly exercised, they can produce no serious collision.' Page 235.

That Chief Justice MARSHALL and his associates did not consider the constitutional grant of power to congress to regulate foreign and interstate commerce as, of its own force, and without national legislation, impairing the police power of each state within its own borders to protect the health and welfare of its inhabitants, is cleary indicated in the passages above quoted from the opinions in Gibbons v. Ogden, and is conclusively proved by the unanimous judgment of the court delivered by the chief justice five years later in Willson v. Marsh Co., 2 Pet. 245. In that case, the legislature of Delaware had authorized a dam to be erected across a navigable tide-water creek which opened into Delaware bay, thereby obstructing the navigation of the creek by a vessel enrolled and licensed under the navigation [135 U.S. 100, 133] laws of the United States. The decision in Gibbons v. Ogden was cited by counsel as conclusive against the validity of the statute of the state. But its validity was upheld by the court, for the following reasons: 'The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,-we should feel not much difficulty in saying that a state law, coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states,-a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as [135 U.S. 100, 134] repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.' 2 Pet. 251, 252.

In Brown v. Maryland, 12 Wheat. 419, the point decided was that an act of the legislature of Maryland, requiring all importes of foreign goods by the bale or package, or of spirituous liquors, and 'other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce,' to first take out a license and pay $50 for it, and imposing a penalty for failure to do so, was, as applied to sales by an importer of foreign liquors in the original packages, unconstitutional, both as laying an impost, and as repugnant to the power of congress to regulate foreign commerce. The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and was not an exercise of the police power of the state. And Chief Justice MARSHALL, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder, or the removal or destruction of infectious or unsound articles which endanger the public health, 'is a branch of the police power, which unquestionably remains, and ought to remain, with the states.' Pages 443, 444.

Moreover, the question there presented and decided concerned foreign commerce only, and not commerce among the states. Chief Justice MARSHALL, at the outset of his opinion, so defined it, saying: 'The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.' Page 436. It is true that, after discussing and deciding that question, he threw out this brief remark: 'It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state.' Page 449. But this remark was obiter dictum, wholly aside from the question before the court, and having no bearing on its decision, and therefore extrajudicial, as has since been noted by Chief Justice TANEY and Mr. Justice MCLEAN in the License Cases, [135 U.S. 100, 135] 5 How. 504, 575, 578, 594, and by Mr. Justice MILLER in Woodruff v. Parham, 8 Wall. 123, 139. To a remark made under such circumstances are peculiarly applicable the warning words of Chief Justice MARSHALL himself in an earlier case, where, having occasion to explain away some dicta of his own in delivering judgment in Marbury v. Madison, 1 Cranch, 137, he said: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' Cohens v. Virginia, 6 Wheat. 264, 399, 400. Another striking instance in which that maxim has been applied and acted on is to be found in the opinion of the court at the present term in Hans v. Louisiana, 134 U.S. 1 , 20, ante, 504.

But the unanimous judgment of this court in 1847 in Peirce v. Mew Hampshire, reported together with Thurlow v. Massachusetts and Fletcher v. Rhode Island as the License Cases, 5 How. 504, is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the court, and Chief Justice TANEY, as well as each of six associate justices, stated his reasons for concurring in the judgment. The cases from Massachusetts and Rhode Island arose under statutes of either state prohibiting sales of spirituous liquors by any person, in less than certain quantities, without first having obtained an annual license from municipal officers,-in the one case from county commissioners, who by the express terms of the statute were not required to grant any licenses when in their opinion the public good did nt require them to be granted; and in the other case, from a town council, who [135 U.S. 100, 136] were forbidden to grant licenses whenever the voters of the town in town- meeting decided that none should be granted. Rev. St. Mass. 1836, c. 47, 3, 17, 23-25; St. 1837, c. 242, 2; Pub. Laws R. I. 1844, p. 496, 4; Laws 1845, p. 72; 5 How. 506-510, 540. Those statutes were held to be constitutional, as applied to foreign liquors which had passed out of the hands of the importer; while it was assumed that, under the decision in Brown v. Maryland, those statutes could be allowed no effect as to such liquors while they remained in the hands of the importer in the original packages upon which duties had been paid to the United States. 5 How. 576, 590, 610, 618.

The case of Peirce v. New Hampshire directly involved the validity, as applied to liquors brought in from another state, of a statute of New Hampshire, which imposed a penalty on any person selling any wine, rum, gin, brandy, or other spirits, in any quantity, 'without license from the selectmen of the town or place where such person resides.' Laws N. H. 1838, c. 369; 5 How. 555. The plaintiffs in error, having been indicted under that statute for selling to one Aaron Sias, in the town of Dover, in the state of New Hampshire, one barrel of gin without license from the selectmen of the town, at the trial admitted that they so sold to him a barrel of American gin; and introduced evidence that 'the barrel of gin was purchased by the defendants in Boston, in the common wealth of Massachusetts, brought coastwise to the landing at Piscataqua bridge, and from thence to the defendants' store in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts.' The defendants contended that the statute was unconstitutional, because it was 'in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States;' and because it was repugnant to the clauses of the constitution of the United States, restricting the power of the states to lay duties on imports or exports, and granting the power to congress to regulate commerce with foreign nations and among the several states. Chief Justice PARKER [135 U.S. 100, 137] instructed the jury 'that this state could not regulate commerce between this and other states; that this state could not prohibit the introduction of articles from another state with such a view, nor prohibit a sale of them with such a purpose; but that, although the state could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries, or from other states; that she might tax them the same as other property, and might regulate the sale

to some extent; that a state might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the states; and that this statute was a regulation of that character, and constitutional.' After a verdict of guilty, exceptions to this instruction were overruled by the highest court of the state. 5 How. 554-557, 13 N. H. 536.

In that case, as in the case at bar, the statute of the state prohibited sales of intoxicating liquors by any person without a license from municipal authorities, and authorized licenses to be granted only to persons residing within the state; and the liquors were sold within the state by the importer, and in the same barrel, keg, or case, unbroken and in the same condition, in which he had brought them from another state. Yet the judgment of the highest court of New Hampshire was unanimously affirmed by this court. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice NELSON were of opinion that the statute of New Hampshire was a regulation of interstate commerce, but yet valid, so long as it was not in conflict with any act of congress. Chief Justice TANEY, after recognizing that 'spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists; and congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted and what excluded, and may therefore admit or not, as it shall deem best, the importation of ardent spirits; and, inasmuch as the laws of congress authorize their importation, no state has a [135 U.S. 100, 138] right to prohibit their introduction;' and yet upholding the validity of the statutes of Massachusetts and Rhode Island, as not interfering with the trade in ardent spirits while they remained a part of foreign commerce, and were in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorized them to be imported, (page 577,)- proceeded to state the case from New Hampshire as follows: 'The present case, however, differs from Brown v. Maryland in this: that the former was one arising out of commerce with foreign nations, which congress has regulated by law; whereas, the present is a case of commerce between two states, in relation to which congress has not exercised its power. Some acts of congress have, indeed, been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one state to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the states operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of congress. But the law of New Hampshire acts directly upon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.' Page 578. And he concluded his opinion thus: 'Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one; for, although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.' Page 586.

Mr. Justice CATRON expressed similar views. While he was [135 U.S. 100, 139] of opinion that the ultimate right of determining what commodities might be lawful subjects of interstate commerce belonged to congress in the exercise of its power to regulate commerce, and not to the states in the exercise of the police power, he was equally clear that the statute of New Hampshire was a valid regulation, in the absence of any legislation upon the subject by congress. After pointing out the difficulties standing in the way of any attempt by congress to make the special and various regulations required at different places at the maritime or inland borders of the states, he said: 'I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that congress cannot do what the states have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in congress be maintained by our decision.' Page 606. 'Congress has stood by for nearly sixty years, and seen the states regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection; and for this court now to decide that the power did not exist in the states, and that all they had done in this respect was void from theb eginning, would overthrow and annul entire codes of state legislation on the particular subject. We would by our decision expunge more state laws and city corporate regulations than congress is likely to make in a century on the same subject; and on no better assumption than that congress and the state legislatures had been altogether mistaken as to their respective powers for 50 years and more. If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.' Page 607. And finally, in summing up his conclusions, he said: 'That the law of New Hampshire was a

regulation of commerce among the states in regard to the article for selling of which the defendants were indicted and convicted; but that the state law was constitutionally passed, because of the power of the state thus to regulate; there being no regulation of congress, special or general, in existence, to which the state law was repugnant.' Pages 608, 609. [135 U.S. 100, 140] Mr. Justice NELSON expressed his concurrence in the opinions delivered by the chief justice and Mr. Justice CATRON. Page 618. Justices MCLEAN, DANIEL, WOODBURY, and GRIER, on the other hand, were of opinion that the license laws of New Hampshire, as well as those of Massachusetts and Rhode Island, were merely police regulations, and not regulations of commerce, although they might incidentally affect commerce.

Mr. Justice MCLEAN, in the course of his opinion in Thurlow v. Massachusetts, said: 'The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the states. Since the adoption of its constitution they have existed in Massachusetts.' Page 588. [St. Mass. 1786, c. 68; 1792, c. 25; 7 Dane, Abr. 43, 44.] 'It is the settled construction of every regulation of commerce that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now, this is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And, though they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the state.' Pages 589, 590. 'A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the state authority. The state may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every [135 U.S. 100, 141] aspect a local regulation, and relates exclusively to the internal police of the state.' Page 591. 'The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments.' Page 592.

In his opinion in Peirce v. New Hampshire, he declared that the same views were equally applicable to that case, and added: 'The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the state. The license system is a police regulation, and, as modified in h e state of New Hampshire, was designed to restrain and prevent immoral indulgence, and to advance the moral and physical welfare of society.' If this tax had been laid on the property as an import into the state, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the states, which has been exclusively given to congress.' 'But this barrel of gin, like all other property within the state of New Hampshire, was liable to taxation by the state. It comes under the general regulation, and cannot be sold without a license. The right of an importer of ardent spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire.' Pages 595, 596. Mr. Justice DANIEL said: 'The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those states, vesting in their domestic tribunals bunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; [135 U.S. 100, 142] they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority. These laws are therefore in violation neither of the constitution of the United States, nor of any law not treaty made in pursuance or under authority of the constitution.' Page 617. Mr. Justice WOODBURY repeated and enforced the same views, saying, among other things: 'It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the state after the foreign importation is completed and on shore.' Page 619. 'The subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government, under the broadest construction of that power.' 'The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For, even under a

prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad.' Page 620. 'But this license is a regulation neither of domestic commerce between the states, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the state, and become component parts of its property. Then it has by the constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the states can interfere in regulation of foreign commerce.' Page 625. 'Whether such laws of the states as to [135 U.S. 100, 143] licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if the are necessary to the well-being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either proper, or apparently embraced in the constitution. So, whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject- matter of that commerce touches the soil or waters within the limits of a state, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government.' Page 627.

Mr. Justice GRIER did not consider the question of the exclusiveness of the power of congress to regulate foreign and interstate commerce as involved in the decision, but maintained the validity of the statutes in question under 'the police power, which is exclusively in the states.' Pages 631, 632. The other members of the court at that time were Mr. Justice WAYNE and Mr. Justice MCKINLEY, who do not appear by the report to have taken part in the decision of those cases, although the former appears at page 545 to have been present at the argument, and by the clerk's minutes to have been upon the bench when the judgments were delivered. It is certain that neither of them dissented from the decision of the court. The consequences of an opposite conclusion in the case from New Hampshire regarding liquors brought from one state into another were forcibly stated by several of the judges Mr. Justice MCLEAN said: 'If the mere conveyance of property from one state to another shall exempt it from taxation, and from general state regulation, it will not be difficult to avoid the police laws of any state, especially by those who live at or near the boundary.' Page 595. Mr. Justice CATRON said: 'To hold that the state license [135 U.S. 100, 144] law was void, as respects spirits coming in from other states as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other states, and that the products of New Hampshire would find an unrestrained market in the neighboring states having similar license laws to those of New Hampshire.' Page 608. Mr. Justice WOODBURY said: 'If the proposition was maintainable, that, without any legislation by congress as to the trade between the states, (except that in coasting, as before explained, to prevent smuggling,) anything imported from another state, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a state, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighboring state. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and, if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.' Pages 625, 626.

Mr. Justice GRIER, in an opinion marked by his characteristic vigor and directness of thought and expression, (after saying that he mainly concurred with Mr. Justice MCLEAN,) summed up the whole matter as follows: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of congress to regulate commerce as necessarily connected with the decision of this point. It has been frequently decided by this court 'that the powers which relate to merely municipal regulations, or what [135 U.S. 100, 145] may more properly be called 'it ernal police,' are not surrendered by the states, or restrained by the constitution of the United States; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category.

As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision; salus populi suprema lex. If the right to control these subjects be 'complete, unqualified, and exclusive' in the state legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others. It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overborad. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the states assume to regulate commerce or to interfere with the regulations of congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference. [135 U.S. 100, 146] It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the states and the United States; each is acting within its sphere, and for the public good; and, if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand-fold in the health, wealth, and happiness of the people.' Pages 631, 632.

This abstract of the License Cases shows (what is made yet clearer by an attentive reading of the opinions as a whole) that the difference of opinion among the judges was upon the question whether the state statutes, which all agreed had some influence upon commerce, and all agreed were valid exercises of the police power, could properly be called regulations of commerce. While many of the judges said or assumed that a state could not restrict the sale by the importer and in the original packages of intoxicating liquors imported from a foreign country, which congress had authorized the importation of, and had caused duties to be levied upon, all of them undoubtingly held that where congress had not legislated a state might, for the protection of the health, the morals, and the safety of its inhabitants, restrict or prohibit, at its discretion and according to its own views of policy, the sale by the importer of intoxicating liquors brought into it from another state, and remaining in the barrels or packages in which they were brought in. The ability and thoroughness with which those cases were argued at the br and on the bench, the care and thought bestowed upon their consideration, as manifested in the opinions delivered by the several judges, and the confidence with which each judge expressed his concurrence in the result, make [135 U.S. 100, 147] the decision of the highest possible authority. It has been accepted and acted on as such by the legislatures, the courts, and the people, of the nation and of the states, for 40 years. It has not been touched by any act of congress; it has guided the legislation of many of the states; and it has been treated as beyond question by this court in a long series of cases. Veazie v. Moor, (1852), 14 How. 568, 575; Sinnot v. Davenport, (1859,) 22 How. 227, 243; Gilman v. Philadelphia, (1865,) 3 Wall. 713, 730; Pervear v. Com., (1866,) 5 Wall. 475, 479; Woodruff v. Parham, (1868,) 8 Wall. 123, 139; U. S. v. Dewitt, (1869,) 9 Wall. 41, 45; Henderson v. Mayor, (1875,) 92 U.S. 259 , 274; Beer Co. v. Massachusetts, (1877,) 97 U.S. 25 , 33; Patterson v. Kentucky, (1878,) Id. 501, 503; Mobile Co. v. Kimball, (1880,) 102 U.S. 691 , 701, Brown v. Houston, (1885,) 114 U.S. 622, 631 , 5 S. Sup. Ct. Rep. 1091; Walling v. Michigan, (1886,) 116 U.S. 446, 461 , 6 S. Sup. Ct. Rep. 454; Mugler v. Kansas, (1887,) 123 U.S. 623, 657 , 658 S., 8 Sup. Ct. Rep. 273.

In the Passenger Cases, 7 How. 283, decided in 1849, two years after the License Cases, statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving from abroad, were adjudged to be repugnant to the constitution and laws of the United States, and therefore void, by the opinions of Justices MCLEAN, WAYNE, CATRON, MCKINLEY, and GRIER, against the dissent of Chief Justice TANEY and Justices DANIEL, NELSON, and WOODBURY, each of the judges delivering a separate opinion. The decision in the License Cases was relied on by each of the dissenting judges, (pages 470, 483, 497, 518, 524, 559;) and no doubt of the soundness of that decision was suggested in the opinions of the majority of the court, or in any of the subsequent cases in which the judgment of that majority was afterwards approved and followed, (Henderson v. Mayor, and Commissioners v. North German Lloyd, 92 U.S. 259 ; Chy Lung v. Freeman, Id. 275; People v. Compagnie, etc., 107 U.S. 59 , 2 Sup. Ct. Rep. 87; Head Money Cases, 112 U.S. 580 , 5 Sup. Ct. Rep. 247.)

When Mr. Justice GRIER, in the Passenger Cases, 7 How. 462, said, 'And to what weight is that argument entitled which assumes that, because it is the policy of congress to [135 U.S. 100, 148] leave this intercourse free, therefore it has not been regulated, and each state may put as many restrictions upon it as she pleases?' the context shows that he had in mind cases in which the policy to leave commerce free had been manifested by statute or treaty, and he had already (page 457) made it manifest that he did not intend to retract or to qualify his opinion in the License Cases.

An intention on the part of congress that commerce shall be free from the operation of laws passed by a state in the exercise of its police power cannot be inferred from the mere fact of there being no national legislation upon the subject, unless in matters as to which the power of congress is exclusive. Where the power of congress is exclusive, the states have, of course, no power to legislate; and it may be said that congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of congress is paramount only, and not exclusive, the power of the state is not excluded until congress has legislated; and no intention that the states should not exercise, or continue to exercise, their power over the subject can be inferred from the want of congressional legislation. Transportation Co. v. Parkersburg, 107 U.S. 691 , 702-704, 2 Sup. Ct. Rep. 732.

The true test for determining when the power of congress to regulate commerce is, and when it is not, exclusive, was formulated and established in Cooley v. Board of Wardens, 12 How. 299, concerning the validiy of a state law for the regulation of pilots and pilotage, in which Mr. Justice CURTIS, in delivering judgment, said: 'When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate conmmerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively [135 U.S. 100, 149] demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress.' He then stated that the act of congress of August 7, 1789, c. 9, 4, (1 St. 54,) in regard to pilotage, manifested the understanding of congress, at the outset of the government, that the nature of the subject was not such as to require its exclusive legislation, but was such that, until congress should find it necessary to exercise its power, it should be left to the legislation of the states, because it was local, and not national, and was likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits; and he added, in words which appear to us equally appropriate to the case now before the court: 'The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.' 'We are of opinion that this state law was enacted by virtue of a power residing in the state to legislate; that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action.' 12 How. 319-321.

In Gilman v. Philadelphia, 3 Wall. 713, 730, this court, speaking by Mr. Justice SWAYNE, applying the same test, and relying on Willson v. Marsh Co. and Cooley v. Board of Wardens, above cited, upheld the validity of a statute [135 U.S. 100, 150] of Pennsylvania authorizing the construction of a bridge across the Schuylkill river, so as to prevent the passage of vessels with masts; and, after stating the points adjudged in Brown v. Maryland and in the Passenger Cases, said: 'But a state, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another state, to be sold by retail, or to be sold at all, without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. License Cases, 5 How. 504.' By the same test, and upon the authority of Willson v. Marsh Co., a statute of Wisconsin, authorizing the erection of a dam across a navigable river, was held to be constitutional in Pound v. Turck, 95 U.S. 459 , 463. To the like effect are Bridge Co. v. Hatch, 125 U.S. 1 , 8-12, 8 Sup. Ct. Rep. 811, and other cases there cited.

Upon like grounds, it was held, in Mobile Co. v. Kimball, 102 U.S. 691 , that a statute of Alabama, authorizn g the

improvement of the harbor of Mobile, did not trench upon the commercial power of congress; and the court, after pointing out that some expressions of Chief Justice MARSHALL in Gibbons v. Ogden as to the exclusiveness of the power of congress to regulate commerce were restricted by the facts of that case, and by the subsequent judgment in Willson v. Marsh Co., said: 'In the License Cases, which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of congress is essential to prohibit the action of the states upon the subjects there considered.' 102 U.S. 700 , 701.

In Woodruff v. Parham, 8 Wall. 123, a state statute, imposing a uniform tax on all sales by auction within it, was held constitutional, as applied to sales of goods the product of other states, and sold in the original and unbroken packages. [135 U.S. 100, 151] In Hinson v. Lott, Id. 148, decided at the same time, it was adjudged that a state statute which prohibited any dealers, introducing any intoxicating liquors into the state, from offering them for sale, without first paying a tax of 50 cents a gallon, and imposed a like tax on liquors manufactured within the state, was valid, as applied to liquors brought from another state, and held and offered for sale in the same barrels or packages in which they were brought in; because, in the words of Mr. Justice MILLER, who delivered the opinion of the court in both cases, it was not 'an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the state.' 8 Wall. 153. These two cases were cited by the court in Low v. Austin, 13 Wall. 29, 34, and in Cook v. Pennsylvania, 97 U.S. 566 , 573, in which, in accord with the opinions in the License Cases, state taxation upon original cases of wines imported from a foreign country, and upon which duties had been paid under acts of congress, was held to be invalid.

In Welton v. Missouri, 91 U.S. 275 , the point decided was that a state statute, requiring the payment of a license tax from persons selling, by going from place to place within the state for the purpose, goods not the growth of manufacture of the state, and not from persons so selling goods which were the growth or manufacture of the state, was unconstitutional and void, by reason of the discrimination; and in Machine Co. v. Gage, 100 U.S. 676 , a state statute imposing a like tax, without discriminating as to the place of growth or produce of material or manufacture, was adjudged to be constitutional and valid, as applied to machines made in and brought from another state.

In Brown v. Houston, 114 U.S. 622 , 5 Sup. Ct. Rep. 1091, it was decided that coal mined in Pennsylvania, and brought in boats by river from Pittsburgh to New Orleans to be there sold by the boat-load on account of the Pennsylvania owner, and remaining afloat in its original condition and original packages, was subject, in common with all other property in the city, to taxation under the general tax laws of Louisiana; and the court referred to Woodruff v. Parham, above cited, as upholding the validity [135 U.S. 100, 152] of a 'tax laid on auction sales of all property indiscriminately,' and 'which had no relation to the movement of goods from one state to another.' 114 U.S. 634 , 5 Sup. Ct. Rep. 1097.

In Walling v. Michigan, 116 U.S. 446 , 6 Sup. Ct. Rep. 454, the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed a different tax upon persons engaged within the state in the business of selling or soliciting the sale of intoxicating liquors to be sent into the state, from that imposed upon persons selling or soliciting the sale of such liquors manufactured i thin the state; and the court declared that the statute would be perfectly justified as 'an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people,' 'if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature.' 116 U.S. 460 , 6 Sup. Ct. Rep. 460.

In Railway Co. v. Illinois, 118 U.S. 557 , 7 Sup. Ct. Rep. 4, the only point decided was that a state had no power to regulate the rates of freight of any part of continuous transportation upon railroads partly within the state and partly in other states. In Robbins v. Taxing Dist., 120 U.S. 489 , 7 Sup. Ct. Rep. 592, a state law requiring the payment of a license tax by drummers and persons not having a regularly licensed house of business within the taxing district, offering for sale of selling any goods by sample, was decided to be unconstitutional as applied to persons offering to sell goods on behalf of merchants residing in other states, because, as the majority of the court held, its effect was 'to tax the sale of such goods, or the offer to sell them, before they are brought into the state.' 120 U.S. 497 , 7 Sup. Ct. Rep. 596. Neither of those cases appears to us to tend to limit the police power of the state to protect the public health,

the public morals, and the public peace within its own borders.

As was said by this court in Sherlock v. Alling, 93 U.S. 99 , 103: 'In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of [135 U.S. 100, 153] their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution.' It was accordingly held in that case that an action against a carrier engaged in interstate commerce might be maintained under a state statute giving a civil remedy, unknown to the common law, for negligence causing death; and in subsequent cases that what a state might punish or afford redress for it might seek by proper precautions to prevent; and consequently that a state statute requiring, under a penalty, engineers of all railroad trains within the state to be examined and licensed by a state board, either as to their qualifications generally, or as to their capacity to distinguish between color signals, was not in its nature a regulation of commerce, but was a constitutional exercise of the power reserved to the states, and intended to secure that safety of persons and property within their territorial limits, and, so far as it affected interstate commerce, not in conflict with any express enactment of congress upon the subject, nor contrary to any intention of congress to be presumed from its silence. Smith v. Alabama, 124 U.S. 465 , 8 Sup. Ct. Rep. 564; Railway Co. v. Alabama, 128 U.S. 96 , 9 Sup. Ct. Rep. 28.

In Railroad Co. v. Husen, 95 U.S. 465 , it was expressly conceded, in the opinion of the court delivered by Mr. Justice STRONG, that a state, in the exercise of its police power, could 'legislate to prevent the spread of crime or pauperism or disturbance of the peace,' as well as 'justify the exclusion of property, dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases.' Id. 471. And the decision, by which the statute of Missouri, forbidding the introduction of any Texas, Mexican, or Indian cattle into the state, was held to be an unconstitutional interference with interstate commerce, rested, as clearly appears in the opinion in that case, and has since been distinctly recognized by the court, upon the ground that the statute made no distinction, in the transportation forbidden, between cattle which might b diseased and those which were not. Kimmish v. Ball, 129 U.S. 217, 221 , 9 S. Sup. Ct. Rep. 277. [135 U.S. 100, 154] The authority of the states, in the exercise of their police power, and for the protection of life and health, to pass laws affecting things which are lawful subjects or instruments of commerce, and even while they are actually employed in commerce, has been expressly recognized by congress in the acts regulating the transportation of nitro-glycerine, as well as in the acts for the observation and execution of the quarantine and health laws of the states. Rev. St. 4278-4280, 4792-4796.

In Morgan's S. S. Co. v. Board of Health, 118 U.S. 455, 465 , 6 S. Sup. Ct. Rep. 1114, the system of quarantine laws established by the state of Louisiana was held, in accordance with earlier opinions, to be a constitutional exercise of the police power; and it was said by the court: 'Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.' It was added that in this respect the case fell within the principle of Willson v. Marsh Co., Cooley v. Board of Wardens, Gilman v. Philadelphia, Pound v. Turck, and other cases.

In Mugler v. Kansas, 123 U.S. 623 , 8 Sup. Ct. Rep. 273, the court said: 'In the License Cases, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by congress of its power to regulate commerce with foreign countries, or among the several states, and the exercise by a state of what are called 'police powers.' Although the members of the court did [135 U.S. 100, 155] not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the constitution of the United States, or with any act of congress.' 123 U.S. 657, 658 , 8 S. Sup. Ct. Rep. 295.

In Bowman v. Railway Co., 125 U.S. 465 , 8 Sup. Ct. Rep. 689, 1062, the point, and the only point, decided, was that a

statute of Iowa, which forbade common carriers to bring intoxicating liquors into the state from any other state, without first obtaining a certificate from a county officer of Iowa that the consignee was authorized by the laws of Iowa to sell such liquors, was an unconstitutional regulation of interstate commerce. While Mr. Justice FIELD in his separate opinion (page 507) intimated, and three dissenting justices (pages 514, 515) feared, that the decision was in effect inconsistent with the decision in the License Cases, Mr. Justice MATTHEWS, who delivered the judgment of the majority of the court, not only cautiously avoided committing the court to any such conclusion, but took great pains to mark the essential difference between the two decisions. On the one hand, after making a careful analysis of the opinions in the License Cases, he said: 'From this analysis it is apparent that the question presented in this case was not decided in the License Cases. The point in judgment in them was strictly confined to the right of the states to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the states was not questioned.' On the other hand, in stating the reasons for holding the statute of Iowa, prohibiting the transportation of liquors fro another state, not to be a legitimate exertion of the police power of the state of Iowa, he said: 'It is not an exercise of the jurisdiction of the state over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border.' 'But the right to prohibit sales, so far as conceded [135 U.S. 100, 156] to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it.' 125 U.S. 479, 498 , 499 S., 8 Sup. Ct. Rep. 695, 705, 706.

In the opinion of the majority of the court in that case, it was noted that the omission of congress to legislate might not so readily justify an inference of its intention to exclude state legislation in matters affecting interstate commerce, as in those affecting foreign commerce; Mr. Justice MATTHEWS saying: 'The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce nor any other subject, except through the government of the United States and its laws and treaties. The same necessity perhaps does not exist equally in reference to commerce among the states. The power conferred upon congress to regulate commerce among the states is indeed contained in the same clause of the constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the states, and paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of congress, or its in tention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet, in respect to commerce among the states, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation or that, until it positively [135 U.S. 100, 157] interferes, such commerce may be left to be freely dealt with by the respective states.' 125 U.S. 482, 483 , 8 S. Sup. Ct. Rep. 697.

In Kidd v. Pearson, 128 U.S. 1 , 9 Sup. Ct. Rep. 6, a statute of Iowa, prohibiting the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary, and sacramental purposes only, and authorizing any building used for their unlawful manufacture to be abated as a nuisance, was unanimously held to be constitutional, as applied to a case in which the liquors were manufactured for exportation and were sold outside the state; and the court, in showing how impracticable it would be for congress to regulate the manufacture of goods in one state to be sold in another, said: 'The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent.' 'A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, itw ould be difficult to imagine.' 128 U.S. 21, 22 , 9 S. Sup. Ct. Rep. 10.

The language thus applied to congressional supervision of the manufacture within one state of intoxicating liquors intended to be sold in other states appears to us to apply with hardly less force to the regulation by congress of the sale within one state of intoxicating liquors brought from another state. How far the protection of the public order, health,

and morals demands the restriction or prohibition of the sale of intoxicating liquors is a question peculiarly appertaining to the legislatures of the several states, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits, and the usages of people of various races and origin, and living in regions far apart and widely differing in climate and in physical characteristics. The local option laws prevailing in many of the states indicate the judgment of as many legislatures that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single state, much less over the area of a continent. It is manifest that the regulation [135 U.S. 100, 158] of the sale, as of the manufacture, of such liquors manufactured in one state to be sold in another, is a subject which, far from requiring, hardly admits of a uniform system or plan throughout the United States. It is, in its very nature, not national, but local; and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the sale or the manufacture of in toxicating liquors generally. Congress cannot regulate this subject under the police power, because that power has not been conceded to congress, but remains in the several states; nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this court in Kidd v. Pearson, above cited, it was the object of the commercial clause of the constitution to secure.

The above review of the judgments of this court since the decision in the License Cases appears to us to demonstrate that that decision, while often referred to, has never been overruled or its authority impugned. It only remains to sum up the reasons which have satisfied us that the judgment of the supreme court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order, and the general welfare of the people is the chief end of government. Salus populi suprema lex. The police power is inherent in the states, reserved to them by the constitution, and necessary to their existence as organized governments. The constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, all statutes of a state must, of course, give way, so far as they are repugnant to the national constitution and laws. But an intention is not lightly to be imputed to the framers of the constitution, or to the congress of the United States, to subordinate the protection of the safety, health, and morals of the people to the promotion of trade and commerce. The police power extends to the control and regulation of things which, when used in a lawful and proper manner, are [135 U.S. 100, 159] subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health, or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produceidleness, disorder, disease, pauperism, and crime. The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several states, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded b congress as part of a national and uniform system.

The statutes in question were enacted by the state of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral, and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce. They have no relation to the movement of goods from one state to another, but operate only on intoxicating liquors within the territorial limits of the state. They include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a state, (the validity of which is unquestioned,) authorizing the erection of bridges and dams across navigable watcrs within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the state.

If the statutes of a state, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another state, and sold by the importer in what are called 'original packages,' the consequence must be that an inhabitant of the state may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other states of the Union, intoxicating liquors of whatever description, [135 U.S. 100, 160] in cases or kegs, or even in single bottles or flasks, despite any legislation of those states on the subject, and although his own state should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of congress

to convince us that it contemplated or intended such a result.

The decision in the License Cases, 5 How. 504, by which the court, maintaining these views, unanimously adjudged that a general statute of a state, prohibiting the sale of intoxicating liquors without license from municipal authorities, included liquors brought from another state and sold by the importer in the original barrel or package, should be upheld and followed, because it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to congress, and the inherent police power reserved to the states; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the constitution; because it has been accepted and acted on for 40 years by congress, by the state legislatures, by the courts, and by the people; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of congress, while it would cripple, not to say destroy, the whole control of every state over the sale of intoxicating liquors within its borders. The silence and inaction of congress upon the subject, during the long period since the decision of the License Cases, appear to us to require the inference that congress intended that the law should remain as thereby declared by this court, rather than to warrant the presumption that congress intended that commerce among the states should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the states. For these reasons we are compelled to dissent from the opinion and judgment of the majority of the court.

Footnotes

[Footnote 1] Reversing 43 N. W. Rep. 188.

[Footnote 2] 5 Sup. Ct. Rep. 1091.

U.S. Supreme Court

CARTER v. CARTER COAL CO., 298 U.S. 238 (1936)

298 U.S. 238

CARTER
v.
CARTER COAL CO. et al.

HELVERING et al.
v.
CARTER et al.

R. C. TWAY COAL CO. et al.
v.
GLENN.

R. C. TWAY COAL CO. et al.
v.
CLARK.

Nos. 636, 651, 649, 650.
Argued and Submitted March 11, 12, 1936.
Decided May 18, 1936.

Beneficent aims however great or well directed can never serve in lieu of constitutional power.

[298 U.S. 238, 255] Messrs. Frederick H. Wood and William D. Whitney, both of New York City, and Richard H. Wilmer, of Washington, D.C., for petitioner Carter.

[298 U.S. 238, 269] Mr. Charles I. Dawson, of Louisville, Ky., for Tway Coal Co.

Messrs. Stanley F. Reed, Sol. Gen., of Washington, D.C., Homer S. Cummings, Atty. Gen., John Dickinson, Asst. Atty. Gen., Charles H. Weston, F. B. Critchlow, A. H. Feller, Robert L. Stern, and Charles Harwood, all of Washington, D.C., for the United States.

[298 U.S. 238, 277] Mr. Karl J. Hardy, of Washington, D.C., for respondents Carter Coal co. et al.

Mr. Joseph Selligman, of Louisville, Ky., for respondent Clark.

[298 U.S. 238, 278]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The purposes of the 'Bituminous Coal Conservation Act of 1935,' involved in these suits, as declared by the title, are to stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for co-operative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes. C. 824, 49 Stat. 991 (15 U.S.C.A. 801-827). The constitutional validity of the act is challenged in each of the suits.

Nos. 636 and 651 are cross-writs of certiorari in a stockholder's suit, brought in the Supreme Court of the District of Columbia by Carter against the Carter Coal Company and some of its officers, Guy T. Helvering (Commissioner of Internal Revenue of the United [298 U.S. 238, 279] States), and certain other officers of the United States, to enjoin the coal company and its officers named from filing an acceptance of the code provided for in said act, from paying any tax imposed upon the coal company under the authority of the act, and from complying with its provisions or the provisions f the code. The bill sought to enjoin the Commissioner of Internal Revenue and the other federal officials named from proceeding under the act in particulars specified, the details of which it is unnecessary to state.
No. 649
is a suit brought in a federal District Court in Kentucky by petitioners against respondent collector of internal revenue for the district of Kentucky, to enjoin him from collecting or attempting to collect the taxes sought to be imposed upon them by the act, on the ground of its unconstitutionality.

No. 650 is a stockholder's suit brought in the same court against the coal company and some of its officers, to secure a mandatory injunction against their refusal to accept and operate under the provisions of the Bituminous Coal Code prepared in pursuance of the act.

By the terms of the act, every producer of bituminous coal within the United States is brought within its provisions.

Section 1 (15 U.S.C.A. 801) is a detailed assertion of circumstances thought to justify the act. It declares that the mining and distribution of bituminous coal throughout the United States by the producer are affected with a national public interest; and that the service of such coal in relation to industrial activities, transportation facilities, health and comfort of the people, conservation by controlled production and economical mining and marketing, maintenance of just and rational relations between the public, owners, producers, and employees, the right of the public to constant and adequate supplies of coal at reasonable prices, and the general welfare of the Nation, [298 U.S. 238, 280] require that the bituminous coal industry should be regulated as the act provides.

Section 1 (15 U.S.C.A. 802), among other things, further declares that the production and distribution by producers of such coal bear upon and directly affect interstate commerce, and render regulation of production and distribution imperative for the protection of such commerce; that certain features connected with the production, distribution, and marketing have led to waste of the national coal resources, disorganization of interstate commerce in such coal, and burdening and obstructing interstate commerce therein; that practices prevailing in the production of such coal directly affect interstate commerce and require regulation for the protection of that commerce; and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and disparate labor costs detrimental to fair interstate

competition, and in order to avoid obstructions to interstate commerce that recur in industrial disputes over labor relations at the mines. These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.

The substantive legislation begins with section 2 (15 U.S.C.A. 803), which establishes in the Department of the Interior a National Bituminous Coal Commission, to be appointed and constituted as the section then specifically provides. Upon this commission is conferred the power to hear evidence and find facts upon which its orders and actions may be predicated.

Section 3 (15 U.S.C.A. 804) provides:

> 'There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market [298 U.S. 238, 281] value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: Provided, That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenu shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: Provided further, That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act (sections 805, 806, 807 and 808 of this chapter), and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 (sections 805, 806, 807 and 808 of this chapter) or of the drawback of taxes provided in section 3 of this Act (this section) be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.'

Section 4 (15 U.S.C.A. 805 et seq.) provides that the commission shall formulate the elaborate provisions contained therein into a working agreement to be known as the Bituminous Coal Code. These provisions require the organization of twenty-three [298 U.S. 238, 282] coal districts, each with a district board the membership of which is to be determined in a manner pointed out by the act. Minimum prices for coal are to be established by each of these boards, which is authorized to make such classification of coals and price variation as to mines and consuming market areas as it may deem proper. 'In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.' (15 U.S.C.A. 807(a). The district board must determine and adjust the total cost of the ascertainable tonnage produced in the district so as to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, which may have been established since January 1, 1934

Without repeating the long and involved provisions with regard to the fixing of minimum prices, it is enough to say that the act confers the power to fix the minimum price of coal at each and every coal mine in the United States, with such price variations as the board may deem necessary and proper. There is also a provision authorizing the commission, when deemed necessary in the public [298 U.S. 238, 283] interest, to establish maximum prices in order to protect the consumer against unreasonably high prices.

All sales and contracts for the sale of coal are subject to the code prices provided for and in effect when such sales and contracts are made. Various unfair methods of competition are defined and forbidden.

The labor provisions of the code, found in part 3 of the same section (15 U.S.C.A. 808), require that in o der to effectuate the purposes of the act the district boards and code members shall accept specified conditions contained in the code, among which are the following:

Employees to be given the right to organize and bargain collectively, through representatives of their own choosing, free from interference, restraint, or coercion of employers or their agents in respect of their concerted activities.

Such employees to have the right of peaceable assemblage for the discussion of the principles of collective bargaining and to select their own check-weighman to inspect the weighing or measuring of coal.

A labor board is created, consisting of three members, to be appointed by the President and assigned to the Department of Labor. Upon this board is conferred authority to adjudicate disputes arising under the provisions just stated, and to determine whether or not an organization of employees had been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives. The board 'may order a code member to meet the representatives of its employees for the purpose of collective bargaining.'

Subdivision (g) of part 3 (15 U.S.C.A. 808(g) provides:

> 'Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the [298 U.S. 238, 284] preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.'

The bill of complaint in Nos. 636 and 651 was filed in the Supreme Court of the District of Columbia on August 31, 1935, the day after the Coal Conservation Act came into effect. That court, among other things, found that the suit was brought in good faith; that if Carter Coal Company should join the code, it would be compelled to cancel existing contracts and pay its proportionate share of administering the code; that the production of bituminous coal is a local activity carried on within state borders; that coal is the Nation's greatest and primary source of energy, vital to the public welfare, of the utmost importance to the industrial and economic life of the Nation and the health and comfort of its inhabitants; and that its distribution in interstate commerce should be regular, continuous, and free of interruptions, obstructions, burdens, and restraints.

Other findings are to the effect that such coal is generally sold f.o. b. mine, and the predominant portion of it shipped outside the state in which it is produced; that the distribution and marketing is predominantly interstate in character; and that the intrastate distribution [298 U.S. 238, 285] and sale are so connected that interstate regulation cannot be accomplished effectively unless transactions of intrastate distribution and sale be regulated.

The court further found the existence of a condition of unrestrained and destructive competition in the system of distribution and marketing such coal, and of destructive price-cutting, burdening and restraining interstate commerce, and dislocating and diverting its normal flow.

The court concludes as a matter of law that the bringing of the suit was not premature; that the plaintiff was without legal remedy, and rightly invoked relief in equity; that the labor provisions of the act and code were unconstitutional for reaso stated, but the price-fixing provisions were valid and constitutional; that the labor provisions are separable; and, since the provisions with respect to price-fixing and unfair competition are valid, the taxing provisions of the act

could stand. Therefore, except for granting a permanent injunction against collection of the 'taxes' accrued during the suit (Ex parte Young, 209 U.S. 123, 147 , 148 S., 28 S.Ct. 441, 13 L.R.A. (N.S.) 932, 14 Ann.Cas. 764), the court denied the relief sought, and dismissed the bill.

Appeals were taken to the United States Court of Appeals for the District of Columbia by the parties; but pending hearing and submission in that court, petitions for writs of certiorari were presented asking us to review the decree of the Supreme Court of the District without awaiting such hearing and submission. Because of the importance of the question and the advantage of a speedy final determination thereof, the writs were granted. 296 U.S. 571 , 56 S.Ct. 371.

The remaining two suits (Nos. 649 and 650), involving the same questions, were brought in the federal District Court for the Western District of Kentucky. That court held the act valid and constitutional in its entirety and entered a decree accordingly. R. C. Tway Coal Co. v. Glenn, 12 F.Supp. 570. Appeals were taken to the Circuit Court of Appeals for the Sixth [298 U.S. 238, 286] Circuit; but, as in the Carter case and for the same reasons, this court granted writs of certiorari in advance of hearing and submission. 296 U.S. 571 , 56 S.Ct. 371.

The questions involved will be considered under the following heads:

1. The right of stockholders to maintain suits of this character.

2. Whether the suits were prematurely brought.

3. Whether the exaction of 15 per centum on the sale price of coal at the mine is a tax or a penalty.

4. The purposes of the act as set forth in section 1, and the authority vested in Congress by the Constitution to effectuate them.

5. Whether the labor provisions of the act can be upheld as an exercise of the power to regulate interstate commerce.

6. Whether subdivision (g) of part 3 of the code is an unlawful delegation of power.

7. The constitutionality of the price-fixing provisions, and the question of severability-that is to say, whether, if either the group of labor provisions or the group of price-fixing provisions be found constitutionally invalid, the other can stand as separable.

First. In the Carter case (Nos. 636 and 651) the stockholder who brought the suit had formally demanded of the board of directors that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and to have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound and that it would adversely affect the business of the company if accepted, nevertheless it should accept the code provided for by the act because the penalty in the form [298 U.S. 238, 287] of a 15 per cent. tax on its gross sales would be seriously injurous and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it.

In the Tway Company cases, the company itself brought suit to enjoin the enforcement of the act (No. 649); and a stockholder brought suit to compel the company to accept the code and operate under its provisions (No. 650).

Without repeating the long averments of the several bills, we are of opinion that the suits were properly brought and were maintainable in a court of equity. The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in Ashwander et al. v. Tennessee Valley Authority, 297 U.S. 288 , 56 S.Ct. 466, 80 L. d. 688 (February 17, 1936), and requires no further discussion.

Second. That the suits were not prematurely brought also is clear. Section 2 of the act is mandatory in its requirement that the commission be appointed by the President. The provisions of section 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15 per cent. is definitely imposed, and its exaction certain to ensue.

In Pennsylvania v. West Virginia, 262 U.S. 553 , 592-595, 43 S.Ct. 658, 663, 32 A.L.R. 300, suits were brought by Pennsylvania and Ohio against West Virginia to enjoin the defendant state from enforcing an act of her Legislature upon the ground that it would injuriously affect or cut off the supply of natural gas produced in her territory and carried by pipe lines into the territory of the plaintiff states and there sold and used. These suits were brought a few days after the West Virginia act became effective. No order had yet been made under it by the Public Service Commission, nor had it been tested in actual practice. But it appeared that the act was certain to operate as the complainant [298 U.S. 238, 288] states apprehended it would. This court held that the suit was not premature. 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'

Pierce v. Society of Sisters, 268 U.S. 510, 535 , 536 S., 45 S.Ct. 571, 574, 39 A.L.R. 468, involved the constitutional validity of the Oregon Compulsory Education Act, which required every parent or other person having control of a child between the ages of eight and sixteen years to send him to the public school of the district where he resides. Suit was brought to enjoin the operation of the act by corporations owning and conducting private schools, on the ground that their business and property was threatened with destruction through the unconstitutional compulsion exercised by the act upon parents and guardians. The suits were held to be not premature, although the effective date of the act had not yet arrived. We said, 'The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.'

See, also, Terrace v. Thompson, 263 U.S. 197, 215 , 216 S., 44 S.Ct. 15; Swift & Co. v. United States, 276 U.S. 311, 326 , 48 S.Ct. 311; Euclid v. Ambler Co., 272 U.S. 365, 386 , 47 S.Ct. 114, 54 A.L.R. 1016; City Bank Co. v. Schnader, 291 U.S. 24, 34 , 54 S.Ct. 259.

Third. The so-called excise tax of 15 per centum on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its drawback allowance of 13 1/2 per cent., is clearly not a tax but a penalty. The exaction applies to all bituminous coal produced, whether it be sold, transported, or consumed in interstate commerce, or transactions in respect of it be confined wholly [298 U.S. 238, 289] to the limits of the state. It also applies to 'captive coal'-that is to say, coal produced for the sole use of the producer.

It is very clear that the 'excise tax' is not imposed for revenue but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement-which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail.

The exaction here is a penalty and not a tax within the test laid down by this court in numerous cases. Child Labor Tax Case, 259 U.S. 20 , 37-39, 42 S.Ct. 449, 21 A.L.R. 1432; United States v. La Franca, 282 U.S. 568, 572 , 51 S.Ct. 278; United States v. Constantine, 296 U.S. 287 , 293 et seq., 56 S.Ct. 223; United States v. Butler, 297 U.S. 1, 70 , 56 S.Ct. 312, 102 A.L.R. 914. While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own, Karnuth v. United States, 279 U.S. 231, 242 , 49 S.Ct. 274; Tyler v. United States, 281 U.S. 497, 502 , 50 S.Ct. 356, 69 A.L.R. 758, that device may not be employed so as to change the nature of the acts or things to which the words are applied. But it is not necessary to pursue the matter further. That the 'tax' is in fact a penalty is not seriously in dispute. The position of the government, as we understand it, is that the validity of the exaction does not rest upon the taxing power but upon the power of Congress to regulate interstate commerce; and that if the act in respect of the labor and price-fixing provisions be not upheld, the 'tax' must fall with them. With that position we agree and confine our consideration accordingly.

Fourth. Certain recitals contained in the act plainly suggest that its makers were of opinion that its constitutionality

could be sustained under some general federal [298 U.S. 238, 290] power, thought to exist, apart from the specific grants of the Constitution. The fallacy of that view will be apparent when we recall fundamental principles which, although hitherto often expressed in varying forms of words, will bear repetition whenever their accuracy seems to be challenged. The recitals to which we refer are contained in section 1 (which is simply a preamble to the act), and, among others, are to the effect that the distribution of bituminous coal is of national interest, affecting the health and comfort of the people and the general welfare of the Nation; that this circumstance, together with the necessity of maintaining just and rational relations between the public, owners, producers, and employees, and the right of the public to constant and adequate supplies at reasonable prices, require regulation of the industry as the act provides. These affirmations-and the further ones that the production and distribution of such coal 'directly affect interstate commerce,' because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce-do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary it is important, because it makes clear, except for the pure assumption that the conditions described 'directly' affect interstate commerce, that the powers which Congress undertook to exercise are not specific but of the most general character-namely, to protect the general public interest and the health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth; [298 U.S. 238, 291] but are they ends, the attainment of which has been committed by the Constitution to the federal government? This is a vital question; for nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.

The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means and ends wit the adoption of methods and details to carry the delegated powers into effect. The distinction between these two things-power and discretion-is not only very plain but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. McCulloch v. Maryland, 4 Wheat. 316, 421. Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed.

The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court. Mr. Justice Story, as early as 1816, [298 U.S. 238, 292] laid down the cardinal rule, which has ever since been followed-that the general government 'can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.' Martin v. Hunter's Lessee, 1 Wheat. 304, 326. In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and 'moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.' The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to intrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, United States v. Butler, supra, 297 U.S. 1 , at page 64, 56 S.Ct. 312, 102 A.L.R. 914; and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted. Compare Jacobson v. Massachusetts, 197 U.S. 11, 22 , 25 S.Ct. 358, 3 Ann.Cas. 765.

There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and

embarrassment. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 232 , 233 S., 20 S.Ct. 96. The state laws with respect to marriage and divorce present a case in point; and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to nego- [298 U.S. 238, 293] tiable instruments, desertion and nonsupport, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws, composed of commissioners from every state in the Union, has for many years been industriously and successfully working to that end by preparing and securing the passage by the several states of uniform laws. If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery.

Replying directly to the suggestion advanced by counsel in Kansas v. C lorado, 206 U.S. 46, 89 , 90 S., 27 S.Ct. 655, 664, to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this court said:

> 'But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should [298 U.S. 238, 294] be granted by the people in the manner they had provided for amending that act.'

The general rule with regard to the respective powers of the national and the state governments under the Constitution is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated-with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, 'when it was found necessary to establish a national government for national purposes,' this court said in Munn v. Illinois, 94 U.S. 113 , 124, 'a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.' While the states are not sovereign in the true sense of that term, but only quasi sovereign, yet in respect of all powers reserved to them they are supreme-'as independent of the general government as that government within its sphere is independent of the States.' The Collector v. Day, 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government [298 U.S. 238, 295] be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U.S. 251, 275 , 38 S.Ct. 529, 3 A.L.R. 649, Ann.Cas.1918E 724, possesses no inherent power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the Nation and in the field of international law is a wholly different matter which it is not necessary now to consider. See, however, Jones v. United States, 137 U.S. 202, 212 , 11 S.Ct. 80; Nishimur Ekiu v. United States, 142 U.S. 651, 659 , 12 S.Ct. 336; Fong Yue Ting v. United States, 149 U.S. 698 , 705 et seq., 13 S.Ct. 1016; Burnet v. Brooks, 288 U.S. 378, 396 , 53 S.Ct. 457, 86 A.L.R. 747.

The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges

from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in Texas v. White, 7 Wall. 700, 725, 'The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or-what may amount to the same thing-so [298 U.S. 238, 296] relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior stat- [298 U.S. 238, 297] ute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, Adkins v. Children's Hospital, 261 U.S. 525, 544 , 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. Schechter Poultry Corp. v. United States, 295 U.S. 495, 549 , 550 S., 55 S.Ct. 837, 97 A.L.R. 947.

We have set forth, perhaps at unnecessary length, the foregoing principles, because it seemed necessary to do so in order to demonstrate that the general purposes which the act recites, and whic , therefore, unless the recitals be disregarded, Congress undertook to achieve, are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution. Proceeding by a process of elimination, which it is not necessary to follow in detail, we shall find no grant of power which authorizes Congress to legislate in respect of these general purposes unless it be found in the commerce clause-and this we now consider.

Fifth. Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. The commerce clause (art. 1, 8, cl. 3) vests in Congress the power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' The function to be exercised is that of regulation. The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. We first inquire, then-What is commerce? The term, as this court many times has said, is [298 U.S. 238, 298] one of extensive import. No allembracing definition has ever been formulated. The question is to be approached both affirmatively and negatively-that is to say, from the points of view as to what it includes and what it excludes.

In Gibbons v. Ogden, 9 Wheat. 1, 189, 190, Chief Justice Marshall said:

> 'Commerce, undoubtedly, is traffic, but it is something more-it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for

> carrying on that intercourse.'

As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. And the power to regulate commerce embraces the instruments by which commerce is carried on. Welton v. State of Missouri, 91 U.S. 275 , 280; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 , 20 S.Ct. 96; Hopkins v. United States, 171 U.S. 578, 597 , 19 S.Ct. 40. In Adair v. United States, 208 U.S. 161, 177 , 28 S.Ct. 277, 281, 13 Ann. Cas. 764, the phrase 'Commerce among the several states' was defined as comprehending 'traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph,-indeed, every species on commercial intercourse among the several states.' In Veazie et al. v. Moor, 14 How. 568, 573, 574, this court, after saying that the phrase could never be applied to transactions wholly internal, significantly added: 'Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase foreign commerce, or fairly im- [298 U.S. 238, 299] plied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned.'

The distinct on between manufacture and commerce was discussed in Kidd v. Pearson, 128 U.S. 1, 20 , 21 S., 22, 9 S.Ct. 6, 10, and it was said:

> 'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation-the fashioning of raw materials into a change of form for use. The functions of commerce are different. ... If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,-in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the northwest, and the cotton-planter of the south, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in congress and [298 U.S. 238, 300] denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multiform, and vital interests,-interests which in their nature are, and must be, local in all the details of their successful management.'

And then, as though foreseeing the present controversy, the opinion proceeds:

> 'Any movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed, and incongruous legislation required by such an interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. ... A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine.'

Chief Justice Fuller, speaking for this court in United States v. E. C. Knight Co., 156 U.S. 1, 12 , 13 S., 15 S.Ct. 249, 253, said:

'Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. ... [298 U.S. 238, 301] 'It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. ...

'The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several ates, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.'

That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause. As this court said in Coe v. Errol, 116 U.S. 517, 526 , 6 S.Ct. 475, 478, 'Though intended for exportation, they may never be exported,-the owner has a perfect right to change his mind,-and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of [298 U.S. 238, 302] property in the state?' It is true that this was said in respect of a challenged power of the state to impose a tax; but the query is equally pertinent where the question, as here, is with regard to the power of regulation. The case was relied upon in Kidd v. Pearson, supra, 128 U.S. 1 , at page 26, 9 S.Ct. 6, 12. 'The application of the principles above announced,' it was there said, 'to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a state is as broad and plenary as its taxing power, and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter.'

In Heisler v. Thomas Colliery Co., 260 U.S. 245, 259 , 260 S., 43 S.Ct. 83, 86, we held that the possibility, or even certainty of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state. To hold otherwise 'would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production.'

In Oliver Iron Co. v. Lord, 262 U.S. 172, 178 , 43 S.Ct. 526, 529, we said on the authority of numerous cited cases: 'Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. ... Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even [298 U.S. 238, 303] though the business be conducted in close connection with interstate commerce.'

The same rule applies to the production of oil. 'Such production is essentially a mining operation, and therefore is not a part of interstate commerce, even though the product obtained is intended to be and in fact is immediately shipped in such commerce.' Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 235 , 52 S.Ct. 559, 565, 86 A.L.R. 403. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the

former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. Utah Power & L. Co. v. Pfost, 286 U.S. 165, 182 , 52 S.Ct. 548. Production is not commerce; but a step in preparation for commerce. Chassaniol v. Greenwood, 291 U.S. 584, 587 , 54 S.Ct. 541.

We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of these things-whether carried on separately or collectively-each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by [298 U.S. 238, 304] force of these activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject- matter of commerce into existence. Commerce disposes of it.

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. Schechter Poultry Corp. v. United States, supra, 295 U.S. 495 , at page 542 et seq., 55 S.Ct. 837, 97 A.L.R. 947. Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products.

Certain decisions of this court, superficially considered, seem to lend support to the defense of the act now under review. But upon examination, they will be seen to be inapposite. Thus, Coronado Co. v. United Mine Workers, 268 U.S. 295, 310 , 45 S.Ct. 551, and kindred cases, involved conspiracies to restrain interstate commerce in violation of the Anti-Trust Laws. The acts of the persons involved were local in character; but the intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into effect. Interstate commerce was the direct object of attack; and the restraint of such commerce was the necessary consequence of the acts and the immediate end in view. Bedford Cut Stone Co. [298 U.S. 238, 305] v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37, 46 , 47 S.Ct. 522, 54 A.L.R. 791. The applicable law was concerned not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce. 'The mere reduction in the supply of an article,' this court said in the Coronado Co. Case, supra, 268 U.S. 295 , at page 310, 45 S.Ct. 551, 556, 'to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act (15 U.S.C.A. 1 et seq.).'

Another group of cases, of which Swift & Company v. United States, 196 U.S. 375 , 25 S.Ct. 276, is an example, rest upon the circumstance that the acts in question constituted direct interferences with the 'flow' of commerce among the states. In the Swift Case, live stock was consigned and delivered to stockyards-not as a place of final destination, but, as the court said in Stafford v. Wallace, 258 U.S. 495, 516 , 42 S.Ct. 397, 402, 23 A.L.R. 229, 'a throat through which the current flows.' The sales which ensued merely changed the private interest in the subject of the current without interfering with its continuity. Industrial Ass'n of San Francisco v. United States, 268 U.S. 64, 79 , 45 S.Ct. 403. It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the court had held that the raising of the cattle, which were involved in the Swift Case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in [298 U.S. 238, 306] point; for it is that situation, and not the one with which the court actually dealt, which here concerns us.

The distinction suggested is illustrated by the decision in Arkadelphia Co. v. St. Louis S.W.R. Co., 249 U.S. 134 , 150-152, 39 S.Ct. 237. That case dealt with orders of a state commission fixing railroad rates. One of the questions

considered was whether certain shipments of rough material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the state, was a continuous movement in interstate commerce. It appeared that when the rough material reached the mills it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About 95 per cent. of the finished articles was made for outbound shipment. When the rough material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the state. And all of them knew and intended that this 95 per cent. of the finished product would be so sold and shipped. This court held that the state order did not interfere with interstate commerce, and that the Swift Case was not in point; as it is not in point here.

The restricted field covered by the Swift and kindred cases is illustrated by the Schechter Case, supra, 295 U.S. 495 , at page 543, 55 S. Ct. 837, 97 A.L.R. 947. There the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a current or flow of interstate commerce. The Swift doctrine was rejected as inapposite. In the Schechter Case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same. [298 U.S. 238, 307] But section 1 (the Preamble) of the act now under review declares that all production and distribution of bituminous coal 'bear upon and directly affect its interstate commerce'; and that regulation thereof is imperative for the protection of such commerce. The contention of the government is that the labor provisions of the act may be sustained in that view.

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the 'Preamble' recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the Schechter Case, supra, 295 U.S. 495 , at page 546 et seq., 55 S.Ct. 837, 850, 97 A.L.R. 947. 'If the commerce clause were construed,' we there said, 'to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.' It was also pointed out, 295 U.S. 495 , at page 548, 55 S.Ct. 837, 851, 97 A.L.R. 947, that 'the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.'

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately-not mediately, remotely, or collaterally-to produce the effect. It connotes the absence of an efficient intervening agency [298 U.S. 238, 308] or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not-What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but-What is the relation between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment, and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the [298 U.S. 238, 309] act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness

of the effect adds to its importance. It does not alter its character.

The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter Case, supra. The only perceptible difference between that case and this is that in the Schechter Case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; w ile here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the Schechter Case. On the contrary, the situations were recognized as akin. The opinion, 295 U.S. 495 , at page 546, 55 S.Ct. 837, 850, 97 A.L.R. 947, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: 'Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.' And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their [298 U.S. 238, 310] indirect effect upon interstate commerce, we said, 295 U.S. 495 , at page 549, 55 S.Ct. 837, 851, 97 A.L.R. 947: 'All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.' A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended.

Sixth. That the act, whatever it may be in form, in fact is compulsory clearly appears. We have already discussed section 3, which imposes the excise tax as a penalty to compel 'acceptance' of the code. Section 14 (15 U.S.C.A. 818) provides that the United States shall purchase no bituminous coal produced at any mine where the producer has not complied with the provisions of the code; and that each contract made by the United States shall contain a provision that the contractor will buy no bituminous coal to use on, or in the carrying out of, such contract unless the producer be a member of the code, as certified by the coal commission. In the light of these provisions we come to a consideration of subdivision (g) of part 3 of section 4, dealing with 'labor relations.'

That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners-namely, 'the producers of more than two-thirds the annual national tonnage production for the preceding calendar year' and 'more than one-half the mine workers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district [298 U.S. 238, 311] or group of districts. The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To 'accept,' in these circumstances, is not to exercise a choice, but to surrender to force.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth

Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Poultry Corp. v. United States, [298 U.S. 238, 312] 295 U.S. 495 , at page 537, 55 S.Ct. 837, 97 A.L.R. 947; Eubank v. Richmond, 226 U.S. 137, 143 , 33 S.Ct. 76, 42 L.R.A.(N.S.) 1123; Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116, 121 , 122 S., 49 S.Ct. 50, 86 A.L.R. 654.

Seventh. Finally, we are brought to the price-fixing provisions of the code. The necessity of considering the question of their constitutionality will depend upon whether they are separable from the labor provisions so that they can stand independently. Section 15 of the act (15 U.S.C.A. 819) provides:

> 'If any provision of this Act (chapter), or the application thereof to any person or circumstances, is held invalid, the remainder of the Act (chapter) and the application of such provisions to other persons or circumstances shall not be affected thereby.'

In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety-that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test-namely, What was the intent of the lawmakers?

Under the statutory rule, the presumption must be overcome by considerations which establish 'the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains,' Williams v. Standard Oil Co., 278 U.S. 235 , 241 et seq., 49 S.Ct. 115, 117, 60 A.L.R. 596; or, as stated in Utah Power & L. Co. v. Pfost, 286 U.S. 165, 184 , 185 S., 52 S.Ct. 548, 553, 'the clear probability that the Legislature would not have been satisfied with the statute un- [298 U.S. 238, 313] less it had included the invalid part.' Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. 'But it is an aid merely; not an inexorable command.' Dorchy v. Kansas, 264 U.S. 286, 290 , 44 S.Ct. 323, 325. The presumption in favor of separability does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole.' Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 362 , 55 S.Ct. 758, 768.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

Section 3 of the act, which provides that no producer shall, by accepting the code or the drawback of taxes, be estopped from contesting the constitutionality of any provision of the code is thought to aid the separability clause. But the effect of that provision is simply to permit the producer to challenge any provision of the code despite his acceptance of the code or the drawback. It seems not to have anything to do with the question of separability.

With the foregoing principles in mind, let us examine the act itself. The title of the act and the preamble demonstrate, as we have already seen, that Congress desired to accomplish certain general purposes therein recited. To that end it created a commission, with man- [298 U.S. 238, 314] datory directions to formulate into a working agreement the provisions set forth in section 4 of the act. That being done, the result is a code. Producers accepting and operating under the code are to be known as code members; and section 4 specifically requires that, in order to carry out the policy of the act, 'the code shall contain the conditions, provisions, and obligations,' (15 U.S.C.A. 805), which are then set forth. No power is vested in the commission, in formulating the code, to omit any of these conditions, provisions, or obligations. The mandate to include them embraces all of them. Following the requirement just quoted, and, significantly, in the same section (International Text-Book Co. v. Pigg, 217 U.S. 91, 112 , 113 S., 30 S.Ct. 481, 27 L.R.A.(N.S.) 493, 18 Ann.Cas. 1103) under appropriate headings, the price-fixing and labor- regulating provisions are

set out in great detail. These provisions, plainly meant to operate together and not separately, constitute the means designed to bring about the stabilization of bituminous-coal production, and thereby to regulate or affect interstate commerce in such coal. The first clause of the title is: 'To stabilize the bituminous coal-mining industry and promote its interstate commerce.'

Thus, the primary contemplation of the act is stabilization of the industry through the regulation of labor and the regulation of prices; for, since both were adopted, we must conclude that both were thought essential. The regulations of labor on the one hand and prices on the other furnish mutual aid and support; and their associated force-not one or the other but both combined-was deemed by Congress to be necessary to achieve the end sought. The statutory mandate for a code upheld by two legs at once suggests the improbability that Congress would have assented to a code supported by only one.

This seems plain enough; for Congress must have been conscious of the fact that elimination of the labor provi- [298 U.S. 238, 315] sions from the act would seriously impair, if not destroy, the force and usefulness of the price provisions. The interdependence of wages and prices is manifest. Approximately two-thirds of the cost of producing a ton of coal is represented by wages. Fair prices necessarily depend upon the cost of production; and since wages constitute so large a proportion of the cost, prices cannot be fixed with any proper relation to cost without taking into consideration this major element. If one of them becomes unc rtain, uncertainty with respect to the other necessarily ensues.

So much is recognized by the code itself. The introductory clause of part 3 (15 U.S.C.A. 808) declares that the conditions respecting labor relations are 'to effectuate the purposes of this Act (chapter).' And subdivision (a) of part 2 (15 U.S.C.A. 807(a), quoted in the forepart of this opinion, reads in part: 'In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, ... equal as nearly as may be to the weighted average of the total costs, per net ton.' Thus wages, hours of labor, and working conditions are to be so adjusted as to effectuate the purposes of the act; and prices are to be so regulated as to stabilize wages, working conditions, and hours of labor which have been or are to be fixed under the labor provisions. The two are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production.

These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one [298 U.S. 238, 316] set of which cannot be removed without fatal consequences to the whole. Paraphrasing the words of this court in Butts v. Merchants' Transp. Co., 230 U.S. 126, 133 , 33 S.Ct. 964, we inquire-What authority has this court, by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone? Are we at liberty to say from the fact that Congress has adopted an entire integrated system that it probably would have enacted a doubtfully-effective fraction of the system? The words of the concurring opinion in the Schechter Case, 295 U.S. 495 , at pages 554, 555, 55 S.Ct. 837, 853, 97 A.L.R. 947, are pertinent in reply: 'To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. ... Wages and hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder.' The conclusion is unavoidable that the price-fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations, or compensations, as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. International Text-Book Co. v. Pigg, supra, 217 U.S. 91 , at page 113, 30 S.Ct. 481, 27 L.R.A.(N.S.) 493, 18 Ann.Cas. 1103; Warren v. Mayor and Aldermen of Charlestown, 2 Gray (Mass.) 84, 98, 99.

The price-fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the matter, nor anything we have said, is to be taken as indicating that the court is of opinion that these provisions, if separately enacted, could be sustained.

If there be in the act provisions, other than those we have considered, that may stand independently, the [298 U.S. 238,

317] question of their validity is left for future determination when, if ever, that question shall be presented for consideration.

The decrees in Nos. 636, 649, and 650 must be reversed and the causes remanded for further consideration in conformity with this opinion. The decree in No. 651 will be affirmed.

It is so ordered.

Separate opinion of Mr. Chief Justice HUGHES.

I agree that the stockholders were entitled to bring their suits; that, in view of the question whether any part of the act could be sustained, the suits were not premature; that the so-called tax is not a real tax, but a penalty; that the constitutional power of the federal government to impose this penalty must rest upon the commerce clause, as the government concedes; that production-in this case mining-which precedes commerce is not itself commerce; and that the power to regulate commerce among the several states is not a power to regulate industry within the state.

The power to regulate interstate commerce embraces the power to protect that commerce from injury, whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end. Second Employers' Liability Cases, 223 U.S. 1, 51 , 32 S.Ct. 169, 38 L.R.A.(N.S.) 44. Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it. Texas & N.O.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548, 570 , 50 S.Ct. 427. But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effect, Congress in its discretion [298 U.S. 238, 318] could assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution. If the people desire to give Congress the power to regulate industries within the state, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

I also agree that subdivision (g) of part 3 of the prescribed Code (15 U.S.C.A. 808(g) is invalid upon three counts: (1) It attempts a broad delegation of legislative power to fix hours and wages without standards of limitation. The government invokes the analogy of legislation which becomes effective on the happening of a specified event, and says that in this case the event is the agreement of a certain proportion of producers and employees, whereupon the other producers and employees become subject to legal obligations accordingly. I think that the argument is unsound and is pressed to the point where the principle would be entirely destroyed. It would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as 'events,' with the result that they would be invested with the force of law having penal sanctions. (2) The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose. (3) The provision goes beyond any proper measure of protection of interstate [298 U.S. 238, 319] commerce and attempts a broad regulation of industry within the state.

But that is not the whole case. The act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power, as the Interstate Commerce Act (49 U.S.C.A. 1 et seq.), the Packers and Stockyards Act (7 U.S.C.A. 181 et seq.), and the Anti-Trust Acts (15 U.S.C.A. 1 et seq.) abundantly show. The Court has repeatedly stated that the power to regulate interstate commerce among the several states is supreme and plenary. Minnesota Rate Cases, 230 U.S. 352, 398 , 33 S.Ct. 729, 48 L. R.A.(N.S.) 1151, Ann.Cas.1916A, 18. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' Gibbons v. Ogden, 9 Wheat. 1, 196. We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that

enjoyed by the states in the regulation of their internal commerce. See Nebbia v. New York, 291 U.S. 502 , 54 S.Ct. 505, 89 A.L.R. 1469.

Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices, or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained. Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541, 547 , 32 S.Ct. 108; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 , 56 S.Ct. 720, 80 L.Ed. --, decided April 27, 1936. [298 U.S. 238, 320] In the legislation before us, Congress has set up elaborate machinery for the fixing of prices of bituminous coal sold in interstate commerce. That provision is attacked in limine. Prices have not yet been fixed. If fixed, they may not be contested. If contested, the act provides for review of the administrative ruling. If in fixing prices, due process is violated by arbitrary, capricious, on confiscatory action, judicial remedy is available. If an attempt is made to fix prices for sales in intrastate commerce, that attempt will also be subject to attack by appropriate action. In that relation it should be noted that in the Carter cases the court below found that substantially all the coal mined by the Carter Coal Company is sold f.o.b. mines and is transported into states other than those in which it is produced for the purpose of filling orders obtained from purchasers in such states. Such transactions are in interstate commerce. Savage v. Jones, 225 U.S. 501, 520 , 32 S.Ct. 715. The court below also found that 'the interstate distribution and sale and the intrastate distribution and sale' of the coal are so 'intimately and inextricably connected' that 'the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated.' Substantially the same situation is disclosed in the Kentucky cases. In that relation, the government invokes the analogy of transportation rates. Houston, E. & W.T. R. Co. v. U.S. (Shreveport Case), 234 U.S. 342 , 34 S.Ct. 833; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co., 257 U.S. 563 , 42 S.Ct. 232, 22 A.L.R. 1086. The question will be the subject of consideration when it arises in any particular application of the act.

Upon what ground, then, can it be said that this plan for the regulation of transactions in interstate commerce in coal is beyond the constitutional power of Congress? The Court reaches that conclusion in the view that the [298 U.S. 238, 321] invalidity of the labor provisions requires us to condemn the act in its entirety. I am unable to concur in that opinion. I think that the express provisions of the act preclude such a finding of inseparability.

This is admittedly a question of statutory construction; and hence we must search for the intent of Congress. And in seeking that intent we should not fail to give full weight to what Congress itself has said upon the very point. That act provides (section 15, 15 U.S.C.A. 819):

> 'If any provision of this Act (chapter), or the application thereof to any person or circumstances, is held invalid, the remainder of the Act (chapter) and the application of such provisions to other persons or circumstances shall not be affected thereby.'

That is a flat declaration against treating the provisions of the act as inseparable. It is a declaration which Congress was competent to make. It is a declaration which reverses the presumption of indivisibility and creates an opposite presumption. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184 , 52 S.Ct. 548.

The above-quoted provision does not stand alone. Congress was at pains to make a declaration of similar import with respect to the provisions of the code (section 3, 15 U.S.C.A. 804):

> 'No producer shall by reason of his acceptance of the code provided for in section 4 (sections 805, 806, 807 and 808 of this chapter), or of the drawback of taxes provided in section 3 of this Act (this section) be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.'

This provision evidently contemplates, when read with the one first quoted, that a stipulation of the code may be found to be unconstitutional and yet that its invalidity shall not be regarded as affecting the obligations attaching to the

remainder.

I do not think that the question of separability should be determined by trying to imagine what Congress would [298 U.S. 238, 322] have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation. Who can tell amid the host of divisive influences playing upon the legislative body what its reaction would have been to a particular excision required by a finding of invalidity? The question does not call for speculation of that sort, but rather for an inquiry whether the provisions are inseparable by virtue of inherent character. That is, when Congress states that the provisions of the act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

All that is said in the preamble of the act, in the directions to the commission which the act creates, and in the stipulations of the code, is subject to the explicit direction of Congress that the provisions of the statute shall not be treated as forming an indivisible unit. The fact that the various requirements furnish to each other mutual aid and support does not establish indivisibility. The purpose of Congress, plainly expressed, was that if a part of that aid were lost, the whole should not be lost. Congress desired that the act and code should be operative so far as they met the constitutional test. Thus we are brought, as I have said, to the question whether, despite this purpose of Congress, we must treat the marketing provisions and the labor provisions as inextricably tied together because of their nature. I find no such tie. The labor provisions are themselves separated and placed in a separate part (part 3) of the code (15 U.S.C.A. 808). It seems quite clear that the validity of the entire act cannot depend upon the provisions as to hours and wages in paragraph (g) of part 3. For what was contemplated by that paragraph is manifestly independent of [298 U.S. 238, 323] the other machinery of the act, as it cannot become effective unless the specified proportion of producers and employees reach an agreement as to particular wages and hours. And the provision for collective bargaining in paragraphs (a) and (b) of part 3 is apparently made separable from the code itself by section 9 of the act (15 U.S.C.A. 813), providing, in substance, that the employees of all producers shall have the right of collective bargaining even when producers do not accept or maintain the code.

The marketing provisions (part 2) of the cod (15 U.S.C.A. 807) naturally form a separate category. The interdependence of wages and prices is no clearer in the coal business than in transportation. But the broad regulation of rates in order to stabilize transportation conditions has not carried with it the necessity of fixing wages. Again, the requirement, in paragraph (a) of part 2 that district boards shall establish prices so as to yield a prescribed 'return per net ton' for each district in a minimum price area, in order 'to sustain the stabilization of wages, working conditions, and maximum hours of labor,' does not link the marketing provisions to the labor provisions by an unbreakable bond. Congress evidently desired stabilization through both the provisions relating to marketing and those relating to labor, but the setting up of the two sorts of requirements did not make the one dependent upon the validity of the other. It is apparent that they are not so interwoven that they cannot have separate operation and effect. The marketing provisions in relation to interstate commerce can be carried out as provided in part 2 without regard to the labor provisions contained in part 3. That fact, in the light of the congressional declaration of separability, should be considered of controlling importance.

In this view, the act, and the code for which it provides, may be sustained in relation to the provisions for [298 U.S. 238, 324] marketing in interstate commerce, and the decisions of the courts below, so far as they accomplish that result, should be affirmed.

Mr. Justice CARDOZO (dissenting in Nos. 636, 649, and 650, and in No. 651 Concurring in the result).

My conclusions compendiously stated are these:

(a) Part 2 of the statute sets up a valid system of price-fixing as applied to transactions in interstate commerce and to those in intrastate commerce where interstate commerce is directly or intimately affected. The prevailing opinion holds nothing to the contrary.

(b) Part 2, with its system of price-fixing, is separable from part 3, which contains the provisions as to labor

considered and condemned in the opinion of the Court.

(c) Part 2 being valid, the complainants are under a duty to come in under the code, and are subject to a penalty if they persist in a refusal.

(d) The suits are premature in so far as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor embodied in part 3. No opinion is expressed either directly or by implication as to those aspects of the case. It will be time enough to consider them when there is the threat or even the possibility of imminent enforcement. If that time shall arrive, protection will be given by clear provisions of the statute (section 3) against any adverse inference flowing from delay or acquiescence.

(e) The suits are not premature to the extent that they are intended to avert a present wrong, though the wrong upon analysis will be found to be unreal.

The complainants are asking for a decree to restrain the enforcement of the statute in all or any of its provisions on the ground that it is a void enactment, and void in all its parts. If some of its parts are valid and are separable from others that are or may be void, and if the parts upheld and separated are sufficient to sustain a [298 U.S. 238, 325] regulatory penalty, the injunction may not issue and hence the suits must fail. There is no need when that conclusion has been reached to stir a step beyond. Of the provisions not considered, some may never take effect, at least in the absence of future happenings which are still uncertain and contingent. Some may operate in one way as to one group and in another way as to others according to particular conditions as yet unknown and unknowable. A decision in advance as to the operation and validity of separable provisions in varying contingencies is premature and hence unwise. 'The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' Liverpool, N.Y. & P. Stea ship Co. v. Emigration Commissioners, 113 U.S. 33, 39 , 5 S.Ct. 352, 355; Abrams v. Van Schaick, 293 U.S. 188 , 55 S.Ct. 135; Wilshire Oil Co. v. United States, 295 U.S. 100 , 55 S.Ct. 673. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' Burton v. United States, 196 U.S. 283, 295 , 25 S.Ct. 243, 245.' Per Brandeis, J., in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 , 56 S.Ct. 466, 483, February 17, 1936. The moment we perceive that there are valid and separable portions, broad enough to lay the basis for a regulatory penalty, inquiry should halt. The complainants must conform to whatever is upheld, and as to parts excluded from the decision, especially if the parts are not presently effective, must make their protest in the future when the occasion or the need arises.

First. I am satisfied that the act is within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the Court, I do not find it necessary to determine at this time. Silence must not be taken as importing acquiescence. Much would have [298 U.S. 238, 326] to be written if the subject, even as thus restricted were to be explored through all its implications, historical and economic as well as strictly legal. The fact that the prevailing opinion leaves the price provisions open for consideration in the future makes it appropriate to forego a fullness of elaboration that might otherwise be necessary. As a system of price fixing, the act is challenged upon three grounds: (1) Because the governance of prices is not within the commerce clause; (2) because it is a denial of due process forbidden by the Fifth Amendment; and (3) because the standards for administrative action are indefinite, with the result that there has been an unlawful delegation of legislative power.

(1) With reference to the first objection, the obvious and sufficient answer is, so far as the act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely 'affect' it. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 , 42 S.Ct. 106; Flanagan v. Federal Coal Co., 267 U.S. 222, 225 , 45 S.Ct. 233; Lemke v. Farmers' Grain Co., 258 U.S. 50, 60 , 42 S.Ct. 244; Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83, 90 , 47 S.Ct. 294; Federal Trade Commission v. Pacific States Paper Trade Association, 273 U.S. 52, 64 , 47 S.Ct. 255. To regulate the price for such transactions is to regulate commerce itself, and not alone it antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 , 55 S.Ct. 497, 101 A.L.R. 55. They must therefore be subject to the power of the Nation unless they are to be withdrawn

altogether from governmental supervision. Cf. Head Money Cases, 112 U.S. 580, 593 , 5 S.Ct. 247; Story, Commentaries on the Constitution, 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. This does not mean, of course, that prices may be fixed for arbitrary reasons or in an arbitrary way. The commerce power of the Nation is [298 U.S. 238, 327] subject to the requirement of due process like the police power of the states. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 , 40 S.Ct. 106; cf. Brooks v. United States, 267 U.S. 432, 436 , 437 S., 45 S.Ct. 345, 37 A.L. . 1407; Nebbia v. New York, 291 U.S. 502, 524 , 54 S.Ct. 505, 89 A.L.R. 1469. Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression. The evidence is overwhelming that congress did not ignore those considerations in the adoption of this act. What is to be said in that regard may conveniently be postponed to the part of the opinion dealing with the Fifth Amendment.

Regulation of prices being an exercise of the commerce power in respect of interstate transactions, the question remains whether it comes within that power as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. Schechter Poultry Corporation v. United States, 295 U.S. 495, 544 , 545 S., 546, 55 S.Ct. 837, 97 A.L.R. 947. Sometimes it is said that the relation must be 'direct' to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' Schechter Poultry Corporation v. United States, supra, concurring opinion, 295 U.S. at page 554, 55 S.Ct. 853, 97 A.L.R. 947. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circum- [298 U.S. 238, 328] stances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, 'intimate' and 'remote' will be found to be as good as any. At all events, 'direct' and 'indirect,' even if accepted as sufficient, must not be read too narrowly. Cf. Stone, J., in Di Santo v. Pennsylvania, 273 U.S. 34, 44 , 47 S.Ct. 267. A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances Congress has the power to protect the business of its carriers against disintegrating encroachments. Houston, E. & W.T.R. Co. v. U.S. (Shreveport Case), 234 U.S. 342, 351 , 352 S., 34 S.Ct. 833; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co., 257 U.S. 563, 588 , 42 S.Ct. 232, 22 A.L.R. 1086; United States v. Louisiana, 290 U.S. 70, 75 , 54 S.Ct. 28; Florida v. United States, 292 U.S. 1 , 54 S.Ct. 603. To be sure, the relation even then may be characterized as indirect if one is nice or over-literal in the choice of words. Strictly speaking, the intrastate rates have a primary effect upon the intrastate traffic and not upon any other, though the repercussions of the competitive system may lead to secondary consequences affecting interstate traffic also. Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301, 306 , 55 S.Ct. 713. What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like imme- [298 U.S. 238, 329] diacy here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. The argument is strongly pressed by intervening counsel that this may not be true in all communities or in exceptional conditions. If so, the operators unlawfully affected may show that the act to that extent is invalid as to them. Such partial invalidity is plainly an insufficient basis for a declaration that the act is invalid as a whole. Dahnke-Walker Co. v. Bondurant, supra, 257 U.S. 282 , at page 289, 42 S.Ct. 106; DuPont v. Commissioner, 289 U.S. 685, 688 , 53 S.Ct. 766.

What has been said in this regard is said with added certitude when complainants' business is considered in the light of the statistics exhibited in the several records. In No. 636, the Carter case, the complainant has admitted that

'substantially all' (over 97 1/2 per cent.) of the sales of the Carter Company are made in interstate commerce. In No. 649 the percentages of intrastate sales are, for one of the complaining companies, 25 per cent., for another 1 per cent., and for most of the others 2 per cent. or 4. The Carter Company has its mines in West Virginia; the mines of the other companies are located in Kentucky. In each of those states, moreover, coal from other regions is purchased in large quantities, and is trus brought into competition with the coal locally produced. Plainly, it is impossible to say either from the statute itself or from any figures laid before us that interstate sales will not be prejudicially affected in West Virginia and Kentucky if intrastate prices are maintained on a lower level. If it be assumed for present purposes that there are other states or regions where the effect may be different, the complaints are not the champions of any rights except their own. Hatch v. [298 U.S. 238, 330] Reardon, 204 U.S. 152, 160 , 161 S., 27 S.Ct. 188, 9 Ann.Cas. 736; Premier-Pabst Sales Co. v. Grosscup (May 18, 1936) 298 U.S. 226 , 56 S. Ct. 754, 80 L.Ed. --.

(2) The commerce clause being accepted as a sufficient source of power, the next inquiry must be whether the power has been exercised consistently with the Fifth Amendment. In the pursuit of that inquiry, Nebbia v. New York, 291 U.S. 502 , 54 S.Ct. 505, 89 A.L.R. 1469, lays down the applicable principle. There a statute of New York prescribing a minimum price for milk was upheld against the objection that price-fixing was forbidden by the Fourteenth Amendment. 1 We found it a sufficient reason to uphold the challenged system that 'the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself.' 291 U.S. 502 , at page 538, 54 S.Ct. 505, 516, 89 A.L.R. 1469.

All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry, not only at the enactment of this statute in August, 1935, but for many years before. Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except a lucky [298 U.S. 238, 331] handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines. 2 The hope of betterment was faint unless the industry could be subjected to the compulsion of a code. In the weeks immediately preceding the passage of this act the country was threatened once more with a strike of ominous proportions. The plight of the industry was not merely a menace to owners and to mine workers, it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy.

Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. 'When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.' Appalachian Coals, Inc., v. United States, 288 U.S. 344, 372 , 53 S.Ct. 471, 478. The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group. Cf. Sugar Institute, Inc., v. [298 U.S. 238, 332] United States, 297 U.S. 553 , 56 S.Ct. 629, March 30, 1936. There is testimony in these records, testimony even by the assailants of the statute, that only through a system of regulated prices can the industry be stabilized and set upon the road of orderly and peaceful progress. 3 If further facts are looked for, they are narrated in the findings as well as in Congressional Reports and a mass of public records. 4 After making every allowance for difference of opinion as to the most efficient cure, the student of the subject is confronted with the indisputable truth that there were ills to be corrected, and ills that had a direct relation to the maintenance of commerce among the states without friction or diversion. An evil existing, and also the power to correct it, the lawmakers were at liberty to use their own discretion in the selection of the means. 5

(3) Finally, and in answer to the third objection to the statute in its price-fixing provisions, there has been no excessive delegation of legislative power. The prices [298 U.S. 238, 333] to be fixed by the district boards and the commission must conform to the following standards: They must be just and equitable; they must take account of the weighted average cost of production for each minimum price area; they must not be unduly prejudicial or preferential as between districts or as between producers within a district; and they must reflect as nearly as possible the relative

market value of the various kinds, qualities, and sizes of coal, at points of delivery in each common consuming market area; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The minimum for any district shall yield a return, per net ton, not less than the weighted average of the total costs per net ton of the tonnage of the minimum price area; the maximum for any mine, if a maximum is fixed, shall yield a return not less than cost plus a reasonable profit. Reasonable prices can as easily be ascertained for coal as for the carriage of passengers or property under the Interstate Commerce Act (49 U.S.C.A. 1 et seq.), or for the services of brokers in the stockyards (Tagg Bros. & Moorhead v. United States, 280 U.S. 420 , 50 S.Ct. 220), or for the use of dwellings under the Emergency Rent Laws (Block v. Hirsh, 256 U.S. 135, 157 , 41 S.Ct. 458, 16 A.L.R. 165; Marcus Brown Co. v. Feldman, 256 U.S. 170 , 41 S.Ct. 465; Levy Leasing Co. v. Siegel, 258 U.S. 242 , 42 S.Ct. 289), adopted at a time of excessive scarcity, when the laws of supply and demand no longer gave a measure for the ascertainment of the reasonable. The standards established by this act are quite as definite as others that have had the approval of this court. New York Central Securities Corporation v. United States, 287 U.S. 12, 24 , 53 S.Ct. 45; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 286 , 53 S.Ct. 627; Tagg Bros. & Moorhead v. United States, supra; Mahler v. Eby, 264 U.S. 32 , 44 S.Ct. 283. Certainly a bench of judges, not experts in the coal business, cannot [298 U.S. 238, 334] say with assurance that members of a commission will be unable, when advised and informed by others experienced in the industry, to make the standards workable, or to overcome through the development of an administrative technique many obstacles and difficulties that might be baffling or confusing to inexperience or ignorance.

The price provisions of the act are contained in a chapter known as section 4, part 2 (15 U.S.C.A. 807). The final subdivisions of that part enumerate certain forms of conduct which are denounced as 'unfair methods of competition.' For the most part, the prohibitions are ancillary to the fixing of a minimum price. The power to fix a price carries with it the subsidiary power to forbid and prevent evasion. Cf. United States v. Ferger, 250 U.S. 199 , 39 S.Ct. 445. The few prohibitions that may be viewed as separate are directed t situations that may never be realized in practice. None of the complainants threatens or expresses the desire to do these forbidden acts. As to those phases of the statute, the suits are premature.

Second. The next inquiry must be whether section 4, part 1 of the statute (15 U.S.C.A. 806) which creates the administrative agencies, and part 2 (15 U.S.C.A. 807), which has to do in the main with the price- fixing machinery, as well as preliminary sections levying a tax or penalty, are separable from part 3 (15 U.S.C.A. 808), which deals with labor relations in the industry with the result that what is earlier would stand if what is later were to fall.

The statute prescribes the rule by which construction shall be governed. 'If any provision of this Act (chapter), or the application thereof to any person or circumstances, is held invalid, the remainder of the Act (chapter) and the application of such provisions to other persons or circumstances shall not be affected thereby.' Section 15, 15 U.S.C.A. 819. The rule is not read as an inexorable mandate. Dorchy v. Kansas, 264 U.S. 286, 290 , 44 S.Ct. 323; Utah Power & Light Co. v. Pfost, 286 [298 U.S. 238, 335] U.S. 165, 184, 52 S.Ct. 548; Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 362 , 55 S.Ct. 758. It creates a 'presumption of divisibility,' which is not applied mechanically or in a manner to frustrate the intention of the law-makers. Even so, the burden is on the litigant who would escape its operation, Here the probabilities of intention are far from overcoming the force of the presumption. They fortify and confirm it. A confirmatory token is the formal division of the statute into 'parts' separately numbered. Part 3 which deals with labor is physically separate from everything that goes before it. But more convincing than the evidences of form and structure, the division into chapters and sections and paragraphs, each with its proper subject matter, are the evidences of plan and function. Part 2, which deals with prices, is to take effect at once, or as soon as the administrative agencies have finished their administrative work. Part 3 in some of its most significant provisions, the section or subdivision in respect of wages and the hours of labor, may never take effect at all. This is clear beyond the need for argument from the mere reading of the statute. The maximum hours of labor may be fixed by agreement between the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers. Wages may be fixed by agreement or agreement negotiated by collective bargaining in any district or group of two or more districts between representatives of producers of more than two-thirds of the annual tonnage production of such districts or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein. It is possible that none of these agreements as to hours and wages will ever be made. If made, they may not be completed for months or even years. In the meantime, however, the provi- [298 U.S. 238, 336] sions of part 2 will be continuously operative, and will

determine prices in the industry. Plainly, then, there was no intention on the part of the framers of the statute that prices should not be fixed if the provisions for wages or hours of labor were found to be invalid.

Undoubtedly the rules as to labor relations are important provisions of the statute. Undoubtedly the lawmakers were anxious that provisions so important should have the force of law. But they announced with all the directness possible for words that they would keep what they could have if they could not have the whole. Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage. 6 To hold otherwise is to ignore the whole history of mining. All in vain have offici l committees [298 U.S. 238, 337] inquired and reported in thousands of printed pages if this lesson has been lost. In the face of that history the Court is now holding that Congress would have been unwilling to give the force of law to the provisions of part 2, which were to take effect at once, if it could not have part 3, which in the absence of agreement between the employers and the miners would never take effect at all. Indeed, the prevailing opinion goes so far, it seems, as to insist that if the least provision of the statute in any of the three chapters is to be set aside as void, the whole statute must go down, for the reason that everything from end to end, or everything at all events beginning with section 4, is part of the Bituminous Coal Code, to be swallowed at a single draught, without power in the commission or even in the court to abate a jot or tittle. One can only wonder what is left of the 'presumption of divisibility' which the lawmakers were at pains to establish later on. Codes under the National Recovery Act (48 Stat. 195) are not a genuine analogy. The Recovery Act made it mandatory (section 7a (15 U.S.C.A. 707(a))) that every code should contain provisions as to labor, including wages and hours, and left everything else to the discretion of the codifiers. Wages and hours in such circumstances were properly described as 'essential features of the plan, its very bone and sinew' (Schechter Poultry Corporation v. United States, supra, concurring opinion, 295 U.S. at page 555, 55 S.Ct. 854, 97 A.L.R. 947), which taken from the body of a code would cause it to collapse. Here on the face of the statute the price provisions of one part and the labor provisions of the other (the two to be administered by separate agencies) are made of equal rank.

What is true of the sections and subdivisions that deal with wages and the hours of labor is true also of the other provisions of the same chapter of the act. Employees are to have the right to organize and bargain collectively through representatives of their own choos- [298 U.S. 238, 338] ing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designation of such representatives, or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and no employee and no one seeking employment shall be required as a condition of employment to join any company union. No threat has been made by any one to do violence to the enjoyment of these immunities and privileges. No attempt to violate them may be made by the complainants or indeed by any one else in the term of four years during which the act is to remain in force. By another subdivision employees are to have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own check-weighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer. None of these privileges or immunities has been threatened with impairment. No attempt to impair them may ever be made by any one.

Analysis of the statute thus leads to the conclusion that the provisions of part 3, so far as summarized, are separable from parts 1 and 2, and that any declaration in respect of their validity or invalidity under the commerce clause of the Constitution or under any other section will anticipate a controversy that may never become real. This being so, the proper course is to withhold an expression of opinion until expression becomes necessary. A different situation would be here if a portion of the statute, and a portion sufficient to uphold the regulatory penalty, did not appear to be valid. If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. Child Labor [298 U.S. 238, 339] Tax Case, 259 U.S. 20 , 42 S.Ct. 449, 21 A.L.R. 1432; Hill v. Wallace, 259 U.S. 44, 62 , 42 S.Ct. 453; Terrace v. Thompson, 263 U.S. 197, 215 , 44 S.Ct. 15; Pierce v. Society of Sisters, 268 U.S. 510, 536 , 45 S.Ct. 571, 39 A.L.R. 468. It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (section 3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser. But the case as it comes to us assumes a different posture, a posture inconsistent with the commission of a trespass either present or prospective. The hypothesis of complete invalidity has been shown to be unreal. The price provisions being valid, the complainants were under a duty to come

in under the code, whether the provisions as to labor are valid or invalid, and their failure to come in has exposed them to a penalty lawfully imposed. They are thus in no position to restrain the acts of the collector, or to procure a judgment defeating the operation of the statute, whatever may be the fate hereafter of particular provisions not presently enforceable. The right to an injunction failing, the suits must be dismissed. Nothing more is needful-no pronouncement more elaborate-for a disposition of the controversy.

A last assault upon the statute is still to be repulsed. The complainants take the ground that the act may not coerce them through the imposition of a penalty into a seeming recognition or acceptance of the code, if any of the code provisions are invalid, however separable from others. I cannot yield assent to a position so extreme. It is one thing to impose a penalty for refusing to come in under a code that is void altogether. It is a very different thing if a penalty is imposed for [298 U.S. 238, 340] refusing to come in under a code invalid at the utmost in separable provisions, not immediately operative, the right to contest them being explicitly reserved. The penalty in those circumstances is adopted as a lawful sanction to compel submission to a statute having the quality of law. A sanction of that type is the one in controversy here. So far as the provisions for collective bargaining and freedom from coercion are concerned, the same duties are imposed upon employers by section 9 of the statute (15 U.S.C.A. 813) whether they come in under the code or not. So far as code members are subject to regulation as to wages and hours of labor, the force of the complainants' argument is destroyed when reference is made to those provisions of the statute in which the effect of recognition and acceptance is explained and limited. By section 3 of the act, 'No producer shall by reason of his acceptance of the code provided for in section 4 (sections 805, 806, 807 and 808 of this chapter) or of the drawback of taxes provided in section 3 of this Act (this section) be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.' These provisions are reinforced and made more definite by sections 5(c) and 6(b), 15 U.S.C.A. 809(c), 810(b), which so far as presently material are quoted in the margin. 7 For the subscriber to the code who is [298 U.S. 238, 341] doubtful as to the validity of some of its requirements, there is thus complete protection. If this might otherwise be uncertain, it would be made clear by our decision in Ex parte Young, 209 U.S. 123 , 28 S.Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann.Cas. 764, which was applied in the court below at the instance and for the benefit of one of these complainants to give relief against penalties accruing during suit. Helvering v. Carter, No. 651. Finally, the adequacy of the remedial devices is made even more apparent when one remembers that the attack upon the statute in its labor regulations assumes the existence of a controversy that may never become actual. The failure to agree upon a wage scale or upon maximum hours of daily or weekly labor may make the statutory scheme abortive in the very phases and aspects that the court has chosen to condemn. What the code will provide as to wages and hours of labor, or whether it will provide anything, is still in the domain of prophecy. The opinion of the Court begins at the wrong end. To adopt a homely form of words, the complainants have been crying before they are really hurt.

My vote is for affirmance.

I am authorized to state that Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.

Footnotes

[Footnote 1] Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 , 40 S.Ct. 106, 108: 'The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations (Ex parte Milligan, 4 Wall. 2, 121- 127; Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 , 13 S.Ct. 622; United States v. Joint-Traffic Ass'n, 171 U.S. 505, 571 , 19 S.Ct. 25; McCray v. United States, 195 U.S. 27, 61 , 24 S.Ct. 769, 1 Ann.Cas. 561; United States v. Cress, 243 U.S. 316, 326 , 37 S.Ct. 380); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state p wer. In re Kemmler, 136 U.S. 436, 448 , 10 S.Ct. 930; Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 , 26 S.Ct. 66.' Cf. Brooks v. United States, 267 U.S. 432, 436 , 437 S., 45 S.Ct. 345, 37 A.L.R. 1407; Nebbia v. New York, 291 U.S. 502, 524 , 54 S.Ct. 505, 89 A.L. R. 1469.

[Footnote 2] The dates and titles are given in the brief for the government in No. 636, at pp. 15-18.

[Footnote 3] See, also, the Report of the Fifteenth Annual Meeting of the National Coal Association, October 26-27,

1934, and the statement of the resolutions adopted at the Sixteenth Annual Meeting as reported at hearings preliminary to the passage of this act. Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H.R. 8479, pp. 20, 152.

[Footnote 4] There is significance in the many bills proposed to the Congress after painstaking reports during successive nat onal administrations with a view to the regulation of the coal industry by Congressional action. S. 2557, October 4, 1921, 67th Cong., 1st Sess.; S. 3147, February 13, 1922, 67th Cong., 2nd Sess.; H.R. 9222, February 11, 1926, 69th Cong., 1st Sess.; H.R. 11898, May 4, 1926 (S. 4177), 69th Cong., 1st Sess.; S. 2935, January 7, 1932 (H.R. 7536), 72nd Cong., 1st Sess.; also same session H.R. 12916 and 9924.

[Footnote 5] 'Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.' Nebbia v. New York, supra, 291 U.S. 502 , at page 538, 54 S.Ct. 505, 517, 89 A.L.R. 1469.

[Footnote 6] At a hearing before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, on H.R. 8479, counsel for the United Mine Workers of America, who had coo perated in the drafting of the Act, said (p. 35):

> 'We have, as can be well understood, a provision of this code dealing with labor relations at the mines. We think that is justified; we think it is impossible to conceive of any regulation of this industry that does not provide for regulation of labor relations at the mines. I realize that while it may be contested, yet I feel that it is going to be sustained.
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> 'Also, there is a provision in this act that if this act, or any part of it, is declared to be invalid as affecting any person or persons, the rest of it will be valid, and if the other provisions of this act still stand and the labor provisions are struck down, we still want the act, because it stabilizes the industry and enables us to negotiate with them on a basis which will at least be different from what we have been confronted with since April, and that is a disinclination to even negotiate a labor wage scale because they claim they are losing money.
>
> 'If the labor provisions go down, we still want the industry stabilized so that our union may negotiate with them on the basis of a living American wage standard.'

[Footnote 7] 5(c); 'Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member.'

6(b): 'Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part. ... The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (sections 346 and 347 of Title 28).'

U.S. Supreme Court

SCHWARTZ v. TEXAS, 344 U.S. 199 (1952)

344 U.S. 199

SCHWARTZ v. TEXAS.
CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.
No. 41.
Argued November 12, 1952.
Decided December 15, 1952.

Section 605 of the Federal Communications Act, which provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish" the contents thereof to any person, and which has been construed to render such intercepted communications inadmissible as evidence in federal courts, does not exclude such intercepted communications from evidence in criminal proceedings in state courts. Pp. 199-204.

___ Tex. Cr. R. ___, 246 S. W. 2d 174, affirmed.

Petitioner was convicted in a Texas state court as an accomplice to the crime of robbery, upon evidence obtained by wire tapping. The Court of Criminal Appeals of Texas upheld the conviction. ___ Tex. Cr. R. ___, 246 S. W. 2d 174, rehearing denied, ___ Tex. Cr. R. ___, 246 S. W. 2d 179. This Court granted certiorari. 343 U.S. 975 . Affirmed, p. 204.

Maury Hughes and Reuben M. Ginsberg argued the cause and filed a brief for petitioner.

By special leave of Court, Calvin B. Garwood, Jr., Assistant Attorney General of Texas, pro hac vice, and Henry Wade argued the cause for respondent. With them on the brief were Price Daniel, Attorney General, Hugh Lyerly and William S. Lott, Assistant Attorneys General, and Ray L. Stokes.

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner, Schwartz, a pawnbroker, entered into a conspiracy with Jarrett and Bennett whereby the latter two were to rob places to be designated by Schwartz and [344 U.S. 199, 200] bring the loot to him to dispose of and divide the

proceeds with them. Pursuant to the plan, Jarrett and Bennett robbed a woman in Dallas, Texas, of her valuable jewels and brought the loot to the petitioner. After the petitioner repeatedly delayed settlement with the robbers, the thieves finally fell out, which proved very helpful to the police. The petitioner tipped off the police where they could find Jarrett. After Jarrett had been in jail about two weeks, he consented to telephone the petitioner from the sheriff's office. With the knowledge and consent of Jarrett, a professional operator set up an induction coil connected to a recorder amplifier which enabled the operator to overhear and simultaneously to record the telephone conversations between Jarrett and the petitioner. These records were used as evidence before the jury that tried and convicted the petitioner as an accomplice to the crime of robbery. The records, admitted only after Jarrett and the petitioner had testified, corroborated Jarrett and discredited the petitioner. The Court of Criminal Appeals of Texas upheld the conviction, ___ Tex. Cr. R. ___, 246 S. W. 2d 174, rehearing denied, ___ Tex. Cr. R. ___, 246 S. W. 2d 179. We granted certiorari, 343 U.S. 975 .

Petitioner contends that 605 of the Federal Communications Act 1 makes inadmissible in evidence the records of intercepted telephone conversations without the petitioner's consent. The pertinent provision of the statute reads as follows:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." [344 U.S. 199, 201]

Section 501 of 47 U.S.C. provides a penalty for the violation of 605.

We are dealing here only with the application of a federal statute to state proceedings. Without deciding, but assuming for the purposes of this case, that the telephone communications were intercepted without being authorized by the sender within the meaning of the Act, the question we have is whether these communications are barred by the federal statute, 605, from use as evidence in a criminal proceeding in a state court.

We think not. Although the statute contains no reference to the admissibility of evidence obtained by wire tapping, it has been construed to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof, Nardone v. United States, 302 U.S. 379 , and this is true even though the communications were intrastate telephone calls. Weiss v. United States, 308 U.S. 321, 329 . Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, Wolf v. Colorado, 338 U.S. 25 , while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. Weeks v. United States, 232 U.S. 383 . The problem under 605 is somewhat different because the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts. Enforcement of the statutory prohibition in 605 can be achieved under the penal provisions of 501. [344 U.S. 199, 202]

This question has been many times before the state courts, and they have uniformly held that 605 does not apply to exclude such communications from evidence in state courts. Leon v. State, 180 Md. 279, 23 A. 2d 706; People v. Stemmer, 298 N. Y. 728, 83 N. E. 2d 141; Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854; People v. Channell, 107 Cal. App. 2d 192, 236 P.2d 654. While these cases are not controlling here, they are entitled to consideration because of the high standing of the courts from which they come.

Texas itself has given consideration to the admissibility of evidence obtained in violation of constitutional or statutory law and has carefully legislated concerning it. In 1925 Texas enacted a statute providing that evidence obtained in violation of the Constitution or laws of Texas or of the United States should not be admissible against the accused in a criminal case. 2 In 1929 this Article 727a of the Texas Code of Criminal Procedure was amended to provide that evidence obtained in violation of the Constitution or laws of Texas or the Constitution of the United States should be inadmissible in evidence, 3 thus eliminating from the coverage of the statute evidence obtained in violation of the laws of the United States.

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to [344 U.S. 199, 203] supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." Atchison, T. & S. F. R. Co. v. Railroad Commission, 283 U.S. 380, 392 - 393. See Savage v. Jones, 225 U.S. 501, 533 .
>
> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." Reid v. Colorado, 187 U.S. 137, 148 .

It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.

We hold that 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so.

Since the statute is not applicable to state proceedings, we do not have to decide the questions of what amounts [344 U.S. 199, 204] to "interception," or whether if there was interception, the sender had authorized it. These questions can arise only in a federal court proceeding.

The judgment is

> Affirmed.

MR. JUSTICE BLACK concurs in the result.

Footnotes

[Footnote 1] 48 Stat. 1064, 47 U.S.C. 151 et seq.

[Footnote 2] Tex. Laws 1925, c. 49, 1.

[Footnote 3] Vernon's Tex. Stat., 1948, Code Crim. Proc., Art. 727a.

MR. JUSTICE FRANKFURTER, concurring in the result.

If the only question involved in this case were the applicability to prosecutions in State courts, in situations like the present, of 605 of the Federal Communications Act, 47 U.S.C. 605, as construed in the two Nardone cases, 302 U.S. 379 ; 308 U.S. 338 , I would join in the opinion of the Court. I agree with the views on this subject expressed by MR. JUSTICE MINTON.

The matter is complicated, however, by a Texas statute (Art. 727a, Vernon's Code of Criminal Procedure (1948)) which renders inadmissible in criminal trials evidence obtained in violation of any provision "of the Constitution of the United States." If this limitation means, according to Texas law, that the State court is to construe what is or is not a violation under the United States Constitution, it does not raise a federal question. But if the Texas legislation means

that the Texas courts are bound by what this Court deems a violation of the United States Constitution, the problem is, or might be, different. See State Tax Commission v. Van Cott, 306 U.S. 511 . While, on the latter assumption, the circumstances attending the evidence that was admitted here would, in my view, render it inadmissible in a federal prosecution, see my dissent in On Lee v. United States, 343 U.S. 747, 758 , the decision of this Court was to the contrary. Therefore the Texas court was in duty bound to follow that decision and to reach the result it reached even if it felt constrained, as apparently it did, to be governed [344 U.S. 199, 205] by the views of this Court as to what constitutes a violation of the United States Constitution. I cannot say that the Texas court should have followed my minority views, to which I adhere, on this constitutional question, and disregarded the Court's authority.

MR. JUSTICE DOUGLAS, dissenting.

Since, in my view (as indicated in my dissent in On Lee v. United States, 343 U.S. 747, 762), this wire tapping was a search that violated the Fourth Amendment, the evidence obtained by it should have been excluded. The question whether the Fourth Amendment is applicable to the states (see Wolf v. Colorado, 338 U.S. 25) probably need not be reached, because a Texas statute has excluded evidence obtained in violation of the Federal Constitution. Therefore I would reverse the judgment. It is true that the prior decisions of the Court point to affirmance. But those decisions reflect constructions of the Constitution which I think are erroneous. They impinge severely on the liberty of the individual and give the police the right to intrude into the privacy of any life. The practices they sanction have today acquired a momentum that is so ominous I cannot remain silent and bow to the precedents that sanction them. [344 U.S. 199, 206]

Connally v. General Construction Company
No. 314
Argued November 30, December 1, 1925
Decided January 4, 1926
269 U.S. 385

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF OKLAHOMA

Syllabus

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process of law. P. 391.

2. Oklahoma Comp.Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed" *held* void for uncertainty. P. 393.

Appeal from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, *inter alia,* to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation. [269 U.S. 388]

SUTHERLAND, J., lead opinion

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of §§ 7255 and 7257, Compiled Oklahoma Statutes 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides:

> [t]hat not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state, . . . shall be deemed to be employed by or on behalf of the state. . . .

For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than $50 nor more than $500, or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense. [269 U.S. 389]

The material averments of the bill, shortly stated, are to the following effect: the construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen, and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day, and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance.

From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Okl., near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $3.60 and $4; Johnson Refining Co., $3.60 and $4.05; Prairie Oil & Gas, $4; Gypsy Oil Co., $4; Gulf Pipe Line Co., $4; Brickyard, $3 and $4; I. Hansen, $3.60; General Construction Company, $3.20; Moore & Pitts Ice Company, $100 per month; cotton gins, $3.50 and $4; Mr. Pitts, $4; Prairie Pipe Line Company, $4; C. B. McCormack, $3; Harry McCoy, $3. The scale of wages paid by the construction company to its laborers was stated to be as follows: six men at $3.20 per day, 7 men at $3.60, 4 men at $4.00, 2 men at $4.40, 4 men at $4.80, 1 man at $5.20, and 1 man at $6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under [269 U.S. 390] authority of a statute of Oklahoma, which imposes upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform. Wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men, and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company, and its officers, agents, and representatives, with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under section 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed. [269 U.S. 391]

Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266, Jud.Code, and granted; the allegations of the bill being taken as true. *General Const. Co. v. Connally,* 3 F.2d 666.

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co. v. Kentucky,* 234 U.S. 216, 221; *Collins v. Kentucky,* 234 U.S. 634, 638.

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases, the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement, but it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co. v. Sherman,* 266 U.S. 497, 502; *Omaechevarria v. Idaho,* 246 U.S. 343, 348, or a well settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States,* 229 U.S. 373, 376; *International Harvester Co. v. Kentucky, supra,* at 223, or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.,* 255 U.S. 81, 92,

> that, for reasons found to [269 U.S. 392] result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.

See also *Waters-Pierce Oil Co. v. Texas (No. 1),* 212 U.S. 86, 108. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky, supra, Collins v. Kentucky, supra, and United States v. Cohen Grocery Co., supra,* and cases there cited. The *Cohen Grocery* case involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States v. Capital Traction Co.,* 34 App.D.C. 592, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

> The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment. [269 U.S. 393]
>
> . . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

In the light of these principles and decisions, then, we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction.* The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The [269 U.S. 394] "current rate of wages" is not simple, but progressive -- from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. *See People ex rel. Rodgers v. Coler,* 166 N.Y. 1, 24-25.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing, rather than another, and in the futility of an attempt to apply a requirement which assumes the existence of a rate of wages single in amount to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. *See State v. Partlow,* 91 N.C. 550, 553; *Commonwealth v. Bank of Pennsylvania,* 3 Watts & S. 173, 177.

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say with any degree of accuracy what areas constitute the locality where a given piece of work is being done? Two

men, moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state Supreme Court on rehearing in *State v. Tibbetts,* 205 P. 776, 779. But all the court did there was to define the word "locality" as meaning "place," [269 U.S. 395] "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. *See Schmidt v. Kansas City Distilling Co.,* 90 Mo. 284, 296; *Woods v. Cochrane and Smith,* 38 Iowa 484, 485; *State ex rel. Christie v. Meek,* 26 Wash. 405, 407-408; *Millville Imp. Co. v. Pitman, etc., Gas Co.,* 75 N.J.Law, 410, 412; *Thomas v. Marshfield,* 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions, the term "locality" might be definite enough, but not so in a statute, such as that under review, imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries, for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary -- as, in the present case, it is alleged it does vary -- among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed. [269 U.S. 396]

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result, on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

Footnotes

♂ * The commissioner's own investigation shows that wages ranged from $3 to $4.05 per day, and the scale of wages paid by the construction company to its laborers, 25 in number, ranged from $3.20 to $6.50 per day, all but 6 of them being paid $3.60 or more.

§ 1101. Definitions

How Current is This?

(a) As used in this chapter—

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104 (b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that

(A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and

(B) an alien presenting a border crossing identification card is not

permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182 (d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182 (a)(2) of this title, unless since such offense the alien has been granted relief under section 1182 (h) or 1229b (a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or

trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(A)

(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)

(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288 (a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him;

(i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or

(ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F)

(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184 (l) [1] of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,

(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)

(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) [22 U.S.C. 288 et seq.], accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i)[(a) Repealed. Pub. L. 106–95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182 (j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184 (i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184 (i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182 (n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184 (g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184 (i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182 (t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182 (m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182 (m)(2) of this title for the facility (as defined in section 1182 (m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121 (g) of title 26 and agriculture as defined in section 203 (f) of title 29, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information

Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182 (j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) [2] of section 1184 of this title, an alien who—

(i) is the fiancee or fiance of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 1151 (b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184 (c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)

(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn,

(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)

(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who—

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)

(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III)

(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or

(b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who—

(i)

(a) is described in section 1184 (c)(4)(A) of this title (relating to athletes), or

(b) is described in section 1184 (c)(4)(B) of this title (relating to entertainment groups);

(ii)

(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the

purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)

(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q)

(i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or

(ii)

(I) an alien citizen of the United Kingdom or the Republic of Ireland, 21 to 35 years of age, unemployed for not less than 12 months, and having a residence for not less than 18 months in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 24 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Secretary of Homeland Security under section 2(a) of the Irish Peace Process Cultural and Training Program Act of 1998 for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and

(II) the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who—

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184 (k) of this title, an alien—

(i) who the Attorney General determines—

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine —

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708 (a) of title 22,

(T)

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(i) subject to section 1184 (o) of this title, an alien who the Attorney General determines—

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22,

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)

(aa) has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or

(bb) has not attained 18 years of age, and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if the Attorney General considers it necessary to avoid extreme hardship—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; and

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien,

(U)

if accompanying, or following to join, the alien described in clause (i);

(i) subject to section 1184 (p) of this title, an alien who files a petition for status under this subparagraph, if the Attorney General determines that—

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if the Attorney General considers it necessary to avoid extreme hardship to the spouse, the child, or, in the case of an alien child, the parent of the alien described in clause (i), the Attorney General may also grant status under this paragraph based upon certification of a government official listed in clause (i)(III) that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184 (q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153 (d) of this title) of a petition to accord a status under section 1153 (a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if—

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and—

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153 (a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's

application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) [50 App. U.S.C. 454 (a)], or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means

(A) a citizen of the United States, or

(B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub. L. 102–232, title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "special immigrant" means—

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435 (a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who—

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States—

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501 (c)(3) of title 26) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: Provided, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602 (a)(1) of title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty [April 1, 1979], and who has performed faithful service as such an employee for one year or more;

(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and

(i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or

(ii) who, on the date on which such Treaty enters into force, has

been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H) an immigrant, and his accompanying spouse and children, who—

(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii) entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and

(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)

(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who

(I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and

(II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who

(I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and

(II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii) an immigrant who is a retired officer or employee of such an international organization, and who

(I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and

(II) files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating—

(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department

under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause—

(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO−6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [3]

(M) subject to the numerical limitations of section 1153 (b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony

where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by

(A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and

(B) the forcible suppression of opposition to such party.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(39) The term "unmarried", when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term "refugee" means

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 1157 (e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion,

nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842 (h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at [4] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [4] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [5]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense

(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and

(ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery,

or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)

(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily—

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily—

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the

organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46) The term "extraordinary ability" means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.

(47)

(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49) The term "stowaway" means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50) The term "intended spouse" means any alien who meets the criteria set forth in section 1154 (a)(1)(A)(iii)(II)(aa)(BB), 1154 (a)(1)(B)(ii)(II)(aa)(BB), or 1229b (b)(2)(A)(i)(III) of this title.

(b) As used in subchapters I and II of this chapter—

(1) The term "child" means an unmarried person under twenty-one years of age who is—

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)

(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who:

(I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i);

(II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and

(III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years; or

(F)

(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151 (b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such

parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same provisos as in clause (i), a child who:

(I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i);

(II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and

(III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151 (b) of this title.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3) The term "person" means an individual or an organization.

(4) The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c) As used in subchapter III of this chapter—

(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 [6] of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2) The terms "parent", "father", and "mother" include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub. L. 100–525, § 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e) For the purposes of this chapter—

(1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

(1) a habitual drunkard;

(2) Repealed. Pub. L. 97–116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182 (a) of this title; or subparagraphs (A) and (B) of section 1182 (a)(2) of this title and subparagraph (C) thereof of such section [7] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or

(9) one who at any time has engaged in conduct described in section 1182 (a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false

statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g) For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

(h) For purposes of section 1182 (a)(2)(E) of this title, the term "serious criminal offense" means—

(1) any felony;

(2) any crime of violence, as defined in section 16 of title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i) With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i) of this section—

(1) the Attorney General and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2) the Attorney General shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be followed by "; or".

[4] So in original. Probably should be preceded by "is".

[5] So in original. Probably should be followed by a semicolon.

[6] See References in Text note below.

[7] So in original. The phrase "of such section" probably should not appear.

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Sec. 1101. - Definitions

(a)

As used in this chapter -

(1)

The term ''administrator'' means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2)

The term ''advocates'' includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3)

The term ''alien'' means any person not a citizen or national of the United States.

(4)

The term ''application for admission'' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5)

The term ''Attorney General'' means the Attorney General of the United States.

(6)

The term ''border crossing identification card'' means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that

(A)

each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and

(B)

an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7)

The term ''clerk of court'' means a clerk of a naturalization court.

(8)

The terms ''Commissioner'' and ''Deputy Commissioner'' mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9)

The term ''consular officer'' means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

(10)

The term ''crewman'' means a person serving in any capacity on board a vessel or aircraft.

(11)

The term ''diplomatic visa'' means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12)

The term ''doctrine'' includes, but is not limited to, policies, practices, purposes,

aims, or procedures.

(13)

(A)

The terms ''admission'' and ''admitted'' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B)

An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C)

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien -

(i)

has abandoned or relinquished that status,

(ii)

has been absent from the United States for a continuous period in excess of 180 days,

(iii)

has engaged in illegal activity after having departed the United States,

(iv)

has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v)

has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi)

is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14)

The term ''foreign state'' includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15)

The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens -

(A)

(i)

an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii)

upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii)

upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under

(i) and (ii) above;

(ii)

above;

(B)

an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C)

an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)

(i)

an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United

States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii)

an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E)

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him;

(i)

solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or

(ii)

solely to develop and direct the operations of an enterprise in which he

has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) [1] of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and

(ii)

the alien spouse and minor children of any such alien if accompanying him or following to join him;

(G)

(i)

a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) (22 U.S.C. 288 et seq.), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii)

other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii)

an alien able to qualify under

(i)

or

(ii)

above except for the fact that the government of which such alien is an accredited representative is not

recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv)

officers, or employees of such international organizations, and the members of their immediate families;

(v)

attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H)

an alien

(i)

(a)

Repealed. Pub. L. 106-95, Sec. 2(c), Nov. 12, 1999, 113 Stat. 1316)

(b)

subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than

services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or

(c)

who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or

(ii)

(a)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26 and

agriculture as defined in section 203(f) of title 29, of a temporary or seasonal nature, or

(b)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or

(iii)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I)

upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or

following to join him;

(J)

an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K)

subject to subsections (d) and (p) of section 1184 of this title, an alien who -

(i)

is the fiancAE1ee or fiancAE1e of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after

admission;

(ii)

has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii)

is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L)

an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and

(ii)

the alien spouse and minor children of any such alien if accompanying him or following to join him;

(N)

(i)

the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii)

a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O)

an alien who -

(i)

has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)

(I)

seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a

specific event or events,

(II)

is an integral part of such actual performance,

(III)

(a)

has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or

(b)

in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV)

has a foreign residence which the alien has no intention of abandoning; or

(iii)

is the alien spouse or child of an alien

described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P)

an alien having a foreign residence which the alien has no intention of abandoning who -

(i)

(a)

is described in section 1184(c)(4)(A) of this title (relating to athletes), or

(b)

is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)

(I)

performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II)

seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the

United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)

(I)

performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II)

seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv)

is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily

(for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or

(ii)

(I)

an alien 35 years of age or younger having a residence in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 36 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Attorney General under section 2(a) of the Irish Peace Process Cultural and Training Program Act of 1998 for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and

(II)

the alien spouse and minor children

of any such alien if accompanying the alien or following to join the alien;

(R)

an alien, and the spouse and children of the alien if accompanying or following to join the alien, who -

(i)

for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii)

seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S)

subject to section 1184(k) of this title, an alien -

(i)

who the Attorney General determines -

(I)

is in possession of critical reliable information concerning a criminal

organization or enterprise;

(II)

is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III)

whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii)

who the Secretary of State and the Attorney General jointly determine -

(I)

is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II)

is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III)

will be or has been placed in danger as a result of providing such information; and

(IV)

is eligible to receive a reward under section 2708(a) of title 22, and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)

(i)

subject to section 1184(n) of this title, an alien who the Attorney General determines -

(I)

is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22,

(II)

is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)

(aa)

has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or

(bb)

has not attained 15 years of age, and

(IV)

the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii)

if the Attorney General considers it necessary to avoid extreme hardship -

(I)

in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, and parents of such alien; and

(II)

in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien,

if accompanying, or following to join, the alien described in clause (i);

(U)

(i)

subject to section 1184(o) [2] of this title, an alien who files a petition for status under this subparagraph, if the Attorney General determines that -

(I)

the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II)

the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III)

the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State,

or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV)

the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii)

if the Attorney General considers it necessary to avoid extreme hardship to the spouse, the child, or, in the case of an alien child, the parent of the alien described in clause (i), the Attorney General may also grant status under this paragraph based upon certification of a government official listed in clause (i)(III) that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien; and

(iii)

the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation;

female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V)

subject to section 1184(o) [2] of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if -

(i)

such petition has been pending for 3 years or more; or

(ii)

such petition has been approved, 3 years or more have elapsed since such filing date, and -

(I)

an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas

under section 1153(a)(2)(A) of this title; or

(II)

the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16)

The term ''immigrant visa'' means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17)

The term ''immigration laws'' includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18)

The term ''immigration officer'' means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19)

The term ''ineligible to citizenship,'' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) (50 App. U.S.C. 454(a)), or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20)

The term ''lawfully admitted for permanent residence'' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21)

The term ''national'' means a person owing permanent allegiance to a state.

(22)

The term ''national of the United States'' means

(A)

a citizen of the United States, or

(B)

a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23)

The term ''naturalization'' means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.

L. 102-232, title III, Sec. 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25)

The term ''noncombatant service'' shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26)

The term ''nonimmigrant visa'' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27)

The term ''special immigrant'' means -

(A)

an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B)

an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C)

an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who -

(i)

for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii)

seeks to enter the United States -

(I)

solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II)

before October 1, 2003, in order to

work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III)

before October 1, 2003, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of title 26) at the request of the organization in a religious vocation or occupation; and

(iii)

has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D)

an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: Provided, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in

exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E)

an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of title 22) enters into force (October 1, 1979), who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty (April 1, 1979), and who has performed faithful service as such an employee for one year or more;

(F)

an immigrant, and his accompanying spouse and children, who is a Panamanian national and

(i)

who, before the date on which such Panama Canal Treaty of 1977 enters into force (October 1, 1979), has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or

(ii)

who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G)

an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 (April 1, 1979), who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

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(H)

an immigrant, and his accompanying spouse and children, who -

(i)

has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii)

was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii)

entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and

(iv)

has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)

(i)

an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status

under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and

(II)

applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii)

an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and

(II)

files a petition for status under this

subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii)

an immigrant who is a retired officer or employee of such an international organization, and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and

(II)

files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv)

an immigrant who is the spouse of a

retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J)

an immigrant who is present in the United States -

(i)

who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(ii)

for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii)

in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that -

(I)

no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and

(II)

no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K)

an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating -

(i)

12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii)

6 years, in the case of an immigrant who is on active duty at the time of

seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L)

an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause -

(i)

to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii)

to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the ''Protocol on the Status of

International Military Headquarters'' set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii)

to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [3]

(M)

subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28)

The term ''organization'' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29)

The term ''outlying possessions of the United States'' means American Samoa and Swains Island.

(30)

The term ''passport'' means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31)

The term ''permanent'' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32)

The term ''profession'' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33)

The term ''residence'' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34)

The term ''Service'' means the Immigration and Naturalization Service of the Department of Justice.

(35)

The term ''spouse'', ''wife'', or ''husband'' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36)

The term ''State'' includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

(37)

The term ''totalitarian party'' means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms ''totalitarian dictatorship'' and ''totalitarianism'' mean and refer to systems of government not representative in fact, characterized by

(A)

the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and

(B)

the forcible suppression of opposition to such party.

(38)

The term ''United States'', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(39)

The term ''unmarried'', when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40)

The term ''world communism'' means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41)

The term ''graduates of a medical school'' means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42)

The term ''refugee'' means

(A)

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B)

in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ''refugee'' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group,

or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43)

The term ''aggravated felony'' means -

(A)

murder, rape, or sexual abuse of a minor;

(B)

illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C)

illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D)

an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E)

an offense described in -

(i)

section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii)

section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii)

section 5861 of title 26 (relating to firearms offenses);

(F)

a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at [4] least one year; ''is''.

(G)

a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at (FOOTNOTE 4) least one year;

(H)

an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I)

an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J)

an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K)

an offense that -

(i)

relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii)

is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii)

is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18 (relating to peonage, slavery, and involuntary servitude);

(L)

an offense described in -

(i)

section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii)

section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii)

section 421 of title 50 (relating to protecting the identity of undercover

agents);

(M)

an offense that -

(i)

involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii)

is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N)

an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [5]

(O)

an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P)

an offense

(i)

which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and

(ii)

for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q)

an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R)

an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one

year;

(S)

an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T)

an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U)

an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)

(A)

The term ''managerial capacity'' means an

assignment within an organization in which the employee primarily -

(i)

manages the organization, or a department, subdivision, function, or component of the organization;

(ii)

supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii)

if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv)

exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by

virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B)

The term ''executive capacity'' means an assignment within an organization in which the employee primarily -

(i)

directs the management of the organization or a major component or function of the organization;

(ii)

establishes the goals and policies of the organization, component, or function;

(iii)

exercises wide latitude in discretionary decision-making; and

(iv)

receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C)

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the

organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45)

The term ''substantial'' means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46)

The term ''extraordinary ability'' means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.

(47)

(A)

The term ''order of deportation'' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B)

The order described under subparagraph (A) shall become final upon the earlier of -

(i)

a determination by the Board of Immigration Appeals affirming such order; or

(ii)

the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)

(A)

The term ''conviction'' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

(i)

a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii)

the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B)

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49)

The term ''stowaway'' means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50)

The term ''intended spouse'' means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(b)

As used in subchapters I and II of this chapter -

(1)

The term ''child'' means an unmarried person under twenty-one years of age who is -

(A)

a child born in wedlock;

(B)

a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C)

a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D)

a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)

(i)

a child adopted while under the age of sixteen years if the child has been in

the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii)

subject to the same proviso as in clause (i), a child who:

(I)

is a natural sibling of a child described in clause (i) or subparagraph (F)(i);

(II)

was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and

(III)

is otherwise described in clause (i), except that the child was adopted while under the age of 18 years; or

(F)

(i)

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this

title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii)

subject to the same provisos as in clause (i), a child who:

(I)

is a natural sibling of a child described in clause (i) or subparagraph (E)(i);

(II)

has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and

(III)

is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title.

(2)

The terms ''parent'', ''father'', or ''mother'' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term ''parent'' does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3)

The term ''person'' means an individual or an organization.

(4)

The term ''immigration judge'' means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5)

The term ''adjacent islands'' includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c)

As used in subchapter III of this chapter -

(1)

The term ''child'' means an unmarried person under twenty-one years of age and

includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 [6] of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2)

The terms ''parent'', ''father'', and ''mother'' include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub.

L. 100-525, Sec. 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e)

For the purposes of this chapter -

(1)

The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2)

The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3)

Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f)

For the purposes of this chapter -

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was -

(1)

a habitual drunkard;

(2) Repealed. Pub.

L. 97-116, Sec. 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3)

a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [7] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4)

one whose income is derived principally from illegal gambling activities;

(5)

one who has been convicted of two or more gambling offenses committed during such period;

(6)

one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7)

one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or

offenses, for which he has been confined were committed within or without such period;

(8)

one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g)

For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation

were defrayed or of the place to which he departed.

(h)

For purposes of section 1182(a)(2)(E) of this title, the term ''serious criminal offense'' means -

(1)

any felony;

(2)

any crime of violence, as defined in section 16 of title 18; or

(3)

any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i)

With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i) of this section -

(1)

the Attorney General and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2)

the Attorney General shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an ''employment authorized'' endorsement or other appropriate work permit

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be followed by ''; or''.

[4] So in original. Probably should be preceded by

[5] So in original. Probably should be followed by a semicolon.

[6] See References in Text note below.

[7] So in original. The phrase ''of such section'' probably should not appear.

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§ 1408. Nationals but not citizens of the United States at birth

How Current is This?

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 1401 (g) of this title shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

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§ 1401. Nationals and citizens of United States at birth

How Current is This?

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person

(A) honorably serving with the Armed Forces of the United States, or

(B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

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Sec. 1408. - Nationals but not citizens of the United States at birth

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

(1)

A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2)

A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3)

A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in

such outlying possession; and

(4)

A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years -

(A)

during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B)

at least five years of which were after attaining the age of fourteen years.

The proviso of section 1401(g) of this title shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section

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Sec. 1401. - Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(a)

a person born in the United States, and subject to the jurisdiction thereof;

(b)

a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c)

a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d)

a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e)

a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f)

a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

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a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five

years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person

(A)

honorably serving with the Armed Forces of the United States, or

(B)

employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h)

a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United

States

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§ 1. Tax imposed

How Current is This?

(a) Married individuals filing joint returns and surviving spouses

There is hereby imposed on the taxable income of—

(1) every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013, and

(2) every surviving spouse (as defined in section 2 (a)),

a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $36,900	15% of taxable income.
Over $36,900 but not over $89,150	$5,535, plus 28% of the excess over $36,900.
Over $89,150 but not over $140,000	$20,165, plus 31% of the excess over $89,150.
Over $140,000 but not over $250,000	$35,928.50, plus 36% of the excess over $140,000.
Over $250,000	$75,528.50, plus 39.6% of the excess over $250,000.

(b) Heads of households

There is hereby imposed on the taxable income of every head of a household (as defined in section 2 (b)) a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $29,600	15% of taxable income.
Over $29,600 but not over $76,400	$4,440, plus 28% of the excess over $29,600.
Over $76,400 but not over $127,500	$17,544, plus 31% of the excess over $76,400.
Over $127,500 but not over $250,000	$33,385, plus 36% of the excess over $127,500.
Over $250,000	$77,485, plus 39.6% of the excess over $250,000.

(c) Unmarried individuals (other than surviving spouses and heads of households)

There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2 (a) or the head of a household as defined in section 2 (b)) who is not a married individual (as defined in section 7703) a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $22,100	15% of taxable income.
Over $22,100 but not over $53,500	$3,315, plus 28% of the excess over $22,100.
Over $53,500 but not over $115,000	$12,107, plus 31% of the excess over $53,500.
Over $115,000 but not over $250,000	$31,172, plus 36% of the excess over $115,000.
Over $250,000	$79,772, plus 39.6% of the excess over $250,000.

(d) Married individuals filing separate returns

There is hereby imposed on the taxable income of every married individual (as defined in section 7703) who does not make a single return jointly with his spouse under section 6013, a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $18,450	15% of taxable income.
Over $18,450 but not over $44,575	$2,767.50, plus 28% of the excess over $18,450.

Over $44,575 but not over $70,000	$10,082.50, plus 31% of the excess over $44,575.
Over $70,000 but not over $125,000	$17,964.25, plus 36% of the excess over $70,000.
Over $125,000	$37,764.25, plus 39.6% of the excess over $125,000.

(e) Estates and trusts

There is hereby imposed on the taxable income of—

(1) every estate, and

(2) every trust,

taxable under this subsection a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $1,500	15% of taxable income.
Over $1,500 but not over $3,500	$225, plus 28% of the excess over $1,500.
Over $3,500 but not over $5,500	$785, plus 31% of the excess over $3,500.
Over $5,500 but not over $7,500	$1,405, plus 36% of the excess over $5,500.
Over $7,500	$2,125, plus 39.6% of the excess over $7,500.

(f) Phaseout of marriage penalty in 15-percent bracket; adjustments in tax tables so that inflation will not result in tax increases

(1) In general

Not later than December 15 of 1993, and each subsequent calendar year, the Secretary shall prescribe tables which shall apply in lieu of the tables contained in subsections (a), (b), (c), (d), and (e) with respect to taxable years beginning in the succeeding calendar year.

(2) Method of prescribing tables

The table which under paragraph (1) is to apply in lieu of the table contained in subsection (a), (b), (c), (d), or (e), as the case may be, with respect to taxable years beginning in any calendar year shall be prescribed—

(A) except as provided in paragraph (8), by increasing the minimum and maximum dollar amounts for each rate bracket for which a tax is imposed under such table by the cost-of-living adjustment for such calendar year,

(B) by not changing the rate applicable to any rate bracket as adjusted under subparagraph (A), and

(C) by adjusting the amounts setting forth the tax to the extent necessary to reflect the adjustments in the rate brackets.

(3) Cost-of-living adjustment

For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is the percentage (if any) by which—

(A) the CPI for the preceding calendar year, exceeds

(B) the CPI for the calendar year 1992.

(4) CPI for any calendar year

For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on August 31 of such calendar year.

(5) Consumer Price Index

For purposes of paragraph (4), the term "Consumer Price Index" means the last Consumer Price Index for all-urban consumers published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.

(6) Rounding

(A) In general

If any increase determined under paragraph (2)(A), section 63 (c)(4), section 68(b)(2) or section 151 (d)(4) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(B) Table for married individuals filing separately

In the case of a married individual filing a separate return, subparagraph (A) (other than with respect to sections 63 (c)(4) and 151 (d)(4)(A)) shall be applied by substituting "$25" for "$50" each place it appears.

(7) Special rule for certain brackets

(A) Calendar year 1994

In prescribing the tables under paragraph (1) which apply with respect to taxable years beginning in calendar year 1994, the Secretary shall make no adjustment to the dollar amounts at which the 36 percent rate bracket begins or at which the 39.6 percent rate begins under any table contained in subsection (a), (b), (c), (d), or (e).

(B) Later calendar years

In prescribing tables under paragraph (1) which apply with respect to taxable years beginning in a calendar year after 1994, the cost-of-living adjustment used in making adjustments to the dollar amounts referred to in subparagraph (A) shall be determined under paragraph (3) by substituting "1993" for "1992".

(8) Elimination of marriage penalty in 15-percent bracket

With respect to taxable years beginning after December 31, 2003, in prescribing the tables under paragraph (1)—

(A) the maximum taxable income in the 15-percent rate bracket in

the table contained in subsection (a) (and the minimum taxable income in the next higher taxable income bracket in such table) shall be 200 percent of the maximum taxable income in the 15-percent rate bracket in the table contained in subsection (c) (after any other adjustment under this subsection), and

(B) the comparable taxable income amounts in the table contained in subsection (d) shall be 1/2 of the amounts determined under subparagraph (A).

(g) Certain unearned income of minor children taxed as if parent's income

(1) In general

In the case of any child to whom this subsection applies, the tax imposed by this section shall be equal to the greater of—

(A) the tax imposed by this section without regard to this subsection, or

(B) the sum of—

(i) the tax which would be imposed by this section if the taxable income of such child for the taxable year were reduced by the net unearned income of such child, plus

(ii) such child's share of the allocable parental tax.

(2) Child to whom subsection applies

This subsection shall apply to any child for any taxable year if—

(A) such child has not attained age 14 before the close of the taxable year, and

(B) either parent of such child is alive at the close of the taxable year.

(3) Allocable parental tax

For purposes of this subsection—

(A) In general

The term "allocable parental tax" means the excess of—

(i) the tax which would be imposed by this section on the parent's taxable income if such income included the net unearned income of all children of the parent to whom this subsection applies, over

(ii) the tax imposed by this section on the parent without regard to this subsection.

For purposes of clause (i), net unearned income of all children of the parent shall not be taken into account in computing any exclusion, deduction, or credit of the parent.

(B) Child's share

A child's share of any allocable parental tax of a parent shall be equal to an amount which bears the same ratio to the total allocable parental tax as the child's net unearned income bears to the aggregate net unearned income of all children of such parent to whom this subsection applies.

(C) Special rule where parent has different taxable year

Except as provided in regulations, if the parent does not have the same taxable year as the child, the allocable parental tax shall be determined on the basis of the taxable year of the parent ending in the child's taxable year.

(4) Net unearned income

For purposes of this subsection—

(A) In general

The term "net unearned income" means the excess of—

(i) the portion of the adjusted gross income for the taxable year which is not attributable to earned income (as defined in section 911 (d)(2)), over

(ii) the sum of—

(I) the amount in effect for the taxable year under section 63 (c)(5)(A) (relating to limitation on standard deduction in the case of certain dependents), plus

(II) the greater of the amount described in subclause (I) or, if the child itemizes his deductions for the taxable year, the amount of the itemized deductions allowed by this chapter for the taxable year which are directly connected with the production of the portion of adjusted gross income referred to in clause (i).

(B) Limitation based on taxable income

The amount of the net unearned income for any taxable year shall not exceed the individual's taxable income for such taxable year.

(5) Special rules for determining parent to whom subsection applies

For purposes of this subsection, the parent whose taxable income shall be taken into account shall be—

(A) in the case of parents who are not married (within the meaning of section 7703), the custodial parent (within the meaning of section 152 (e)) of the child, and

(B) in the case of married individuals filing separately, the individual with the greater taxable income.

(6) Providing of parent's TIN

The parent of any child to whom this subsection applies for any taxable year shall provide the TIN of such parent to such child and such child shall include such TIN on the child's return of tax imposed by this section for such taxable year.

(7) Election to claim certain unearned income of child on parent's return

(A) In general

If—

(i) any child to whom this subsection applies has gross income for the taxable year only from interest and dividends (including Alaska Permanent Fund dividends),

(ii) such gross income is more than the amount described in paragraph (4)(A)(ii)(I) and less than 10 times the amount so described,

(iii) no estimated tax payments for such year are made in the name and TIN of such child, and no amount has been deducted and withheld under section 3406, and

(iv) the parent of such child (as determined under paragraph (5)) elects the application of subparagraph (B),

such child shall be treated (other than for purposes of this paragraph) as having no gross income for such year and shall not be required to file a return under section 6012.

(B) Income included on parent's return

In the case of a parent making the election under this paragraph—

(i) the gross income of each child to whom such election applies (to the extent the gross income of such child exceeds twice the amount described in paragraph (4)(A)(ii)(I)) shall be included in such parent's gross income for the taxable year,

(ii) the tax imposed by this section for such year with respect to such parent shall be the amount equal to the sum of—

(I) the amount determined under this section after the application of clause (i), plus

(II) for each such child, 10 percent of the lesser of the amount described in paragraph (4)(A)(ii)(I) or the excess of the gross income of such child over the amount so described, and

(iii) any interest which is an item of tax preference under section 57(a)(5) of the child shall be treated as an item of tax preference of such parent (and not of such child).

(C) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph.

(h) Maximum capital gains rate

(1) In general

If a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of—

(A) a tax computed at the rates and in the same manner as if this subsection had not been enacted on the greater of—

(i) taxable income reduced by the net capital gain; or

(ii) the lesser of—

(I) the amount of taxable income taxed at a rate below 25 percent; or

(II) taxable income reduced by the adjusted net capital gain;

(B) 5 percent (0 percent in the case of taxable years beginning after 2007) of so much of the adjusted net capital gain (or, if less, taxable income) as does not exceed the excess (if any) of—

(i) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 25 percent, over

(ii) the taxable income reduced by the adjusted net capital gain;

(C) 15 percent of the adjusted net capital gain (or, if less, taxable income) in excess of the amount on which a tax is determined under subparagraph (B);

(D) 25 percent of the excess (if any) of—

(i) the unrecaptured section 1250 gain (or, if less, the net capital gain (determined without regard to paragraph (11))), over

(ii) the excess (if any) of—

(I) the sum of the amount on which tax is determined under subparagraph (A) plus the net capital gain, over

(II) taxable income; and

(E) 28 percent of the amount of taxable income in excess of the sum of the amounts on which tax is determined under the preceding subparagraphs of this paragraph.

(2) Net capital gain taken into account as investment income

For purposes of this subsection, the net capital gain for any taxable year shall be reduced (but not below zero) by the amount which the taxpayer takes into account as investment income under section 163 (d)(4)(B)(iii).

(3) Adjusted net capital gain

For purposes of this subsection, the term "adjusted net capital gain" means the sum of—

(A) net capital gain (determined without regard to paragraph (11)) reduced (but not below zero) by the sum of—

(i) unrecaptured section 1250 gain, and

(ii) 28-percent rate gain, plus

(B) qualified dividend income (as defined in paragraph (11)).

(4) 28-percent rate gain

For purposes of this subsection, the term "28-percent rate gain" means the excess (if any) of—

(A) the sum of—

(i) collectibles gain; and

(ii) section 1202 gain, over

(B) the sum of—

(i) collectibles loss;

(ii) the net short-term capital loss; and

(iii) the amount of long-term capital loss carried under section 1212 (b)(1)(B) to the taxable year.

(5) Collectibles gain and loss

For purposes of this subsection—

(A) In general

The terms "collectibles gain" and "collectibles loss" mean gain or loss (respectively) from the sale or exchange of a collectible (as defined in section 408 (m) without regard to paragraph (3) thereof) which is a capital asset held for more than 1 year but only to the extent such gain is taken into account in computing gross income and such loss is taken into account in computing taxable income.

(B) Partnerships, etc.

For purposes of subparagraph (A), any gain from the sale of an interest in a partnership, S corporation, or trust which is attributable to unrealized appreciation in the value of collectibles shall be treated as gain from the sale or exchange of a collectible. Rules similar to the rules of section 751 shall apply for purposes of the preceding sentence.

(6) Unrecaptured section 1250 gain

For purposes of this subsection—

(A) In general

The term "unrecaptured section 1250 gain" means the excess (if any) of—

(i) the amount of long-term capital gain (not otherwise treated as ordinary income) which would be treated as ordinary income if section 1250 (b)(1) included all depreciation and the applicable percentage under section 1250 (a) were 100 percent, over

(ii) the excess (if any) of—

(I) the amount described in paragraph (4)(B); over

(II) the amount described in paragraph (4)(A).

(B) Limitation with respect to section 1231 property

The amount described in subparagraph (A)(i) from sales, exchanges, and conversions described in section 1231 (a)(3)(A) for any taxable year shall not exceed the net section 1231 gain (as defined in section 1231 (c)(3)) for such year.

(7) Section 1202 gain

For purposes of this subsection, the term "section 1202 gain" means the excess of—

(A) the gain which would be excluded from gross income under

section 1202 but for the percentage limitation in section 1202 (a), over

(B) the gain excluded from gross income under section 1202.

(8) Coordination with recapture of net ordinary losses under section 1231

If any amount is treated as ordinary income under section 1231 (c), such amount shall be allocated among the separate categories of net section 1231 gain (as defined in section 1231 (c)(3)) in such manner as the Secretary may by forms or regulations prescribe.

(9) Regulations

The Secretary may prescribe such regulations as are appropriate (including regulations requiring reporting) to apply this subsection in the case of sales and exchanges by pass-thru entities and of interests in such entities.

(10) Pass-thru entity defined

For purposes of this subsection, the term "pass-thru entity" means—

(A) a regulated investment company;

(B) a real estate investment trust;

(C) an S corporation;

(D) a partnership;

(E) an estate or trust;

(F) a common trust fund; and

(G) a qualified electing fund (as defined in section 1295).

(11) Dividends taxed as net capital gain

(A) In general

For purposes of this subsection, the term "net capital gain" means net capital gain (determined without regard to this paragraph) increased by qualified dividend income.

(B) Qualified dividend income

For purposes of this paragraph—

(i) In general The term "qualified dividend income" means dividends received during the taxable year from—

(I) domestic corporations, and

(II) qualified foreign corporations.

(ii) Certain dividends excluded Such term shall not include—

(I) any dividend from a corporation which for the taxable year of the corporation in which the distribution is made, or the preceding taxable year, is a corporation exempt from tax under section 501 or 521,

(II) any amount allowed as a deduction under section 591 (relating to deduction for dividends paid by mutual savings

banks, etc.), and

(III) any dividend described in section 404 (k).

(iii) Coordination with section 246 (c) Such term shall not include any dividend on any share of stock—

(I) with respect to which the holding period requirements of section 246 (c) are not met (determined by substituting in section 246 (c) "60 days" for "45 days" each place it appears and by substituting "121-day period" for "91-day period"), or

(II) to the extent that the taxpayer is under an obligation (whether pursuant to a short sale or otherwise) to make related payments with respect to positions in substantially similar or related property.

(C) Qualified foreign corporations

(i) In general Except as otherwise provided in this paragraph, the term "qualified foreign corporation" means any foreign corporation if—

(I) such corporation is incorporated in a possession of the United States, or

(II) such corporation is eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of this paragraph and which includes an exchange of information program.

(ii) Dividends on stock readily tradable on United States securities market A foreign corporation not otherwise treated as a qualified foreign corporation under clause (i) shall be so treated with respect to any dividend paid by such corporation if the stock with respect to which such dividend is paid is readily tradable on an established securities market in the United States.

(iii) Exclusion of dividends of certain foreign corporations Such term shall not include any foreign corporation which for the taxable year of the corporation in which the dividend was paid, or the preceding taxable year, is a passive foreign investment company (as defined in section 1297).

(iv) Coordination with foreign tax credit limitation Rules similar to the rules of section 904 (b)(2)(B) shall apply with respect to the dividend rate differential under this paragraph.

(D) Special rules

(i) Amounts taken into account as investment income Qualified dividend income shall not include any amount which the taxpayer takes into account as investment income under section 163 (d)(4)(B).

(ii) Extraordinary dividends If a taxpayer to whom this section applies receives, with respect to any share of stock, qualified dividend income from 1 or more dividends which are extraordinary dividends (within the meaning of section 1059 (c)), any loss on the sale or exchange of such share shall, to the extent of such dividends, be treated as long-term capital loss.

(iii) Treatment of dividends from regulated investment companies

and real estate investment trusts A dividend received from a regulated investment company or a real estate investment trust shall be subject to the limitations prescribed in sections 854 and 857.

(i) Rate reductions after 2000

(1) 10-percent rate bracket

(A) In general

In the case of taxable years beginning after December 31, 2000—

(i) the rate of tax under subsections (a), (b), (c), and (d) on taxable income not over the initial bracket amount shall be 10 percent, and

(ii) the 15 percent rate of tax shall apply only to taxable income over the initial bracket amount but not over the maximum dollar amount for the 15-percent rate bracket.

(B) Initial bracket amount

For purposes of this paragraph, the initial bracket amount is—

(i) $14,000 in the case of subsection (a),

(ii) $10,000 in the case of subsection (b), and

(iii) 1/2 the amount applicable under clause (i) (after adjustment, if any, under subparagraph (C)) in the case of subsections (c) and (d).

(C) Inflation adjustment

In prescribing the tables under subsection (f) which apply with respect to taxable years beginning in calendar years after 2003—

(i) the cost-of-living adjustment shall be determined under subsection (f)(3) by substituting "2002" for "1992" in subparagraph (B) thereof, and

(ii) the adjustments under clause (i) shall not apply to the amount referred to in subparagraph (B)(iii).

If any amount after adjustment under the preceding sentence is not a multiple of $50, such amount shall be rounded to the next lowest multiple of $50.

(D) Coordination with acceleration of 10 percent rate bracket benefit for 2001

This paragraph shall not apply to any taxable year to which section 6428 applies.

(2) Reductions in rates after June 30, 2001

In the case of taxable years beginning in a calendar year after 2000, the corresponding percentage specified for such calendar year in the following table shall be substituted for the otherwise applicable tax rate in the tables under subsections (a), (b), (c), (d), and (e).

In the case of taxable years beginning during calendar year:	The corresponding percentages shall be substituted for the following percentages:	28%	31%	36%	39.6%
2001	27.5%	30.5%	35.5%	39.1%	
2002	27.0%	30.0%	35.0%	38.6%	
2003 and thereafter	25.0%	28.0%	33.0%	35.0%	

(3) Adjustment of tables

The Secretary shall adjust the tables prescribed under subsection (f) to carry out this subsection.

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Sec. 1. - Tax imposed

(a) Married individuals filing joint returns and surviving spouses

There is hereby imposed on the taxable income of -

(1)

every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013, and

(2)

every surviving spouse (as defined in section 2(a)),

a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $36,900	15% of taxable income.
Over $36,900 but not over $89,150	$5,535, plus 28% of the excess over $36,900.

Over $89,150 but not over $140,000	$20,165, plus 31% of the excess over $89,150.
Over $140,000 but not over $250,000	$35,928.50, plus 36% of the excess over $140,000.
Over $250,000	$75,528.50, plus 39.6% of the excess over $250,000.

(b) Heads of households

There is hereby imposed on the taxable income of every head of a household (as defined in section 2(b)) a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $29,600	15% of taxable income.
Over $29,600 but not over $76,400	$4,440, plus 28% of the excess over $29,600.
Over $76,400 but not over $127,500	$17,544, plus 31% of the excess over $76,400.
Over $127,500 but not over $250,000	$33,385, plus 36% of the excess over $127,500.
Over $250,000	$77,485, plus 39.6% of the excess over $250,000.

(c) Unmarried individuals (other than surviving spouses and heads of households)

There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as

defined in section 7703) a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $22,100	15% of taxable income.
Over $22,100 but not over $53,500	$3,315, plus 28% of the excess over $22,100.
Over $53,500 but not over $115,000	$12,107, plus 31% of the excess over $53,500.
Over $115,000 but not over $250,000	$31,172, plus 36% of the excess over $115,000.
Over $250,000	$79,772, plus 39.6% of the excess over $250,000.

(d) Married individuals filing separate returns

There is hereby imposed on the taxable income of every married individual (as defined in section 7703) who does not make a single return jointly with his spouse under section 6013, a tax determined in accordance with the following table:

If taxable income is:	The tax is:
Not over $18,450	15% of taxable income.
Over $18,450 but not over $44,575	$2,767.50, plus 28% of the excess over $18,450.
Over $44,575 but not over $70,000	$10,082.50, plus 31% of the excess over $44,575.
Over $70,000 but not over $125,000	$17,964.25, plus 36% of the excess over $70,000.

Over $125,000	$37,764.25, plus 39.6% of the excess over $125,000.

(e) Estates and trusts

There is hereby imposed on the taxable income of -

(1)

every estate, and

(2)

every trust,

taxable under this subsection a tax determined in accordance with the following table

If taxable income is:	The tax is:
Not over $1,500	15% of taxable income.
Over $1,500 but not over $3,500	$225, plus 28% of the excess over $1,500.
Over $3,500 but not over $5,500	$785, plus 31% of the excess over $3,500.
Over $5,500 but not over $7,500	$1,405, plus 36% of the excess over $5,500.
Over $7,500	$2,125, plus 39.6% of the excess over $7,500.

(f) Adjustments in tax tables so that inflation will not result in tax increases

(1) In general

Not later than December 15 of 1993, and

each subsequent calendar year, the Secretary shall prescribe tables which shall apply in lieu of the tables contained in subsections (a), (b), (c), (d), and (e) with respect to taxable years beginning in the succeeding calendar year.

(2) Method of prescribing tables

The table which under paragraph (1) is to apply in lieu of the table contained in subsection (a), (b), (c), (d), or (e), as the case may be, with respect to taxable years beginning in any calendar year shall be prescribed -

(A)

by increasing the minimum and maximum dollar amounts for each rate bracket for which a tax is imposed under such table by the cost-of-living adjustment for such calendar year,

(B)

by not changing the rate applicable to any rate bracket as adjusted under subparagraph (A), and

(C)

by adjusting the amounts setting forth the tax to the extent necessary to reflect the adjustments in the rate brackets.

(3) Cost-of-living adjustment

For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is

the percentage (if any) by which -

(A)

the CPI for the preceding calendar year, exceeds

(B)

the CPI for the calendar year 1992.

(4) CPI for any calendar year

For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on August 31 of such calendar year.

(5) Consumer Price Index

For purposes of paragraph (4), the term ''Consumer Price Index'' means the last Consumer Price Index for all-urban consumers published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.

(6) Rounding

(A) In general

If any increase determined under paragraph (2)(A), section 63(c)(4), section 68(b)(2) or section 151(d)(4) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of

$50.

(B) Table for married individuals filing separately

In the case of a married individual filing a separate return, subparagraph (A) (other than with respect to subsection (c)(4) of section 63 (as it applies to subsections (c)(5)(A) and (f) of such section) and section 151(d)(4)(A)) shall be applied by substituting ''$25'' for ''$50'' each place it appears.

(7) Special rule for certain brackets

(A) Calendar year 1994

In prescribing the tables under paragraph (1) which apply with respect to taxable years beginning in calendar year 1994, the Secretary shall make no adjustment to the dollar amounts at which the 36 percent rate bracket begins or at which the 39.6 percent rate begins under any table contained in subsection (a), (b), (c), (d), or (e).

(B) Later calendar years

In prescribing tables under paragraph (1) which apply with respect to taxable years beginning in a calendar year after 1994, the cost-of-living adjustment used in making adjustments to the dollar amounts referred to in subparagraph (A) shall be determined under paragraph (3) by substituting ''1993'' for ''1992''.

(g) Certain unearned income of minor children

taxed as if parent's income

(1) In general

In the case of any child to whom this subsection applies, the tax imposed by this section shall be equal to the greater of -

(A)

the tax imposed by this section without regard to this subsection, or

(B)

the sum of -

(i)

the tax which would be imposed by this section if the taxable income of such child for the taxable year were reduced by the net unearned income of such child, plus

(ii)

such child's share of the allocable parental tax.

(2) Child to whom subsection applies

This subsection shall apply to any child for any taxable year if -

(A)

such child has not attained age 14 before the close of the taxable year, and

(B)

either parent of such child is alive at the close of the taxable year.

(3) Allocable parental tax

For purposes of this subsection -

(A) In general

The term ''allocable parental tax'' means the excess of -

(i)

the tax which would be imposed by this section on the parent's taxable income if such income included the net unearned income of all children of the parent to whom this subsection applies, over

(ii)

the tax imposed by this section on the parent without regard to this subsection.

For purposes of clause (i), net unearned income of all children of the parent shall not be taken into account in computing any exclusion, deduction, or credit of the parent.

(B) Child's share

A child's share of any allocable parental tax of a parent shall be equal to an amount which bears the same ratio to the

total allocable parental tax as the child's net unearned income bears to the aggregate net unearned income of all children of such parent to whom this subsection applies.

(C) Special rule where parent has different taxable year

Except as provided in regulations, if the parent does not have the same taxable year as the child, the allocable parental tax shall be determined on the basis of the taxable year of the parent ending in the child's taxable year.

(4) Net unearned income

For purposes of this subsection -

(A) In general

The term ''net unearned income'' means the excess of -

(i)

the portion of the adjusted gross income for the taxable year which is not attributable to earned income (as defined in section 911(d)(2)), over

(ii)

the sum of -

(I)

the amount in effect for the taxable year under section 63(c)(5)(A)

(relating to limitation on standard deduction in the case of certain dependents), plus

(II)

the greater of the amount described in subclause (I) or, if the child itemizes his deductions for the taxable year, the amount of the itemized deductions allowed by this chapter for the taxable year which are directly connected with the production of the portion of adjusted gross income referred to in clause (i).

(B) Limitation based on taxable income

The amount of the net unearned income for any taxable year shall not exceed the individual's taxable income for such taxable year.

(5) Special rules for determining parent to whom subsection applies

For purposes of this subsection, the parent whose taxable income shall be taken into account shall be -

(A)

in the case of parents who are not married (within the meaning of section 7703), the custodial parent (within the meaning of section 152(e)) of the child, and

(B)

in the case of married individuals filing separately, the individual with the greater taxable income.

(6) Providing of parent's TIN

The parent of any child to whom this subsection applies for any taxable year shall provide the TIN of such parent to such child and such child shall include such TIN on the child's return of tax imposed by this section for such taxable year.

(7) Election to claim certain unearned income of child on parent's return

(A) In general

If -

(i)

any child to whom this subsection applies has gross income for the taxable year only from interest and dividends (including Alaska Permanent Fund dividends),

(ii)

such gross income is more than the amount described in paragraph (4)(A)(ii)(I) and less than 10 times the amount so described,

(iii)

no estimated tax payments for such year are made in the name and TIN of

such child, and no amount has been deducted and withheld under section 3406, and

(iv)

the parent of such child (as determined under paragraph (5)) elects the application of subparagraph (B),

such child shall be treated (other than for purposes of this paragraph) as having no gross income for such year and shall not be required to file a return under section 6012.

(B) Income included on parent's return

In the case of a parent making the election under this paragraph -

(i)

the gross income of each child to whom such election applies (to the extent the gross income of such child exceeds twice the amount described in paragraph (4)(A)(ii)(I)) shall be included in such parent's gross income for the taxable year,

(ii)

the tax imposed by this section for such year with respect to such parent shall be the amount equal to the sum of -

(I)

the amount determined under this section after the application of clause (i), plus

(II)

for each such child, 15 percent of the lesser of the amount described in paragraph (4)(A)(ii)(I) or the excess of the gross income of such child over the amount so described, and

(iii)

any interest which is an item of tax preference under section 57(a)(5) of the child shall be treated as an item of tax preference of such parent (and not of such child).

(C) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph.

(h) Maximum capital gains rate

(1) In general

If a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of -

(A)

a tax computed at the rates and in the same manner as if this subsection had

not been enacted on the greater of -

(i)

taxable income reduced by the net capital gain; or

(ii)

the lesser of -

(I)

the amount of taxable income taxed at a rate below 28 percent; or

(II)

taxable income reduced by the adjusted net capital gain;

(B)

10 percent of so much of the adjusted net capital gain (or, if less, taxable income) as does not exceed the excess (if any) of -

(i)

the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 28 percent, over

(ii)

the taxable income reduced by the adjusted net capital gain;

(C)

20 percent of the adjusted net capital gain (or, if less, taxable income) in excess of the amount on which a tax is determined under subparagraph (B);

(D)

25 percent of the excess (if any) of -

(i)

the unrecaptured section 1250 gain (or, if less, the net capital gain), over

(ii)

the excess (if any) of -

(I)

the sum of the amount on which tax is determined under subparagraph (A) plus the net capital gain, over

(II)

taxable income; and

(E)

28 percent of the amount of taxable income in excess of the sum of the amounts on which tax is determined under the preceding subparagraphs of this paragraph.

(2) Reduced capital gain rates for qualified 5-year gain

(A) Reduction in 10-percent rate

In the case of any taxable year beginning after December 31, 2000, the rate under paragraph (1)(B) shall be 8 percent with respect to so much of the amount to which the 10-percent rate would otherwise apply as does not exceed qualified 5-year gain, and 10 percent with respect to the remainder of such amount.

(B) Reduction in 20-percent rate

The rate under paragraph (1)(C) shall be 18 percent with respect to so much of the amount to which the 20-percent rate would otherwise apply as does not exceed the lesser of -

(i)

the excess of qualified 5-year gain over the amount of such gain taken into account under subparagraph (A) of this paragraph; or

(ii)

the amount of qualified 5-year gain (determined by taking into account only property the holding period for which begins after December 31, 2000),

and 20 percent with respect to the remainder of such amount. For purposes of determining under the preceding sentence whether the holding period of property begins after December 31, 2000, the holding period of property acquired

pursuant to the exercise of an option (or other right or obligation to acquire property) shall include the period such option (or other right or obligation) was held.

(3) Net capital gain taken into account as investment income

For purposes of this subsection, the net capital gain for any taxable year shall be reduced (but not below zero) by the amount which the taxpayer takes into account as investment income under section 163(d)(4)(B)(iii).

(4) Adjusted net capital gain

For purposes of this subsection, the term ''adjusted net capital gain'' means net capital gain reduced (but not below zero) by the sum of -

(A)

unrecaptured section 1250 gain; and

(B)

28-percent rate gain.

(5) 28-percent rate gain

For purposes of this subsection, the term ''28-percent rate gain'' means the excess (if any) of -

(A)

the sum of -

(i)

collectibles gain; and

(ii)

section 1202 gain, over

(B)

the sum of -

(i)

collectibles loss;

(ii)

the net short-term capital loss; and

(iii)

the amount of long-term capital loss carried under section 1212(b)(1)(B) to the taxable year.

(6) Collectibles gain and loss

For purposes of this subsection -

(A) In general

The terms ''collectibles gain'' and ''collectibles loss'' mean gain or loss (respectively) from the sale or exchange of a collectible (as defined in section 408(m) without regard to paragraph (3) thereof) which is a capital asset held for more than 1 year but only to the extent

such gain is taken into account in computing gross income and such loss is taken into account in computing taxable income.

(B) Partnerships, etc.

For purposes of subparagraph (A), any gain from the sale of an interest in a partnership, S corporation, or trust which is attributable to unrealized appreciation in the value of collectibles shall be treated as gain from the sale or exchange of a collectible. Rules similar to the rules of section 751 shall apply for purposes of the preceding sentence.

(7) Unrecaptured section 1250 gain

For purposes of this subsection -

(A) In general

The term ''unrecaptured section 1250 gain'' means the excess (if any) of -

(i)

the amount of long-term capital gain (not otherwise treated as ordinary income) which would be treated as ordinary income if section 1250(b)(1) included all depreciation and the applicable percentage under section 1250(a) were 100 percent, over

(ii)

the excess (if any) of -

(I)

the amount described in paragraph (5)(B); over

(II)

the amount described in paragraph (5)(A).

(B) Limitation with respect to section 1231 property

The amount described in subparagraph (A)(i) from sales, exchanges, and conversions described in section 1231(a)(3)(A) for any taxable year shall not exceed the net section 1231 gain (as defined in section 1231(c)(3)) for such year.

(8) Section 1202 gain

For purposes of this subsection, the term ''section 1202 gain'' means the excess of -

(A)

the gain which would be excluded from gross income under section 1202 but for the percentage limitation in section 1202(a), over

(B)

the gain excluded from gross income under section 1202.

(9) Qualified 5-year gain

For purposes of this subsection, the term ''qualified 5-year gain'' means the aggregate long-term capital gain from property held for more than 5 years. The determination under the preceding sentence shall be made without regard to collectibles gain, gain described in paragraph (7)(A)(i), and section 1202 gain.

(10) Coordination with recapture of net ordinary losses under section 1231

If any amount is treated as ordinary income under section 1231(c), such amount shall be allocated among the separate categories of net section 1231 gain (as defined in section 1231(c)(3)) in such manner as the Secretary may by forms or regulations prescribe.

(11) Regulations

The Secretary may prescribe such regulations as are appropriate (including regulations requiring reporting) to apply this subsection in the case of sales and exchanges by pass-thru entities and of interests in such entities.

(12) Pass-thru entity defined

For purposes of this subsection, the term ''pass-thru entity'' means -

(A)

a regulated investment company;

(B)

a real estate investment trust;

(C)

an S corporation;

(D)

a partnership;

(E)

an estate or trust;

(F)

a common trust fund;

(G)

a foreign investment company which is described in section 1246(b)(1) and for which an election is in effect under section 1247; and

(H)

a qualified electing fund (as defined in section 1295).

(13) Special rules

(A) Determination of 28-percent rate gain

In applying paragraph (5) -

(i)

the amount determined under subparagraph (A) of paragraph (5)

shall include long-term capital gain (not otherwise described in such subparagraph) -

(I)

which is properly taken into account for the portion of the taxable year before May 7, 1997; or

(II)

from property held not more than 18 months which is properly taken into account for the portion of the taxable year after July 28, 1997, and before January 1, 1998;

(ii)

the amount determined under subparagraph (B) of paragraph (5) shall include long-term capital loss (not otherwise described in such subparagraph) -

(I)

which is properly taken into account for the portion of the taxable year before May 7, 1997; or

(II)

from property held not more than 18 months which is properly taken into account for the portion of the taxable year after July 28, 1997, and before January 1, 1998; and

(iii)

subparagraph (B) of paragraph (5) (as in effect immediately before the enactment of this clause) shall apply to amounts properly taken into account before January 1, 1998.

(B) Determination of unrecaptured section 1250 gain

The amount determined under paragraph (7)(A)(i) shall not include gain -

(i)

which is properly taken into account for the portion of the taxable year before May 7, 1997; or

(ii)

from property held not more than 18 months which is properly taken into account for the portion of the taxable year after July 28, 1997, and before January 1, 1998.

(C) Special rules for pass-thru entities

In applying this paragraph with respect to any pass-thru entity, the determination of when gains and loss are properly taken into account shall be made at the entity level.

(D) Charitable remainder trusts

Subparagraphs (A) and (B)(ii) shall not apply to any capital gain distribution

made by a trust described in section 664.'

Next

Code **Sec. 1.1-1 Income tax on individuals.**

(a) General rule.

(1) Section 1 of the Code imposes an income tax on the income of every individual who is a citizen or resident of the United States and, to the extent provided by section 871(b) or 877(b), on the income of a nonresident alien individual. For optional tax in the case of taxpayers with adjusted gross income of less than $10,000 (less than $5,000 for taxable years beginning before January 1, 1970) see section 3. The tax imposed is upon taxable income (determined by subtracting the allowable deductions from gross income). The tax is determined in accordance with the table contained in section 1. See subparagraph (2) of this paragraph for reference guides to the appropriate table for taxable years beginning on or after January 1, 1964, and before January 1, 1965, taxable years beginning after December 31, 1964, and before January 1, 1971, and taxable years beginning after December 31, 1970. In certain cases credits are allowed against the amount of the tax. See Part IV (section 31 and following), Subchapter A, Chapter 1 of the Code. In general, the tax is payable upon the basis of returns rendered by persons liable therefor (Subchapter A (sections 6001 and following), Chapter 61 of the Code) or at the source of the income by withholding. For the computation of tax in the case of a joint return of a husband and wife, or a return of a surviving spouse, for taxable years beginning before January 1, 1971, see section 2. The computation of tax in such a case for taxable years beginning after December 31, 1970, is determined in accordance with the table contained in section 1(a) as amended by the Tax Reform Act of 1969. For other rates of tax on individuals, see section 5(a). For the imposition of an additional tax for the calendar years 1968, 1969, and 1970, see section 51(a).

(2)

(i) For taxable years beginning on or after January 1, 1964, the tax imposed upon a single individual, a head of a household, a married individual filing a separate return, and estates and trusts is the tax imposed by section 1 determined in accordance with the appropriate table contained in the following subsection of section 1:

Taxable years beginning in 1964	Taxable years beginning after 1964 but before 1971	Taxable years beginning after Dec. 31, 1970 (references in this column are to the Code as amended by the Tax Reform Act of 1969)

Single individual	Sec. 1(a)(1)	Sec. 1(a)(2)	Sec. 1(c).
Head of a household	Sec. 1(b)(1)	Sec. 1(b)(2)	Sec. 1(b).
Married individual filing a separate return	Sec. 1(a)(1)	Sec. 1(a)(2)	Sec. 1(d).
Estates and trusts	Sec. 1(a)(1)	Sec. 1(a)(2)	Sec. 1(d).

(ii) For taxable years beginning after December 31, 1970, the tax imposed by section 1(d), as amended by the Tax Reform Act of 1969, shall apply to the income effectively connected with the conduct of a trade or business in the United States by a married alien individual who is a nonresident of the United States for all or part of the taxable year or by a foreign estate or trust. For such years the tax imposed by section 1(c), as amended by such Act, shall apply to the income effectively connected with the conduct of a trade or business in the United States by an unmarried alien individual (other than a surviving spouse) who is a nonresident of the United States for all or part of the taxable year. See paragraph (b)(2) of section 1.871-8.

(3) The income tax imposed by section 1 upon any amount of taxable income is computed by adding to the income tax for the bracket in which that amount falls in the appropriate table in section 1 the income tax upon the excess of that amount over the bottom of the bracket at the rate indicated in such table.

(4) The provisions of section 1 of the Code, as amended by the Tax Reform Act of 1969, and of this paragraph may be illustrated by the following examples:

Example 1.

A, an unmarried individual, had taxable income for the calendar year 1964 of $15,750. Accordingly, the tax upon such taxable income would be $4,507.50, computed as follows from the table in section 1(a)(1):

Tax on $14,000 (from table)	$3,790.00

Tax on $1,750 (at 41 percent as determined from the table)	717.50
Total tax on $15,750	4,507.50

Example 2.

Assume the same facts as in example (1), except the figures are for the calendar year 1965. The tax upon such taxable income would be $4,232.50, computed as follows from the table in section 1(a)(2):

Tax on $14,000 (from table)	$3,550.00
Tax on $1,750 (at 39 percent as determined from the table)	682.50
Total tax on $15,750	4,232.50

Example 3.

Assume the same facts as in example (1), except the figures are for the calendar year 1971. The tax upon such taxable income would be $3,752.50, computed as follows from the table in section 1(c), as amended:

Tax on $14,000 (from table)	$3,210.00
Tax on $1,750 (at 31 percent as determined from the table)	542.50
Total tax on $15,750	3,752.50

(b) Citizens or residents of the United States liable to tax.

In general, all citizens of the United States, wherever resident, and all resident alien individuals are

liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States. Pursuant to section 876, a nonresident alien individual who is a bona fide resident of Puerto Rico during the entire taxable year is, except as provided in section 933 with respect to Puerto Rican source income, subject to taxation in the same manner as a resident alien individual. As to tax on nonresident alien individuals, see sections 871 and 877.

(c) Who is a citizen.

Every person born or naturalized in the United States and subject to its jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see Chapters 1 and 2 of Title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481-1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7332, 39 FR 44216, Dec. 23, 1974]

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§ 31.6674-1 Penalties for fraudulent statement or failure to furnish statement.
§ 31.6682-1 False information with respect to withholding.
§ 31.7805-1 Promulgation of regulations.

Authority: 26 U.S.C. 7805.

Sections 31.3121(a)–1, 31.3121(a)–3, 31.3231(e)–1, 31.3231(e)–3, 31.3306(b)–1, 31.3306(b)–2, 31.3401(a)–1, and 31.3401(a)–4 also issued under 26 U.S.C. 62.

Section 31.3121(b)(7)–2 also issued under 26 U.S.C. 3121(b)(7)(F).

Section 31.3121(b)(19)–1 also issued under 26 U.S.C. 7701(b)(11).

Section 31.3306(c)(18)–1 also issued under 26 U.S.C. 7701(b)(11).

Section 31.3401(a)(6)–1 also issued under 26 U.S.C. 1441(c)(4) and 26 U.S.C. 3401(a)(6).

Section 31.3402(f)(1)–1 also issued under 26 U.S.C. 3402(m).

Section 31.3402(f)(5)–1 also issued under 26 U.S.C. 3402 (i) and (m).

Section 31.3402(f)(5)–1T also issued under 26 U.S.C. 3402 (i) and (m).

Section 31.3402(n)–1 also issued under 26 U.S.C. 6001, 6011 and 6364.

Section 31.3402(r)–1 also issued under 26 U.S.C. 3402(p) and (r).

Sections 31.3406(a)–1 through 31.3406(i)–1 also issued under 26 U.S.C.3406(i).

Section 31.3406(j)–1 also issued under 26 U.S.C. 3406(i).

Section 31.6011(a)–3A is also issued under the authority of 26 U.S.C. 6011.

Section 31.6011(a)–4 also issued under 26 U.S.C. 6011.

Section 31.6051–1 also issued under 26 U.S.C. 6051.

Section 31.6051–2 also issued under 26 U.S.C. 6051.

Sections 31.6053–3 (b)(5), (h) and (j)(9) and 31.6053–4 are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.

Sections 31.6053–3T and 31.6053–4T are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.

Section 31.6071–1 also issued under 26 U.S.C. 6071.

Section 31.6071(a)–1A is also issued under the authority of 26 U.S.C. 6071.

Section 31.6081–1 also issued under 26 U.S.C. 6081.

Section 31.6205–2 is also issued under 26 U.S.C. 6205(a)(1).

Sections 31.6302–1 through 31.6302–3 also issued under 26 U.S.C. 6302 (a), (c), and (h).

Section 31.6302–4 also issued under 26 U.S.C. 6302 (a) and (c).

Section 31.6302(c)–2A is also issued under 26 U.S.C. 6302 and 6157(d).

Section 31.6302(c)–3 also issued under 26 U.S.C. 6302(h).

Source: T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, unless otherwise noted.

Subpart A—Introduction

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§ 31.0-1 Introduction.

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(a) *In general.* The regulations in this part relate to the employment taxes imposed by subtitle C (chapters 21 to 25, inclusive) of the Internal Revenue Code of 1954, as amended. References in the regulations to the “Internal Revenue Code” or the “Code” are references to the Internal Revenue Code of 1954, as amended, unless otherwise indicated. References to the Federal Insurance Contributions Act, the Railroad Retirement Tax Act, and the Federal Unemployment Tax Act are references to chapters 21, 22, and 23, respectively, of the Code. References to sections of law are references to sections of the Internal Revenue Code unless otherwise indicated. The regulations in this part also provide rules relating to the deposit of other taxes by electronic funds transfer.

(b) *Division of regulations.* The regulations in this part are divided into 7 subparts. Subpart A contains provisions relating to general definitions and use of terms, the division and scope of the regulations in this part, and the extent to which the regulations in this part supersede prior regulations relating to employment taxes. Subpart B relates to the taxes under the Federal Insurance Contributions Act. Subpart C relates to the taxes under the Railroad Retirement Tax Act. Subpart D relates to the tax under the Federal Unemployment Tax Act. Subpart E relates to the collection of income tax at source on wages under chapter 24 of the Code. Subpart F relates to the provisions of chapter 25 of the Code which are applicable in respect of the taxes imposed by chapters 21 to 24, inclusive, of the Code. Subpart G relates to selected provisions of subtitle F of the Code, relating to procedure and administration, which have special application in respect of the taxes imposed by subtitle C of the Code. Inasmuch as these regulations constitute Part 31 of Title 26 of the Code of Federal Regulations, each section of the regulations is preceded by a section symbol and 31 followed by a decimal point (§31.). Sections of law or references thereto are preceded by “Sec.” or the word “section”.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 8723, 62 FR 37492, July 14, 1997]

§ 31.0-2 General definitions and use of terms.

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(a) *In general.* As used in the regulations in this part, unless otherwise expressly indicated—

(1) The terms defined in the provisions of law contained in the regulations in this part shall have the meanings so assigned to them.

(2) The Internal Revenue Code of 1954 means the act approved August 16, 1954 (26 U.S.C.), entitled "An act to revise the internal revenue laws of the United States", as amended.

(3) The Internal Revenue Code of 1939 means the act approved February 10, 1939 (53 Stat., Part 1), as amended.

(4) The Social Security Act means the act approved August 14, 1935 (42 U.S.C. c. 7), as amended.

(5) (i) The Social Security Amendments of 1954 means the act approved September 1, 1954 (68 Stat. 1052), as amended.

(ii) The Social Security Amendments of 1956 means the act approved August 1, 1956 (70 Stat. 807), as amended.

(iii) The Social Security Amendments of 1958 means the act approved August 28, 1958 (72 Stat. 1013), as amended.

(iv) The Social Security Amendments of 1960 means the act approved September 13, 1960 (74 Stat. 924).

(v) The Social Security Amendments of 1961 means the act approved June 30, 1961 (75 Stat. 131).

(vi) The Social Security Amendments of 1965 means the act approved July 30, 1965 (79 Stat. 286).

(vii) The Social Security Amendments of 1967 means the act approved January 2, 1968 (81 Stat. 821).

(viii) The Social Security Amendments of 1972 means the act approved October 30, 1972 (86 Stat. 1329).

(6) The Social Security Administration means the Social Security Administration of the Department of Health and Human Services. (See the Statement of Organization and delegations of Authority of the Department of Health and Human Services (20 CFR Part 1996).)

(7) District director means district director of internal revenue. The term also includes the Director of International Operations in all cases where the authority to perform the functions which may be performed by a district director has been delegated to the Director of International Operations.

(8) Person includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation, or venture is carried on. It includes a guardian, committee, trustee, executor, administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, conservator, or any person acting in a fiduciary capacity.

(9) Calendar quarter means a period of 3 calendar months ending on March 31, June 30, September 30, or December 31.

(10) Account number means the identifying number of an employee assigned, as the case may be, under the Internal Revenue Code of 1954, under Subchapter A of Chapter 9 of the Internal Revenue Code of 1939, or under Title VIII of the Social Security Act. See also §301.7701–11 of this chapter (Regulations on Procedure and Administration).

(11) Identification number means the identifying number of an employer assigned, as the case may be, under the Internal Revenue Code of 1954, under Subchapter A or D of Chapter 9 of the Internal Revenue Code of 1939, or under Title VIII of the Social Security Act. See also §301.7701–12 of this chapter (Regulations on Procedure and Administration).

(12) Regulations 90 means the regulations approved February 17, 1936 (26 CFR (1939) Part 400), as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to Subchapter C of Chapter 9 and other provisions of the Internal Revenue Code of 1939 by Treasury Decision 4885, approved February 11, 1939 (26 CFR (1939) 1943 Cum. Supp., p. 5876), together with any amendments to such regulations as so made applicable to the Internal Revenue Code of 1939.

(13) Regulations 91 means the regulations approved November 9, 1936 (26 CFR (1939) Part 401), as amended, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to Subchapter A of Chapter 9 and other provisions of the Internal Revenue Code of 1939 by Treasury Decision 4885, approved February 11, 1939 (26 CFR (1939) 1943 Cum. Supp., p. 5876), together with any amendments to such regulations as so made applicable to the Internal Revenue Code of 1939.

(14) Regulations 106 means the regulations approved February 24, 1940 (26 CFR (1939) Part 402), as amended, relating to the employees' tax and the employers' tax under the Federal Insurance Contributions Act (Subchapter A of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1939 and before 1951.

(15) Regulations 107 means the regulations approved September 12, 1940 (26 CFR (1939) Part 403), as amended, relating to the excise tax on employers under the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1939 and before 1955.

(16) Regulations 114 means the regulations approved December 30, 1948 (26 CFR (1939) Part 411), as amended, relating to the employers' tax, employees' tax, and employee representatives' tax under the Railroad Retirement Tax Act (Subchapter B of Chapter 9 of the Internal Revenue Code of 1939) with respect to compensation paid after 1948 for services rendered after 1946 and before 1955.

(17) Regulations 120 means the regulations approved December 22, 1953 (26 CFR (1939) Part 406), as amended, relating to collection of income tax at source on wages under Subchapter D of Chapter 9 of the Internal Revenue Code of 1939 with respect to the period after 1953 and before 1955.

(18) Regulations 128 means the regulations approved December 6, 1951 (26 CFR (1939) Part 408), as

amended, relating to the employee tax and the employer tax under the Federal Insurance Contributions Act (Subchapter A of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1950 and before 1955.

(19) The cross references in the regulations in this part to other portions of the regulations, when the word “see” is used, are made only for convenience and shall be given no legal effect.

(b) *Subpart B.* As used in Subpart B of this part, unless otherwise expressly indicated—

(1) Act means the Federal Insurance Contributions Act.

(2) Taxes means the employee tax and the employer tax, as respectively defined in this paragraph.

(3) Employee tax means the tax (with respect to wages received by an employee after Dec. 31, 1965, the taxes) imposed by section 3101 of the Code.

(4) Employer tax means the tax (with respect to wages paid by an employer after Dec. 31, 1965, the taxes) imposed by section 3111 of the Code.

(c) *Subpart C.* As used in Subpart C of this part, unless otherwise expressly indicated—

(1) Act means the Railroad Retirement Tax Act.

(2) Railway Labor Act means the act approved May 20, 1926 (45 U.S.C. c. 8), as amended.

(3) Railroad Retirement Act of 1937 means the act approved June 24, 1937 (45 U.S.C. 228a and following), as amended.

(4) Railroad Retirement Board means the board established pursuant to section 10 of the Railroad Retirement Act of 1937 (45 U.S.C. 228j).

(5) Tax means the employee tax, the employee representative tax, or the employer tax, as respectively defined in this paragraph.

(6) Employee tax means the tax imposed by section 3201 of the Code.

(7) Employee representative tax means the tax imposed by section 3211 of the Code.

(8) Employer tax means the tax imposed by section 3221 of the Code.

(d) *Subpart D.* As used in Subpart D of this part, unless otherwise expressly indicated:

(1) Act means the Federal Unemployment Tax Act.

(2) Railroad Unemployment Insurance Act means the act approved June 25, 1938 (45 U.S.C. c. 11), as

amended.

(3) Tax means the tax imposed by section 3301 of the Code.

(e) *Subpart E.* As used in Subpart E of this part, unless otherwise expressly indicated, tax means the tax required to be deducted and withheld from wages under section 3402 of the Code.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6658, 28 FR 6631, June 27, 1963; T.D. 6983, 33 FR 18013, Dec. 4, 1968; T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.0-3 Scope of regulations.

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(a) *Subpart B.* The regulations in Subpart B of this part relate to the imposition of the employee tax and the employer tax under the Federal Insurance Contributions Act with respect to wages paid and received after 1954 for employment performed after 1936. In addition to employment in the case of remuneration therefor paid and received after 1954, the regulations in Subpart B of this part relate also to employment performed after 1954 in the case of remuneration therefor paid and received before 1955. The regulations in Subpart B of this part include provisions relating to the definition of terms applicable in the determination of the taxes under the Federal Insurance Contributions Act, such as “employee”, “wages”, and “employment”. The provisions of Subpart B of this part relating to “employment” are applicable also, (1) to the extent provided in §31.3121(b)–2, to services performed before 1955 the remuneration for which is paid after 1954, and (2) to the extent provided in §31.3121(k)–3, to services performed before 1955 the remuneration for which was paid before 1955. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 408 (Regulations 128).)

(b) *Subpart C.* The regulations in Subpart C of this part relate to the imposition of the employee tax, the employee representative tax, and the employer tax under the Railroad Retirement Tax Act with respect to compensation paid after 1954, for services rendered after such date. The regulations in Subpart C of this part include provisions relating to the definition of terms applicable in the determination of the taxes under the Railroad Retirement Tax Act, such as “employee”, “employee representative”, “employer”, and “compensation”. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 411 (Regulations 114).)

(c) *Subpart D.* The regulations in Subpart D of this part relate to the imposition on employers of the excise tax under the Federal Unemployment Tax Act for the calendar year 1955 and subsequent calendar years with respect to wages paid after 1954 for employment performed after 1938. In addition to employment in the case of remuneration therefor paid after 1954, the regulations in Subpart D of this part relate also to employment performed after 1954 in the case of remuneration therefor paid before 1955. The regulations in Subpart D of this part include provisions relating to the definition of terms applicable in the determination of the tax under the Federal Unemployment Tax Act, such as “employee”, “employer”, “employment”, and “wages”. The regulations in Subpart D of this part also include provisions relating to the credits against the Federal tax for State contributions. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 403 (Regulations 107).)

(d) *Subpart E.* The regulations in Subpart E of this part relate to the withholding under chapter 24 of the Code of income tax at source on wages paid after 1954, regardless of when such wages were earned. The regulations in Subpart E of this part include provisions relating to the definition of terms applicable in the determination of the tax under chapter 24 of the Code, such as “employee”, “employer”, and “wages”. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 406 (Regulations 120).)

(e) *Subpart F.* The regulations in Subpart F of this part deal with the general provisions contained in chapter 25 of the Code, which relate to the employment taxes imposed by chapters 21 to 24, inclusive, of the Code. (For prior regulations on the subject matter of section 3503, see 26 CFR (1939) 411.802 and 408.803 (Regulations 114 and 128, respectively). For prior regulations on the subject matter of section 3504, see 26 CFR (1939) 406.807 and 408.906 (Regulations 120 and 128, respectively).)

(f) *Subpart G.* The regulations in Subpart G of this part, which are prescribed under selected provisions of subtitle F of the Code, relate to the procedural and administrative requirements in respect of records, returns, deposits, payments, and related matters applicable to the employment taxes imposed by subtitle C (chapters 21 to 25, inclusive) of the Code. In addition, the provisions of Subpart G of this part relate to adjustments and to claims for refund, credit, or abatement, made after 1954, in connection with the employment taxes imposed by subtitle C of the Internal Revenue Code of 1954, by chapter 9 of the Internal Revenue Code of 1939, or by the corresponding provisions of prior law, but not to any adjustment reported, or credit taken, in whole or in part on any return or supplemental return filed on or before July 31, 1960. The provisions of Subpart G of this part also relate to deposits of taxes imposed by subchapter B of chapter 9 of the 1939 Code or by corresponding provisions of prior law with respect to compensation paid after 1954 for services rendered before 1955. For other administrative provisions which have application to the employment taxes imposed by subtitle C of the Code, see Part 301 of this chapter (Regulations on Procedure and Administration). (The administrative and procedural regulations applicable with respect to a particular employment tax for a prior period were combined with the substantive regulations relating to such tax for such period. For the regulations applicable to the respective taxes for prior periods, see paragraphs (a), (b), (c), and (d) of this section.) Subpart G of this part also provides rules relating to the deposit of other taxes by electronic funds transfer.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8305, July 2, 1964; T.D. 8723, 62 FR 37493, July 14, 1997]

§ 31.0-4 Extent to which the regulations in this part supersede prior regulations.

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The regulations in this part, with respect to the subject matter within the scope thereof, supersede 25 CFR (1939) Parts 403, 406, 408, and 411 (Regulations 107, 120, 128, and 114, respectively). The Regulation on Monthly Returns and Payment of Employment Taxes (23 FR 5006) are also superseded.

Subpart B—Federal Insurance Contributions Act (Chapter 21, Internal Revenue Code of 1954)

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Tax on Employees

top

§ 31.3101-1 Measure of employee tax.

top

The employee tax is measured by the amount of wages received after 1954 with respect to employment after 1936. See §31.3121(a)–1, relating to wages; and §§31.3121(b)–1 to 31.3121(b)–4, inclusive, relating to employment. For provisions relating to the time of receipt of wages, see §31.3121(a)–2.

[T.D. 6744, 29 FR 8305, July 2, 1964]

§ 31.3101-2 Rates and computation of employee tax.

top

(a) *Old-age, survivors, and disability insurance.* The rates of employee tax for old-age, survivors, and disability insurance with respect to wages received in calendar years after 1954 are as follows:

Calendar year	Percent
1955 and 1956	2
1957 and 1958	2.25
1959	2.5
1960 and 1961	3
1962	3.125
1963 to 1965, both inclusive	3.625
1966	3.85
1967	3.9
1968	3.8
1969 and 1970	4.2
1971 and 1972	4.6
1973	4.85
1974 to 2010, both inclusive	4.95
2011 and subsequent calendar years	5.95

(b) *Hospital insurance.* The rates of employee tax for hospital insurance with respect to wages received in calendar years after 1965 are as follows:

Calendar year	Percent
1966	0.35
1967	.50
1968 to 1972, both inclusive	.60
1973	1.0
1974 to 1977, both inclusive	0.90
1978 to 1980, both inclusive	1.10
1981 to 1985, both inclusive	1.35
1986 and subsequent calendar years	1.50

(c) *Computation of employee tax.* The employee tax is computed by applying to the wages received by the employee the rate in effect at the time such wages are received.

Example. In 1972, employee A performed for employer X services which constituted employment (see §31.3121(b)–2). In 1973 A receives from X $1,000 as remuneration for such services. The tax is payable at the 5.85 percent rate (4.85 percent plus 1.0 percent) in effect for the calendar year 1973 (the year in which the wages are received) and not at the 5.2 percent rate which was in effect for the calendar year 1972 (the year in which the services were performed).

[T.D. 7374, 40 FR 30947, July 24, 1975]

§ 31.3101-3 When employee tax attaches.

 top

The employee tax attaches at the time that the wages are received by the employee. For provisions relating to the time of such receipt, see §31.3121(a)–2.

§ 31.3102-1 Collection of, and liability for, employee tax; in general.

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(a) The employer shall collect from each of his employees the employee tax with respect to wages for employment performed for the employer by the employee. The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from such wages as and when paid. (For provisions relating to the time of such payment, see §31.3121(a)–2.) The employer is required to collect the tax, notwithstanding the wages are paid in something other than money, and to pay over the tax in money. (As to the exclusion from wages of remuneration paid in any medium other than cash for certain types of services, see §31.3121(a)(7)–1, relating to such remuneration paid for service not in the course of the employer's trade or business or for domestic service in a private home of the employer; and §31.3121(a)(8)–1, relating to such remuneration paid for agricultural labor.) For provisions relating to the collection of, and liability for, employee tax in respect of tips, see §31.3102–3.

(b) The employer is permitted, but not required, to deduct amounts equivalent to employee tax from payments to an employee of cash remuneration to which the sections referred to in this paragraph (b) are applicable prior to the time that the sum of such payments equals—

(1) $100 in the calendar year, for service not in the course of the employer's trade or business, to which §31.3121(a)(7)–1 is applicable;

(2) The applicable dollar threshold (as defined in section 3121(x)) in the calendar year, for domestic service in a private home of the employer, to which §31.3121(a)(7)–1 is applicable;

(3) $150 in the calendar year, for agricultural labor, to which §31.3121(a)(8)–1(c)(1)(i) is applicable; or

(4) $100 in the calendar year, for service performed as a home worker, to which §31.3121(a)(10)–1 is applicable.

(c) At such time as the sum of the cash payments in the calendar year for a type of service referred to in paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section equals or exceeds the amount specified, the employer is required to collect from the employee any amount of employee tax not previously deducted. If an employer pays cash remuneration to an employee for two or more of the types of service referred to in paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section, the provisions of paragraph (b) of this section and this paragraph (c) are to be applied separately to the amount of remuneration attributable to each type of service. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, *see* §31.6413(a)–1.

(d) In collecting employee tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. The employer is liable for the employee tax with respect to all wages paid by him to each of his employees whether or not it is collected from the employee. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him the employee also is liable for the employee tax with respect to all the wages received by him. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. The employer is indemnified against the claims and demands of any person for the amount of any payment of such tax made by the employer to the district director.

(e)(1) The provisions of paragraphs (a) and (d) of this section apply to any payment made on or after January 1, 1955.

(2) The provisions of paragraphs (b) and (c) of this section that apply to any payment made for service not in the course of the employer's trade or business or for service performed as a home worker within the meaning of section 3121(d)(3)(C) apply to any such payment made on or after January 1, 1978. The provisions of paragraphs (b) and (c) of this section that apply to any payment made for domestic service in a private home of the employer apply to any such payment made on or after January 1, 1994. The provisions of paragraphs (b) and (c) of this section that apply to any payment made for agricultural labor apply to any such payment made on or after January 1, 1988. For rules applicable to any payment for these services made prior to the dates set forth in this paragraph (e)(2), *see* §31.3102–1 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR Parts 30 to 39, revised as of April 1, 2006).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8305, July 2, 1964; T.D. 7001, 34 FR 998, Jan. 23, 1969; T.D. 9266, 71 FR 35154, June 19, 2006]

§ 31.3102-2 Manner and time of payment of employee tax.

 top

The employee tax is payable to the district director in the manner and at the time prescribed in Subpart G of the regulations in this part. For provisions relating to the payment by an employee of employee tax in respect of tips, see paragraph (d) of §31.3102–3.

[T.D. 7001, 34 FR 998, Jan. 23, 1969]

§ 31.3102-3 Collection of, and liability for, employee tax on tips.

 top

(a) *Collection of tax from employee*—(1) *In general.* Subject to the limitations set forth in subparagraph (2) of this paragraph, the employer shall collect from each of his employees the employee tax on those tips received by the employee which constitute wages for purposes of the tax imposed by section 3101. (For provisions relating to the treatment of tips as wages, see 3121(a)(12) and 3121(q).) The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see subparagraph (3) of this paragraph). For purposes of this section the term "wages (exclusive of tips) which are under the control of the employer" means, with respect to a payment of wages, an amount equal to wages as defined in section 3121(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to collect employee tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of employee tax on tips reported to him only to the extent that the employer can—

(i) During the period beginning at the time the written statement is submitted to him and ending at the close of the 10th day of the month following the month in which the statement was submitted, or

(ii) In the case of an employer who elects to deduct the tax on an estimated basis (see paragraph (c) of this section), during the period beginning at the time the written statement is submitted to him and ending at the close of the 30th day following the quarter in which the statement was submitted,

collect the employee tax by deducting it or causing it to be deducted as provided in subparagraph (1).

(3) *Furnishing of funds to employer.* If the amount of employee tax in respect of tips reported by the employee to the employer in a written statement (or statements) furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer, the employee may furnish to the employer, within the period specified in subparagraph (2) (i) or (ii) of this paragraph (whichever is applicable), an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and the statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to employee tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see §31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see §31.3121(a)(12)–1.)

(c) *Collection of employee tax on estimated basis*—(1) *In general.* Subject to certain limitations and conditions, an employer may, at his discretion, make collection of the employee tax in respect of tips reported by an employee to the employer on an estimated basis. An employer who elects to make collection of the employee tax on an estimated basis shall:

(i) In respect of each employee, make an estimate of the amount of tips that will be reported, pursuant to section 6053(a), by the employee to the employer in a calendar quarter.

(ii) Determine the amount which must be deducted upon each payment of wages (exclusive of tips) which are under the control of the employer to be made during the quarter by the employer to the employee in order to collect from the employee during the quarter an amount equal to the amount obtained by multiplying the estimated quarterly tips by the sum of the rates of tax under subsections (a) and (b) of section 3101.

(iii) Deduct from any payment of such employee's wages (exclusive of tips) which are under the control of the employer, or from funds referred to in paragraph (a)(3) of this section, such amount as may be necessary to adjust the amount of tax withheld on the estimated basis to conform to the amount of employee tax imposed upon, and required to be deducted in respect of, tips reported by the employee to the employer during the calendar quarter in written statements furnished to the employer pursuant to section 6053(a). If an adjustment is required, the additional employee tax required to be collected may be deducted upon any payment of the employee's wages (exclusive of tips) which are under the control of the employer during the quarter and within the first 30 days following the quarter or from funds turned over by the employee to the employer for such purposes within such period. For

provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see §31.6413(a)–1.

(2) *Estimating tips employee will report*—(i) *Initial estimate.* The initial estimate of the amount of tips that will be reported by a particular employee in a calendar quarter shall be made on the basis of the facts and circumstances surrounding the employment of that employee. However, if a number of employees are employed under substantially the same circumstances and working conditions, the initial estimate established for one such employee may be used as the initial estimate for other employees in that group.

(ii) *Adjusting estimate.* If the quarterly estimate of tips in respect of a particular employee continues to differ substantially from the amount of tips reported by the employee and there are no unusual factors involved (for example, an extended absence from work due to illness) the employer shall make an appropriate adjustment of his estimate of the amount of tips that will be reported by the employee.

(iii) *Reasonableness of estimate.* The employer must be prepared, upon request of the district director, to disclose the factors upon which he relied in making the estimate, and his reasons for believing that the estimate is reasonable.

(d) *Employee tax not collected by employer*. If—

(1) The amount of the employee tax imposed by section 3101 in respect of those tips received by an employee which constitute wages exceeds

(2) The amount of employee tax imposed by section 3101 (in respect of tips reported by the employee to the employer) which can be collected by the employer from such employee's wages (exclusive of tips) which are under the control of the employer or from funds referred to in paragraph (a)(3) of this section,

the employee shall be liable for the payment of tax in an amount equal to such excess. For provisions relating to the manner and time of payment of employee tax by an employee, see paragraph (d) of §31.6011(a)–1 and paragraph (a)(4) of §31.6071(a)–1. For provisions relating to statements required to be furnished by employers to employees in respect of uncollected employee tax on tips reported to the employer, see §31.6053–2.

[T.D. 7001, 34 FR 998, Jan. 23, 1969; 34 FR 1554, Jan. 31, 1969]

Tax on Employers

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§ 31.3111-1 Measure of employer tax.

top

The employer tax is measured by the amount of wages paid after 1954 with respect to employment after 1936. See §31.3121(a)–1, relating to wages, and §§31.3121(b)–1 to 31.3121(b)–4, inclusive, relating to employment. For provisions relating to time of payment of wages, see §31.3121(a)–2.

[T.D. 6744, 29 FR 8306, July 2, 1964]

§ 31.3111-2 Rates and computation of employer tax.

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(a) *Old-age, survivors, and disability insurance.* The rates of employer tax for old-age, survivors, and disability insurance with respect to wages paid in calendar years after 1954 are as follows:

Calendar year	Percent
1955 and 1956	2
1957 and 1958	2.25
1959	2.5
1960 and 1961	3
1962	3.125
1963 to 1965, both inclusive	3.625
1966	3.85
1967	3.9
1968	3.8
1969 and 1970	4.2
1971 and 1972	4.6
1973	4.85
1974 to 2010, both inclusive	4.95
2011 and subsequent calendar years	5.95

(b) *Hospital insurance.* The rates of employer tax for hospital insurance with respect to wages paid in calendar years after 1965 are as follows:

Calendar year	Percent
1966	0.35
1967	.50
1968 to 1972, both inclusive	.60
1973	1.0
1974 to 1977, both inclusive	0.90
1978 to 1980, both inclusive	1.10
1981 to 1985, both inclusive	1.35
1986 and subsequent calendar years	1.50

(c) *Computation of employer tax.* The employer tax is computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid.

[T.D. 6983, 33 FR 18014, Dec. 4, 1968, as amended by T.D. 7374, 40 FR 30948, July 24, 1975]

§ 31.3111-3 When employer tax attaches.

 top

The employer tax attaches at the time that the wages are paid by the employer. For provisions relating to the time of such payment, see §31.3121(a)–2.

§ 31.3111-4 Liability for employer tax.

 top

The employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him.

§ 31.3111-5 Manner and time of payment of employer tax.

top

The employer tax is payable to the district director in the manner and at the time prescribed in Subpart G of the regulations in this part.

§ 31.3112-1 Instrumentalities of the United States specifically exempted from the employer tax.

top

Section 3112 makes ineffectual as to the employer tax imposed by section 3111 those provisions of law which grant to an instrumentality of the United States an exemption from taxation, unless such provisions grant a specific exemption from the tax imposed by section 3111 by an express reference to such section or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939). Thus, the general exemptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3111 or by section 1410 of the 1939 Code are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3111. For provisions relating to the exception from employment of services performed in the employ of an instrumentality of the United States specifically exempted from the employer tax, see §31.3121(b)(5)–1. For provisions relating to services performed for an instrumentality exempt on December 31, 1950, from the employer tax, see paragraph (c) of §31.3121 (b) (6)–1.

General Provisions

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§ 31.3121(a)-1 Wages.

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(a)(1) Whether remuneration paid after 1954 for employment performed after 1936 constitutes wages is determined under section 3121(a). This section and §§31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive (relating to the statutory exclusions from wages), apply with respect only to remuneration paid after 1954 for employment performed after 1936. Whether remuneration paid after 1936 and before 1940 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether remuneration paid after 1939 and before 1951 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether remuneration paid after 1950 and before 1955 for employment performed after 1936 constitutes wages shall be determined in accordance with the

applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) The term *compensation* as used in section 3231(e) of the Internal Revenue Code has the same meaning as the term *wages* as used in this section, determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(b) The term "wages" means all remuneration for employment unless specifically excepted under section 3121(a) (see §§31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, §31.3121(a)(8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

(e) Generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment. See, however, §§31.3121 (a)(7)–1, 31.3121(a)(8)–1, 31.3121(a)(10)–1, and 31.3121(a)(12)–1, relating to the treatment of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business and for domestic service in a private home of the employer, for agricultural labor, for services performed by certain homeworkers, and as tips, respectively.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called "vacation allowances" paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of

the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see §31.3121(a)–3.

(i) Remuneration for employment, unless such remuneration is specifically excepted under section 3121(a) or paragraph (j) of this section, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by B during the month of January 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B, the employer, during the month. A leaves the employ of B at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of B), B pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages and the taxes are payable with respect thereto.

(j) In addition to the exclusions specified in §§31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3121(b) and which are not deemed to be employment under section 3121(c) (see §31.3121(c)–1).

(2) Remuneration for services which are deemed not to be employment under section 3121(c) (see §31.3121(c)–1).

(3) Tips or gratuities paid, prior to January 1, 1966, directly to an employee by a customer of an employer, and not accounted for by the employee to the employer. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§31.3121(a)(12) and 31.3121(q).

(k) *Split-dollar life insurance arrangements.* Except as otherwise provided under section 3121(v), *see* §§1.61–22 and 1.7872–15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 999, Jan. 23, 1969; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 8276, 54 FR 51027, Dec. 12, 1989; T.D. 8324, 55 FR 51696, Dec. 17, 1990; T.D. 8582, 59 FR 66189, Dec. 23, 1994; T.D. 9092, 68 FR 45361, Sept. 17, 2003]

§ 31.3121(a)-1T Question and answer relating to the definition of wages in section 3121(a) (Temporary).

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The following question and answer relates to the definition of wages in section 3121(a) of the Internal Revenue Code of 1954, as amended by section 531(d)(1)(A) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of "wages" under section 3121(a)?

A–1: Yes, unless specifically excluded from the definition of "wages" pursuant to section 3121(a)(1) through (20). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of "wages" if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 755, Jan. 7, 1985]

§ 31.3121(a)-2 Wages; when paid and received.

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(a) In general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are paid by an employer at the time that they are actually or constructively paid unless under paragraph (c) of this section they are deemed to be subsequently paid. For provisions relating to the time when tips received by an employee are deemed paid to the employee, see §31.3121 (q)–1.

(b) Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see §31.3123–1.

(c)(1) The first $100 of cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for—

(i) Service not in the course of the employer's trade or business, to which §31.3121(a)(7)–1 is applicable, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year is at least $100; or

(ii) Service performed as a home worker within the meaning of section 3121(d)(3)(C), to which §31.3121(a)(10)–1 is applicable, shall be deemed to be paid by the employer to the employee at the

first moment of time in such calendar year that the sum of such cash payments made within such year is at least $100.

(2) Cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for domestic service in a private home of the employer to which §31.3121(a)(7)–1 is applicable, and before the sum of the payments of such cash remuneration equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year.

(3) Cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for agricultural labor to which §31.3121(a)(8)–1 is applicable, and before either of the events described in paragraphs (c)(3)(i) and (c)(3)(ii) of this section has occurred, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that—

(i) The sum of the payments of such remuneration is $150 or more; or

(ii) The employer's expenditures for agricultural labor in such calendar year equals or exceeds $2,500, except that this paragraph (c)(3)(ii) shall not apply in determining when such remuneration is deemed to be paid under this paragraph if such employee—

(A) Is employed as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment;

(B) Commutes daily from his permanent residence to the farm on which he is so employed; and

(C) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(4) If an employer pays cash remuneration to an employee for two or more of the types of service referred to in this paragraph, the provisions of this paragraph are to be applied separately to the amount of remuneration attributable to each type of service.

(d)(1) The provisions of paragraphs (a) and (b) of this section apply to any payment of wages made on or after January 1, 1955.

(2) The provisions of paragraph (c) of this section that apply to any payment of wages made for service not in the course of the employer's trade or business or for service performed as a home worker within the meaning of section 3121(d)(3)(C) apply to any such payment made on or after January 1, 1978. The provisions of paragraph (c) of this section that apply to any payment of wages made for domestic service in a private home of the employer apply to any such payment made on or after

January 1, 1994. The provisions of paragraph (c) of this section that apply to any payment of wages made for agricultural labor apply to any such payment made on or after January 1, 1988. For rules applicable to any payment of wages for these services made prior to the dates set forth in this paragraph (d)(2), *see* §31.3121(a)–2 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR Parts 30 to 39, revised as of April 1, 2006).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8306, July 2, 1964; T.D. 7001, 34 FR 999, Jan. 23, 1969; T.D. 9266, 71 FR 35154, June 19, 2006]

§ 31.3121(a)-3 Reimbursement and other expense allowance amounts.

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(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and §1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51696, Dec. 17, 1990]

§ 31.3121(a)(1)-1 Annual wage limitation.

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(a) *In general.* (1) The term "wages" does not include that part of the remuneration paid by an employer to an employee within any calendar year—

(i) After 1954 and before 1959 which exceeds the first $4,200 of remuneration,

(ii) After 1958 and before 1966 which exceeds the first $4,800 of remuneration,

(iii) After 1965 and before 1968 which exceeds the first $6,600 of remuneration,

(iv) After 1967 and before 1972 which exceeds the first $7,800 of remuneration,

(v) After 1971 and before 1973 which exceeds the first $9,000 of remuneration,

(vi) After 1972 and before 1974 which exceeds the first $10,800 of remuneration,

(vii) After 1973 and before 1975 which exceeds the first $13,200 of remuneration, or

(viii) After 1974 which exceeds the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective for such calendar year

(exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3121(a)–1 or

§§31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) paid within the calendar year by an employer to the employee for employment performed for him at any time after 1936. For provisions relating to the treatment of tips for purposes of the annual wage limitation see §31.3121(q)–1.

(2) The annual wage limitation applies only if the remuneration received during any 1 calendar year by an employee from the same employer for employment performed after 1936 exceeds the amount of such limitation. The limitation in such case relates to the amount of remuneration received during any 1 calendar year for employment after 1936 and not to the amount of remuneration for employment performed in any 1 calendar year.

Example. Employee A, in 1967 receives $7,000 from employer B in part payment of $8,000 due him from employment performed in 1967. In 1968 A receives from employer B the balance of $1,000 due him for employment performed in 1967, and thereafter in 1968 also receives $7,000 for employment performed in 1968 for employer B. The first $6,600 of the $7,000 received during 1967 is subject to the taxes in 1967. The remaining $400 received in 1967 is not included as wages and is not subject to the taxes. The balance of $1,000 received in 1968 for employment during 1967 is subject to the taxes during 1968 as is also the first $6,800 of the $7,000 thereafter received in 1968 ($1,000 plus $6,800 totaling $7,800, which is the annual wage limitation applicable to remuneration received in 1968 by an employee from any one employer). The remaining $200 received in 1968 is not included as wages and is not subject to the taxes.

(3) If during a calendar year the employee receives remuneration from more than one employer, the annual wage limitation does not apply to the aggregate remuneration received from all of such employers, but instead applies to the remuneration received during such calendar year from each employer with respect to employment after 1936. In such case the first remuneration received in any calendar year after 1974 up to the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) (the first $13,200 received in 1974, the first $10,800 received in 1973, the first $9,000 received in 1972, the first $7,800 received in any calendar year after 1967 and before 1972, the first $6,600 received in any calendar year after 1965 and before 1968, the first $4,800 received in any calendar year after 1958 and before 1966, or the first $4,200 received in any calendar year after 1954 and before 1959) from each employer constitutes wages and is subject to the taxes, even though, under section 6413(c), the employee may be entitled to a special credit or refund of a portion of the employee tax deducted from his wages received during the calendar year. In this connection and in connection with the two examples immediately following, see §31.6413(c)–1, relating to special credits or refunds of employee tax. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the United States or a wholly owned instrumentality thereof, see §31.3122. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the Government of Guam, the Government of American Samoa, the District of Columbia, a political subdivision of the Government of Guam, or the Government of American Samoa, or any instrumentality of any of the foregoing which is wholly owned thereby, see §31.3125. In connection with the application of the annual wage limitation, see also paragraph (b) of this section, relating to the circumstances under which wages paid by a predecessor employer are deemed to be paid by his successor. In connection with the annual wage limitation in the case of remuneration paid after December 31, 1978, from two or more related

corporations that compensate an employee through a common paymaster, see §31.3121(s)–1.

Example 1. During 1968 employee C receives from employer D a salary of $1,300 a month for employment performed for D during the first 7 months of 1968, or total remuneration of $9,100. At the end of the 6th month C has received $7,800 from employer D, and only that part of his total remuneration from D constitutes wages subject to the taxes. The $1,300 received by employee C from employer D in the 7th month is not included as wages and is not subject to the taxes. At the end of the 7th month C leaves the employ of D and enters the employ of E. C receives remuneration of $1,560 a month from employer E in each of the remaining 5 months of 1968, or total remuneration of $7,800 from employer E. The entire $7,800 received by C from employer E constitutes wages and is subject to the taxes. Thus, the first $7,800 received from employer D and the entire $7,800 received from employer E constitute wages.

Example 2. During the calendar year 1968 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation and during such year receives a salary of $7,800 from each corporation. Each $7,800 received by F from each of the Corporations X, Y, and Z (whether or not such corporations are related) constitutes wages and is subject to the taxes.

(b) *Wages paid by predecessor attributed to successor.* (1) If an employer (hereinafter referred to as a successor) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and if immediately after the acquisition the successor employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for purposes of the application of the annual wage limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3121(a)–1 or §§31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by the predecessor during such calendar year and prior to the acquisition shall be considered as having been paid by the successor.

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the annual wage limitation, be treated as having been paid to such employee by a successor if:

(i) The successor during a calendar year acquired substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of the predecessor;

(ii) Such employee was employed in the trade or business of the predecessor immediately prior to the acquisition and is employed by the successor in his trade or business immediately after the acquisition; and

(iii) Such wages were paid during the calendar year in which the acquisition occurred and prior to such acquisition.

(3) The method of acquisition by an employer of the property of another employer is immaterial. The acquisition may occur as a consequence of the incorporation of a business by a sole proprietor or a partnership, the continuance without interruption of the business of a previously existing partnership by a new partnership or by a sole proprietor, or a purchase or any other transaction whereby substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of one employer is acquired by another employer.

(4) Substantially all the property used in a separate unit of a trade or business may consist of substantially all the property used in the performance of an essential operation of the trade or business, or it may consist of substantially all the property used in a relatively self-sustaining entity which forms a part of the trade or business.

Example 1. The M Corporation which is engaged in the manufacture of automobiles, including the manufacture of automobile engines, discontinues the manufacture of the engines and transfers all the property used in such manufacturing operation to the N Company. The N Company is considered to have acquired a separate unit of the trade or business of the M Corporation, namely, its engine manufacturing unit.

Example 2. The R Corporation which is engaged in the operation of a chain of grocery stores transfers one of such stores to the S Company. The S Company is considered to have acquired a separate unit of the trade or business of the R Corporation.

(5) A successor may receive credit for wages paid to an employee by a predecessor only if immediately prior to the acquisition the employee was employed by the predecessor in his trade or business which was acquired by the successor and if immediately after the acquisition such employee is employed by the successor in his trade or business (whether or not in the same trade or business in which the acquired property is used). If the acquisition involves only a separate unit of a trade or business of the predecessor, the employee need not have been employed by the predecessor in that unit provided he was employed in the trade or business of which the acquired unit was a part.

Example. The Y Corporation in 1968 acquires by purchase all the property of the X Company and immediately after the acquisition employs in its trade or business employee A, who, immediately prior to the acquisition, was employed by the X Company. The X Company has in 1968 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $5,000 of wages to A. The Y Corporation in 1968 pays to A remuneration of $5,000 with respect to employment. Only $2,800 of the remuneration paid by the Y Corporation is considered to be wages. For purposes of the $7,800 limitation, the Y Corporation is credited with the $5,000 paid to A by the X Company. If in the same calendar year, the Z Company acquires the property by purchase from the Y Corporation and A immediately after the acquistion is employed by the Z Company in its trade or business, no part of the remuneration paid to A by the Z Company in the year of the acquisition will be considered to be wages. The Z Company will be credited with the remuneration paid to A by the Y Corporation and also with the wages paid to A by the X Company (considered for purposes of the application of the $7,800 limitation as having also been paid by the Y Corporation).

(6) Where a corporation described in section 501(c)(3) which is exempt from income tax under section 501(a) has in effect a certificate filed pursuant to section 3121(k), or pursuant to section 1426(1) of the

Internal Revenue Code of 1939, waiving its exemption from the taxes imposed by the Act, the activity in which such corporation is engaged is considered to be its trade or business for the purpose of determining whether the transferred property was used in the trade or business of the predecessor and for the purpose of determining whether the employment by the predecessor and the successor of an individual whose services were retained by the successor constitute employment in a trade or business. Thus, if a charitable or religious organization, subject to the taxes by virtue of its certificate, acquires all the property of another such organization likewise subject to the taxes and retains the services of employees of the predecessor, wages paid to such employees by the predecessor in the year of the acquisition (and prior to such acquisition) will be attributed to the successor for purposes of the annual wage limitation.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8307, July 2, 1964; T.D. 6983, 33 FR 18015, Dec. 4, 1968; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 7660, 44 FR 75139, Dec. 19, 1979]

§ 31.3121(a)(2)-1 Payments on account of sickness or accident disability, medical or hospitalization expenses, or death.

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(a) The term “wages” does not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(1) Sickness or accident disability of an employee or any of his dependents, only if payment is received under a workers' compensation law;

(2) Medical or hospitalization expenses in connection with sickness or accident disability of an employee or any of his dependents, or

(3) Death of an employee or any of his dependents.

(b) The plan or system established by an employer need not provide for payments on account of all of the specified items, but such plan or system may provide for any one or more of such items. Payments for any one or more of such items under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Workers' compensation law.* (1) For purposes of paragraph (a)(1) of this section, a payment made under a workers' compensation law includes a payment made pursuant to a statute in the nature of a workers' compensation act.

(2) For purposes of paragraph (a)(1) of this section, a payment made under a workers' compensation law does not include a payment made pursuant to a State temporary disability insurance law.

(3) If an employee receives a payment on account of sickness or accident disability that is not made under a workers' compensation law or a statute in the nature of a workers' compensation act, the payment is not excluded from wages as defined by section 3121(a)(2)(A) even if the payment must be repaid if the employee receives a workers' compensation award or an award under a statute in the nature of a workers' compensation act with respect to the same period of absence from work.

(4) If an employee receives a payment on account of non-occupational injury sickness or accident disability such payment is not excluded from wages, as defined by section 3121(a)(2)(A).

(e) *Examples.* The following examples illustrate the principles of paragraph (d) of this section:

Example 1. A local government employee is injured while performing work-related activities. The employee is not covered by the State workers' compensation law, but is covered by a local government ordinance that requires the local government to pay the employee's full salary when the employee is out of work as a result of an injury incurred while performing services for the local government. The ordinance does not limit or otherwise affect the local government's liability to the employee for the work-related injury. The local ordinance is not a workers' compensation law, but it is in the nature of a workers' compensation act. Therefore, the salary the employee receives while out of work as a result of the work-related injury is excluded from wages under section 3121(a)(2)(A).

Example 2. The facts are the same as in *Example 1* except that the local ordinance requires the employer to continue to pay the employee's full salary while the employee is unable to work due to an injury whether or not the injury is work-related. Thus, the local ordinance does not limit benefits to instances of work-related disability. A benefit paid under an ordinance that does not limit benefits to instances of work-related injuries is not a statute in the nature of a workers' compensation act. Therefore, the salary the injured employee receives from the employer while out of work is wages subject to FICA even though the employee's injury is work-related.

Example 3. The facts are the same as in *Example 1* except that the local ordinance includes a rebuttable presumption that certain injuries, including any heart attack incurred by a firefighter or other law enforcement personnel is work-related. The presumption in the ordinance does not eliminate the requirement that the injury be work-related in order to entitle the injured worker to full salary. Therefore, the ordinance is a statute in the nature of a workers' compensation act, and the salary the injured employee receives pursuant to the ordinance is excluded from wages under section 3121(a)(2)(A).

(f) It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit

payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 9233, 70 FR 74199, Dec. 15, 2005]

§ 31.3121(a)(3)-1 Retirement payments.

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The term "wages" does not include any payment made by an employer to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of the employee's retirement. Thus, payments made to an employee on account of his retirement are excluded from wages under this exception even though not made under a plan or system.

§ 31.3121(a)(4)-1 Payments on account of sickness or accident disability, or medical or hospitalization expenses.

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The term "wages" does not include any payment made by an employer to, or on behalf of, an employee on account of the employee's sickness or accident disability or the medical or hospitalization expenses in connection with the employee's sickness or accident disability, if such payment is made after the expiration of 6 calendar months following the last calendar month in which such employee worked for such employer. Such payments are excluded from wages under this exception even though not made under a plan or system. If the employee does not actually perform services for the employer during the requisite period, the existence of the employer- employee relationship during that period is immaterial.

§ 31.3121(a)(5)-1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans.

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(a) *Payments from or to certain tax- exempt trusts.* The term "wages" does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of, an employee or his beneficiary from a trust.

If at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages.

(b) *Payments under or to certain annuity plans.* (1) The term "wages" does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term "wages" does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan,

if at the time of such payment the annuity plan meets the requirements of section 401(a)(3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term "wages" does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

[T.D. 6876, 31 FR 2596, Feb. 10, 1966]

§ 31.3121(a)(5)-2T Payments under or to an annuity contract described in section 403(b) (temporary).

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(a) *Salary reduction agreement defined.* For purposes of section 3121(a)(5)(D), the term *salary reduction agreement* means a plan or arrangement (whether evidenced by a written instrument or otherwise) whereby payment will be made by an employer, on behalf of an employee or his or her beneficiary, under or to an annuity contract described in section 403(b)—

(1) If the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at §1.401(k)–1(a)(3) of this chapter;

(2) If the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election); or

(3) If the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces his or her compensation.

(b) *Effective date.* (1) This section is applicable November 16, 2004.

(2) The applicability of this section expires on or before November 15, 2007.

[T.D. 9159, 69 FR 67055, Nov. 16, 2004]

§ 31.3121(a)(6)-1 Payment by an employer of employee tax under section 3101 or employee contributions under a State law.

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The term “wages” does not include any payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of either (a) the employee tax imposed by section 3101 or the corresponding section of prior law, or (b) any payment required from an employee under a State unemployment compensation law.

§ 31.3121(a)(7)-1 Payments for services not in the course of employer's trade or business or for domestic service.

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(a) *Meaning of terms*—(1) *Services not in the course of employer's trade or business.* The term “services not in the course of the employer's trade or business” includes services that do not promote or advance the trade or business of the employer. Such term does not include services performed for a corporation. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home of the employer. See paragraph (f) of §31.3121(g)–1 for provisions relating to services not in the course of the employer's trade or business performed on a farm operated for profit.

(2) *Domestic service in a private home of the employer.* Services of a household nature performed by an employee in or about a private home of the person by whom he is employed constitute domestic

service in a private home of the employer. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home. In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. The term "domestic service in a private home of the employer" does not include the services enumerated above unless such services are performed in or about a private home of the employer. Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's home, are not included within the term "domestic service in a private home of the employer". As used in this section, the term does not include domestic service in a private home of the employer performed on a farm operated for profit or service not in the course of the employer's trade or business. See paragraph (f) §31.3121(g)–1 for provisions relating to domestic service in a private home of the employer performed on a farm operated for profit.

(b) *Payments other than in cash.* The term "wages" does not include remuneration paid in any medium other than cash (1) for service not in the course of the employer's trade or business, or (2) for domestic service in a private home of the employer. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, for service not in the course of the employer's trade or business or for domestic service in a private home of the employer does not constitute wages.

(c) *Cash payments.* (1) The term *wages* does not include cash remuneration paid by an employer in any calendar year to an employee for—

(i) Domestic service in a private home of the employer, unless the cash remuneration paid in such year by the employer to the employee for such service equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year; or

(ii) Service not in the course of the employer's trade or business, unless the cash remuneration paid in such year by the employer to the employee for such service equals or exceeds $100.

(2) The tests relating to cash remuneration are based on the remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. The following example illustrates this provision:

Example. On March 31, 2004, employer X pays employee A cash remuneration of $100 for service not in the course of X's trade or business. Such remuneration constitutes wages subject to the taxes even though $10 thereof represents payment for such service performed by A for X in December 2003.

(3) In determining whether wages have been paid either for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met. If an employee receives cash remuneration from an employer in a calendar year for both types of services the pertinent cash-remuneration test is to be applied separately to each type of service. If an employee receives cash remuneration from more than one employer in a calendar year for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, the pertinent cash-remuneration test is to be applied separately to the remuneration received from each employer.

(d) *Cross references.* (1) For provisions relating to deduction of employee tax or amounts equivalent to the tax from cash payments for the services described in this section, *see* §31.3102–1;

(2) For provisions relating to time of payment of wages for such services, *see* §31.3121(a)–2;

(3) For provisions relating to computations to the nearest dollar of any payment of cash remuneration for domestic service in a private home of the employer, *see* §31.3121(i)–1.

(e) *Effective dates.* (1) The provisions of this section apply to any cash payment for service not in the course of the employer's trade or business made on or after January 1, 1978 and for domestic service in a private home of the employer made on or after January 1, 1994.

(2) For rules applicable to any cash payment made prior to the dates set forth in paragraph (e)(1), *see* §31.3121(a)(7)–1 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR Parts 30 to 39, revised as of April 1, 2006).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 9266, 71 FR 35155, June 19, 2006]

§ 31.3121(a)(8)-1 Payments for agricultural labor.

top

(a) *Scope of this section.* For purposes of the regulations in this section, the term “agricultural labor” means only such agricultural labor (see §31.3121(g)–1) as constitutes employment or is deemed to constitute employment by reason of the rules relating to included and excluded services contained in section 3121(c) (see §31.3121(c)–1) or the corresponding section of prior law.

(b) *Payments other than in cash.* The term “wages” does not include remuneration paid in any medium other than cash for agricultural labor. For meaning of the term “cash remuneration”, see

paragraph (f) of the regulations in this section.

(c) *Cash payments.* (1) The term *wages* does not include cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) The cash remuneration paid in such year by the employer to the employee for such labor is $150 or more; or

(ii) The employer's expenditures for agricultural labor in such year equal or exceed $2,500, except that this paragraph (c)(1)(ii) shall not apply in determining whether remuneration paid to an employee constitutes wages for agricultural labor if such employee—

(A) Is employed as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment;

(B) Commutes daily from his permanent residence to the farm on which he is so employed; and

(C) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(2) The application of the provisions of paragraph (c)(1) of this section may be illustrated by the following example:

Example. Employer X pays A $140 in cash for agricultural labor in calendar year 2004. X makes no other payments to A during the year and makes no other payment for agricultural labor to any other employee. Employee A is not employed as a hand-harvest laborer. Neither the $150-cash-remuneration test nor the $2,500-employer's-expenditures-for-agricultural-labor test is met. Accordingly, the remuneration paid by X to A is not subject to the taxes. If in 2004 X had paid A $140 in cash for agricultural labor and had made expenditures of $2,360 or more to other employees for agricultural labor, the $140 paid by X to A would have been subject to tax because the $2,500-employer's-expenditures-for-agricultural-labor test would have been met. Or, if X had paid A $150 in cash in 2004 and made no other payments to any other employee for agricultural labor, the $150 paid by X to A would have been subject to tax because the $150-cash-remuneration test would have been met.

(d) *Application of cash-remuneration test.* (1) If an employee receives cash remuneration from an employer both for services which constitute agricultural labor and for services which do not constitute agricultural labor, only the amount of such remuneration which is attributable to agricultural labor shall be included in determining whether cash remuneration of $150 or more has been paid in the calendar year by the employer to the employee for agricultural labor. The following example illustrates this paragraph (d)(1):

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for X in connection with the operation of the store, works on X's farm when additional help

is required for the farm activities. In the calendar year 2004, X pays A $140 in cash for services performed in agricultural labor, and $4,000 for services performed in connection with the operation of the store. X has no additional expenditures for agricultural labor in 2004. Since the cash remuneration paid by X to A in the calendar year 2004 for agricultural labor is less than $150, the $150-cash-remuneration test is not met. The $140 paid by X to A in 2004 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to cash remuneration of $150 or more is based on the cash remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. It is immaterial if such cash remuneration is paid in a calendar year other than the year in which the agricultural labor is performed. The following example illustrates this paragraph (d)(2):

Example. Employer X pays cash remuneration of $150 in the calendar year 2004 to employee A for agricultural labor. Such remuneration constitutes wages even though $10 of such amount represents payment for agricultural labor performed by A for X in December 2003.

(3) In determining whether $150 or more has been paid to an employee for agricultural labor, only cash remuneration for such labor shall be taken into account. If an employee receives cash remuneration in any one calendar year from more than one employer for agricultural labor, the cash-remuneration test is to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such labor.

(e) *Application of employer's-expenditures-for-agricultural-labor test.* (1) If an employer has expenditures in a calendar year for agricultural labor and for non-agricultural labor, only the amount of such expenditures for agricultural labor shall be included in determining whether the employer's expenditures for agricultural labor in such year equal or exceed $2,500. The following example illustrates this paragraph (e)(1):

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for X in connection with the operation of the store, works on X's farm when additional help is required for the farm activities. In calendar year 2004, X pays A $140 in cash for services performed in agricultural labor, and $4,000 for services performed in connection with the operation of the store. X has no additional expenditures for agricultural labor in 2004. Since X's expenditures for agricultural labor in 2004 are less than $2,500, the employer's-expenditures-for-agricultural-labor test is not met. The $140 paid by X to A in 2004 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to an employer's expenditures of $2,500 or more for agricultural labor is based on the expenditures paid by the employer in a calendar year rather than on the expenses incurred by the employer during a calendar year. It is immaterial if the expenditures are paid in a calendar year other than the year in which the agricultural labor is performed. The following example illustrates this paragraph (e)(2):

Example. Employer X employs A to construct fences on a farm owned by X. The work constitutes agricultural labor and is performed over the course of November and December 2003. A is not employed by X at any other time, however X does have other employees to whom X pays remuneration of $2,000 for

agricultural labor in 2003. X pays A $140 in cash in November 2003 and $140 in cash in January 2004, in full payment for the work. The $140 payment to A made in November is not wages for calendar year 2003 because the $150-cash-remuneration test is not met and X's total expenditures for agricultural labor for such year are not equal to or in excess of $2,500. The $140 payment to A made in January is not wages for 2004 because the $150 cash-remuneration test is not met. However, if X pays additional remuneration to employees for agricultural labor in 2004 that equals or exceeds $2,360, the employer's-expenditures-for-agricultural-labor test will be met and the $140 paid by X to A in 2004 will be considered wages. It is immaterial that the work was performed in 2003.

(f) *Meaning of "cash remuneration."* Cash remuneration includes checks and other monetary media of exchange. Cash remuneration does not include payments made in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, farm products, or other goods or commodities.

(g) *Cross references.* (1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for agricultural labor, see §31.3102–1.

(2) For provisions relating to the time of payment of wages for agricultural labor, see §31.3121(a)–2.

(3) For provisions relating to records to be kept with respect to agricultural labor, see paragraph (b) of §31.6001–2.

(h) *Effective dates.* The provisions of this section apply to any payment for agricultural labor made on or after January 1, 1988. For rules applicable to any payment for agricultural labor made prior to January 1, 1988, *see* §31.3121(a)(8)–1 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR parts 30 to 39, revised as of April 1, 2006).

[T.D. 6744, 29 FR 8308, July 2, 1964, as amended by T.D. 9266, 71 FR 35155, June 19, 2006]

§ 31.3121(a)(9)-1 Payments to employees for nonwork periods.

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(a) The term "wages" does not include any payment (other than vacation or sick pay) made by an employer to an employee for a period throughout which the employment relationship exists between the employer and the employee, but in which the employee does not work (other than being subject to call for the performance of work) for the employer, if such payment is made after the calendar month in which—

(1) The employee attains age 65, if the employee is a man to whom the payment is made before January 1975, or if the employee is a woman to whom the payment is made before November 1956, or

(2) The employee attains age 62, if the employee is a man to whom the payment is made after December 1974, or if the employee is a woman to whom the payment is made after October 1956.

(b) Vacation or sick pay is not within this exclusion from wages. If the employee does any work for the employer in the period for which the payment is made, no remuneration paid by such employer to such employee with respect to such period is within this exclusion from wages.

Example. Mrs. A, an employee of X, attained the age of 62 on September 15, 1956, and discontinued the performance of regular work for X on September 30, 1956. Their employment relationship continued for several years until Mrs. A's death, and X paid Mrs. A $50 per month as consideration for Mrs. A's agreement to work when asked by X. The payment for each month was made on the first day of each succeeding month. After September 30, 1956, the only work performed by Mrs. A for X was performed on one day in October 1956. The payment made by X to Mrs. A on November 1 (for October 1956) is not excluded from wages under this exception, but the payments made thereafter are excluded from wages. The payment on November 1 was not excluded because Mrs. A worked for X on one day in October 1956. (Inasmuch as Mrs. A had attained age 62 in September 1956, the November 1 payment would have been excluded if Mrs. A had not performed any work for X in October 1956.)

[T.D. 6744, 29 FR 8309, July 2, 1964, as amended by T.D. 7373, 40 FR 30957, July 24, 1975; 40 FR 32831, Aug. 5, 1975]

§ 31.3121(a)(10)-1 Payments to certain home workers.

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(a) The term *wages* does not include remuneration paid by an employer in any calendar year to an employee for service performed as a home worker who is an employee by reason of the provisions of section 3121(d)(3)(C) (*see* §31.3121(d)–1(d)), unless the cash remuneration paid in such calendar year by the employer to the employee for such services is $100 or more. The test relating to cash remuneration of $100 or more is based on remuneration paid in a calendar year rather than on remuneration earned during a calendar year. If cash remuneration of $100 or more is paid in a particular calendar year, it is immaterial whether such remuneration is in payment for services performed during the year of payment or during any other year.

(b) The application of paragraph (a) of this section may be illustrated by the following example:

Example. A, a home worker, performs services for X, a manufacturer, in 2003 and 2004. In the performance of the home work A is an employee by reason of section 3121(d)(3)(C). In March 2004, A returns to X articles made by A at home from materials received by A from X in 2003. X pays A cash remuneration of $100 for such work when the finished articles are delivered. The $100 includes $10 which represents remuneration for home work performed by A in 2003. The entire $100 is subject to the taxes. Any additional cash remuneration paid by X to A in 2004 for such services is also subject to the taxes.

(c) In the event an employee receives remuneration in any one calendar year from more than one employer for services performed as a home worker of the character described in paragraph (a) of this section, the regulations in this section are to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such services. This exclusion from wages has no application to remuneration paid for services performed as a home worker who is an employee under section 3121(d)(2) (*see* §31.3121(d)–1(c)) relating to common law employees.

(d) Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the $100 cash-remuneration test is met. If the cash remuneration paid in any calendar year by an employer to an employee for services performed as a home worker of the character described in paragraph (a) of this section is $100 or more, then no remuneration, whether in cash or in any medium other than cash, paid by the employer to the employee in such calendar year for such services is excluded from wages under this exception.

(e)(1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for services performed as a home worker within the meaning of section 3121(d)(3)(C), *see* §31.3102–1.

(2) For provisions relating to the time of payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), *see* §31.3121(a)–2.

(3) For provisions relating to records to be kept with respect to payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), *see* §31.6001–2.

(f) The provisions of this section apply to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made on or after January 1, 1978. For rules applicable to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made prior to January 1, 1978, *see* §31.3121(a)(10)–1 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR parts 30 to 39, revised as of April 1, 2006).

[T.D. 9266, 71 FR 35156, June 19, 2006]

§ 31.3121(a)(11)-1 Moving expenses.

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(a) The term “wages” does not include remuneration paid on or after November 1, 1964, to or on behalf of an employee, either as an advance or a reimbursement, specifically for moving expenses incurred or expected to be incurred, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to

induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term "moving expenses" has the same meaning as when used in section 217 and the regulations thereunder.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3121(a), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3121(a).

[T.D. 7375, 40 FR 42350, Sept. 12, 1975]

§ 31.3121(a)(12)-1 Tips.

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The term "wages" does not include remuneration received by an employee after December 1965 in the form of tips if—

(a) The tips are paid in any medium other than cash, or

(b) The cash tips received by an employee in any calendar month in the course of his employment by an employer are less than $20.

If the cash tips received by an employee in a calendar month after December 1965 in the course of his employment by an employer amount to $20 or more, none of the cash tips received by the employee in such calendar month are excluded from the term "wages" under this section. The cash tips to which this section applies include checks and other monetary media of exchange. Tips received by an employee in any medium other than cash, such as passes, tickets, or other goods or commodities do not constitute wages. If an employee in any calendar month performs services for two or more employers and receives tips in the course of his employment by each employer, the $20 test is to be applied separately with respect to the cash tips received by the employee in respect of his services for each employer and not to the total cash tips received by the employee during the month. As to the time tips are deemed paid, see §31.3121(q)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (j)(3) of §31.3121 (a)–1.

[T.D. 7001, 34 FR 999, Jan. 23, 1969]

§ 31.3121(a)(13)-1 Payments under certain employers' plans after retirement, disability, or death.

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(a) *In general.* The term "wages" does not include the amount of any payment or series of payments made after January 2, 1968, by an employer to, or on behalf of, an employee or any of his dependents under a plan established by the employer which makes provisions for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), which is paid or commences to be paid upon or within a reasonable time after the termination of an employee's employment relationship because of the employee's—

(1) Death,

(2) Retirement for disability, or

(3) Retirement after attaining an age specified in the plan established by the employer or in a pension plan of the employer at the age at which a person in the employee's circumstances is eligible for retirement.

A payment or series of payments made under the circumstances described in the preceding sentence is excluded from "wages" even if made pursuant to an incentive compensation plan which also provides for the making of other types of payments. However, any payment or series of payments which would have been paid if the employee's relationship had not been terminated is not excluded from "wages" under this section and section 3121(a)(13). For example, lump-sum payments for unused vacation time or a final paycheck received after retirement are payments which the employee would have received whether or not he retired and therefore are not excluded from "wages" under this section. Further, if any payment is made upon or after termination of employment for any reason other than those set out in subparagraphs (1), (2), and (3) of this paragraph such payment is not excludable from "wages" by this section. For example, if a pension plan provides for retirement upon disability, completion of 30 years of service, or attainment of age 65, and if an employee who is not disabled retires at age 61 after 30 years of service, none of the retirement payments made to the employee under the pension plan (including any made after he is 65) is excludable from "wages" under this section. However, if the pension plan had conditioned retirement after 30 years of service upon attainment of age 60, all of the retirement payments would have been excludable.

(b) *Plan.* The plan or system established by an employer need not provide for payments because of termination of employment for all the reasons set out in paragraphs (a)(1), (2), and (3) of this section, but such plan or system may provide for payments because of termination for any one or more of such reasons. Payments because of termination of employment for any one or more of such reasons under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) *Dependents.* Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Benefit payment.* It is immaterial for purposes of this exclusion whether the amount or possibility of benefit payments is paid on account of services rendered or taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

(e) *Example.* The application of this section may be illustrated by the following example:

Example. A, an employee, receives a salary of $1,500 a month, payable on the 5th day of the month following the month for which the salary is earned. A's employer has established an incentive compensation plan for a class of his employees, including A, providing for the payment of deferred compensation on termination of employment, including termination upon an employee's death, retirement at age 65 (the retirement age specified in the plan), or retirement for disability. On March 1, 1973, A attains the age of 65 and retires. On March 5, 1973, A receives $5,500 from his employer of which $1,500 represents A's salary for services he performed in February 1973, and $4,000 represents incentive compensation paid under the employer's plan. The amount of $4,000 is excluded from "wages" under this section. The amount of $1,500 is not excluded from "wages" under this section.

[T.D. 7374, 40 FR 30949, July 24, 1975]

§ 31.3121(a)(14)-1 Payments by employer to survivor or estate of former employee.

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The term "wages" does not include any payment by an employer to a survivor or the estate of a former employee made after 1972 and after the calendar year in which such employee died.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(15)-1 Payments by employer to disabled former employee.

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The term "wages" does not include any payment made after 1972 by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any service for such employer during the period for which such payment is made.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(18)-1 Payments or benefits under a qualified educational assistance program.

top

The term "wages" does not include any payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, if at the time of such payment or furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3121(b)-1 Employment; services to which the regulations in this subpart apply.

top

(a) The provisions of the regulations in this subpart relating to the term "employment" apply with respect to services performed after 1954. Certain provisions also apply with respect to services performed before 1955 for which the remuneration is paid after 1954 (see paragraph (b) of §31.3121 (b)–2. For provisions relating generally to services performed before 1955, see paragraph (a) of §31.3121 (b)–2. For provisions relating to the circumstances under which services which do not constitute employment are nevertheless deemed to be employment, and relating to the circumstances under which services which constitute employment are nevertheless deemed not to be employment, see §31.3121 (c)–1. For provisions relating to who are employees and who are employers see §§31.3121 (d)–1 and 31.3121 (d)–2, respectively.

(b) The taxes apply with respect to remuneration paid after 1954 for services performed before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§31.3121(a)–1 to 31.3121(a)(13)–1 relating to wages.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18015, Dec. 4, 1968]

§ 31.3121(b)-2 Employment; services performed before 1955.

top

(a) *General rule.* (1) Subject to the provisions of paragraph (b) of this section:

(i) Services performed after 1936 and before 1955 which were employment under the applicable law in effect before 1955 constitute employment under section 3121(b).

(ii) Services performed after 1936 and before 1955 which were not employment under the applicable law in effect before 1955 do not constitute employment under section 3121(b).

(2) Except as provided in paragraph (b) of this section, determination of whether services performed before 1955 constitute employment shall be made in accordance with the applicable provisions of law in effect before 1955 and of the regulations thereunder. The regulations applicable in determining whether service performed after 1936 and before 1955 constitute employment are as follows:

(i) Services performed after 1936 and before 1940—26 CFR (1939) Part 401 (Regulations 91).

(ii) Services performed after 1939 and before 1951—26 CFR (1939) Part 402 (Regulations 106).

(iii) Services performed after 1950 and before 1955—26 CFR (1939) Part 408 (Regulations 128).

(b) *Certain services performed before 1955 the remuneration for which is paid after 1954.* (1) Services of the following character performed before 1955, for which remuneration is paid after 1954, constitute employment under section 3121(b):

(i) Agricultural labor, as defined in section 3121(g) (see §31.3121(g)–1), other than services of the character described in section 3121(b)(1) (relating to services performed in connection with the production or harvesting of certain oleoresinous products and services performed by certain foreign agricultural workers), which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(1) of such Code, as in effect at the time the services were performed.

(ii) Services not in the course of the employers' trade or business (see paragraph (a)(1) of §31.3121(a)(7)–1) which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(3) of such Code, as in effect at the time the services were performed.

(2) Services of the character described in paragraphs (a) and (b) of §31.3121(b)(1)–1, which were performed by certain foreign agricultural workers before 1955 and the remuneration for which is paid after 1954, do not constitute employment under section 3121(b), irrespective of whether they constituted employment under section 1426(b) of the 1939 Code, as in effect at the time the services were performed.

(3) This paragraph has no application to services performed before 1955 and the remuneration for which was paid before 1955.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§ 31.3121(b)-3 Employment; services performed after 1954.

top

(a) *In general.* Whether services performed after 1954 constitute employment is determined in accordance with the provisions of section 3121(b).

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see §31.3121(e)–1) by an employee for his employer, unless specifically excepted by section 3121(b), constitute employment. With respect to services performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the employer also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the employer may be citizens and residents of a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment.

(c) *Services performed outside the United States*—(1) *In general.* Except as provided in paragraphs (c)(2) and (3) of this section, services performed outside the United States (see §31.3121(e)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) Services performed after 1954 by an employee for an employer "on or in connection with" an American vessel or American aircraft outside the United States (see §31.3121(e)–1) constitute employment if:

(*a*) The employee is also employed "on and in connection with" such vessel or aircraft when outside the United States; and

(*b*) The services are performed under a contract of service, between the employee and the employer, which is entered into within the United States, or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft it touches at a port within the United States; and

(*c*) The services are not excepted under section 3121(b).

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on such vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(iii) If services are performed by an employee "on and in connection with" an American vessel or American aircraft when outside the United States and the conditions listed in paragraph (c)(2)(i) (*b*) and (*c*) of this section are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment. The expression "on or in connection with" refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(iv) Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment under this subparagraph, notwithstanding services performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.

(v) A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term "port" means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo. For definitions of "American vessel" and "American aircraft", see §31.3121(f)–1.

(vi) With respect to services performed outside the United States on or in connection with an American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.

(3) *By a citizen of the United States as an employee for an American employer.* Services performed after 1954 outside the United States by a citizen of the United States as an employee for an American employer constitute employment provided the services are not specifically excepted under section 3121(b). For definitions of "citizen of the United States" and "American employer", see §§31.3121(e)–1 and 3121 (h)–1, respectively.

(4) *By a citizen of the United States as an employee for a foreign subsidiary corporation.* For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services not constituting employment which are performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see section 3121(1) and Part 36 of this chapter (Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§ 31.3121(b)-4 Employment; excepted services in general.

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(a) Services performed by an employee for an employer do not constitute employment for purposes of the taxes if they are specifically excepted from employment under any of the numbered paragraphs of section 3121(b). Services so excepted do not constitute employment for purposes of the taxes even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft, or are performed outside the United States by a citizen of the United States for an American employer. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3121(b), such regulations apply to services performed after 1954.

(b) The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services in an excepted class rendered by the employee.

Example. A is an individual who is employed part time by B to perform services which are specifically excepted from employment under one of the numbered paragraphs of section 312(b). A is also employed by C part time to perform services which constitute employment. While no tax liability is incurred with respect to A's remuneration for services performed in the employ of B (the services being excepted from employment), the exception does not embrace the services performed by A in the employ of C (which constitute employment) and the taxes attached with respect to the wages (see §31.3121(a)–1) for such services.

(c) For provisions relating to the circumstances under which services which are excepted are nevertheless deemed to be employment, and relating to the circumstances under which services which are not excepted are nevertheless deemed not to be employment, see §31.3121(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8310, July 2, 1964]

§ 31.3121(b)(1)-1 Certain services performed by foreign agricultural workers, or performed before 1959 in connection with oleoresinous products.

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(a) *Services of workers from Mexico.* Services performed before 1965 by foreign agricultural workers from the Republic of Mexico under contracts entered into in accordance with title V of the Agricultural Act of 1949, as amended, are excepted from employment. Contracts entered into pursuant to the provisions of such title V may provide for the performance only of services which constitute "agricultural employment". The term "agricultural employment" includes certain services which do not constitute "agricultural labor" as that term is defined in section 3121(g) (see §31.3121(g)–1. For purposes of title V of the Agricultural Act of 1949, as amended, the term "agricultural employment" includes services or activities included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938, as amended, or section 3121(g) of the Internal Revenue Code. Under section

507 of the Agricultural Act of 1949, as amended, and as in effect before October 3, 1961, the term "agricultural employment" included also horticultural employment, cotton ginning, compressing and storing, crushing of oil seeds, and the packing, canning, freezing, drying, or other processing of perishable or seasonable agricultural products.

(b) *Services of workers from British West Indies.* Services performed by a foreign agricultural worker lawfully admitted to the United States from the Bahamas, Jamaica, or the other British West Indies, on a temporary basis to perform form agricultural labor are excepted from employment.

(c) *Services performed after 1956 by foreign workers.* Services performed after 1956 by a foreign agricultural worker lawfully admitted to the United States from any foreign country or possession thereof, including the Republic of Mexico, on a temporary basis to perform agricultural labor are excepted from employment.

(d) *Services performed before 1959 in connection with the production or harvesting of certain oleoresinous products.* Services performed before 1959 in connection with the production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided the processing is carried on by the original producer of the crude gum, are expected from employment. However, the services to which this paragraph relates constitute agricultural labor as defined in section 3121(g) (see paragraph (d) of §31.3121(g)–1). Thus, any cash remuneration paid for such services, to the extent that the services are deemed to constitute employment by reason of the rules relating to included and excluded services continued in section 3121(c) (see §31.3121(c)–1), is taken into account in applying the test prescribed in section 3121(a)(8)(B) for determining whether cash remuneration paid for agricultural labor constitutes wages (see paragraph (c) of §31.3121(a)(8)–1).

(e) *Cross-reference.* See paragraph (b) of §31.3121(b)–2 for provisions relating to the status of services of the character to which paragraphs (a) and (b) of this section apply which were performed before 1955 and the remuneration for which is paid after 1954.

[T.D. 6744, 29 FR 8310, July 2, 1964]

§ 31.3121(b)(2)-1 Domestic service performed by students for certain college organizations.

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(a) Services of a household nature performed in or about the club rooms or house of a local college club, or in or about the club rooms or house of a local chapter of a college fraternity or sorority, by a student who is enrolled and regularly attending classes at a school, college, or university are excepted from employment. For purposes of this exception, the statutory tests are the type of services performed by the employee, the character of the place where the services are performed, and the status of the employee as a student enrolled and regularly attending classes at a school, college, or

university.

(b) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the services performed therein are not within the exception.

(d) An organization is a *school, college, or university* within the meaning of section 3121(b)(2) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(e) Services of a household nature are not within the exception if performed in or about rooming or lodging houses, boarding houses, clubs (except local college clubs) hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

(f) For provisions relating to domestic service in a private home of the employer, see §31.3121(a)(7)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 9167, 69 FR 76405, Dec. 21, 2004]

§ 31.3121(b)(3)-1 Family employment.

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(a) Certain services are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. The exceptions are as follows:

(1) Services performed by an individual in the employ of his or her spouse;

(2) (i) Services performed before 1961 by a father or mother in the employ of his or her son or daughter;

(ii) Services not in the course of the employer's trade or business, or domestic service in a private

home of the employer, performed after 1960 but prior to 1968 by a father or mother in the employ of his or her son or daughter;

(iii) Services not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed after 1967 by a father or mother in the employ of his or her son or daughter unless (*a*) the employer has a child (including an adopted child or stepchild) living in his or her home who is under age 18 or who has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and (*b*) the employer is during the calendar quarter in which the services are rendered:

(*1*) A widow or widower;

(*2*) A divorced person who has not remarried; or

(*3*) A married person who has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for such child for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and

(3) Services performed by a son or daughter under the age of 21 in the employ of his or her father or mother.

(b) Under paragraph (a) (1) and (2) (i) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. Under paragraph (a)(2) (ii) and (iii) of this section, in addition to the family relationship, there is a further requirement that the services performed after 1960 and before 1968 for purposes of paragraph (a)(2)(ii) and after 1967 for purposes of paragraph (a)(2)(iii) shall be services not in the course of the employer's trade or business or shall be domestic service in a private home of the employer. The terms “services not in the course of the employer's trade or business” and “domestic service in a private home of the employer” have the same meaning as when used in §31.3121(a) (7)–1, except that it is immaterial under paragraphs (a) (2) (ii) and (iii) of this section whether or not such services are performed on a farm operated for profit. The mere fact that a mental or physical disability, whether temporary or permanent, renders a child or spouse incapable of self-support does not necessarily mean that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child within the meaning of paragraph (a)(2)(iii) of this section. A written statement by a doctor of the existence of the mental or physical condition of the child or spouse which states that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child and which sets forth the period of time during which the condition has existed and is likely to exist will usually be sufficient evidence to establish the existence and duration of the condition at the time of the statement. Under paragraph (a)(3) of this section, in addition to the family relationship, there is a further requirement that the son or daughter shall be under the age of 21, and the exception continues only during the time that the son or daughter is under the age of 21.

(c) Services performed in the employ of a corporation are not within the exception. Services performed in the employ of a partnership are not within the exception unless the requisite family relationship exists between the employee and each of the partners comprising the partnership.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 7374, 40 FR 30950, July 24, 1975]

§ 31.3121(b)(4)-1 Services performed on or in connection with a non-American vessel or aircraft.

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(a) Services performed within the United States by an employee for an employer "on or in connection with" a vessel not an American vessel, or "on or in connection with" an aircraft not an American aircraft, are excepted from employment if—

(1) The employee is employed by such employer "on and in connection with" such vessel or aircraft when outside the United States, and

(2) (i) The employee is not a citizen of the United States, or (ii) the employer is not an American employer.

(b) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft when outside the United States which are also in connection with the vessel or aircraft. Services performed on the vessel outside the United States by employees as officers or members of the crew, or by employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft outside the United States by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(c) The expression "on or in connection with" refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(d) Services performed within the United States on or in connection with a non-American vessel or aircraft for an employer by an employee who is not a citizen of the United States are excepted from employment, irrespective of whether the employer is or is not an American employer, provided the

employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft by an employee for an employer who is not an American employer also are excepted from employment, irrespective of whether the employee is or is not a citizen of the United States, provided the employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft for an American employer by an employee who is a citizen of the United States are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Further, section 3121(b)(4) does not except from employment services performed within the United States for an employer, whether or not an American employer, on or in connection with a non-American vessel or aircraft by an employee, whether or not a citizen of the United States, who is not also employed by such employer on and in connection with the vessel or aircraft when outside the United States.

(e) Services performed outside the United States on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, by a citizen of the United States as an employee for an American employer are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed on and in connection with such vessel or aircraft when outside the United States. Services performed outside the United States on or in connection with a vessel not an American vessel or on or in connection with an aircraft not an American aircraft, either by an employee who is not a citizen of the United States or for an employer who is not an American employer, do not, in any event, constitute employment. See paragraph (c) of §31.3121(b)–3, relating to services performed outside the United States which constitute employment.

(f) See paragraph (c)(2)(v) of §31.3121(b)–3 for definitions of “vessel” and “aircraft”, §31.3121(f)–1, for definitions of “American vessel” and “American aircraft”, §31.3121(e)–1, for definition of “citizen of the United States”, and §31.3121(h)–1, for definition of “American employer”.

§ 31.3121(b)(5)-1 Services in employ of an instrumentality of the United States specifically exempted from the employer tax.

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Services performed in the employ of an instrumentality of the United States are excepted from employment if such instrumentality is exempt from the employer tax imposed by section 3111 by virtue of any other provision of law which specifically refers to such section 3111 or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939) in granting exemption from the employer tax. This exception does not operate to exclude from employment services performed in the employ of an instrumentality of the United States unless the Congress has granted to such instrumentality a specific exemption from the tax imposed by section 3111 or the corresponding section of prior law. For provisions which make general exemptions from Federal

taxation ineffectual as to the employer tax imposed by section 3111, see §31.3112–1. For other exceptions from employment applicable with respect to services performed in the employ of an instrumentality of the United States, see §31.3121(b)(6)–1.

§ 31.3121(b)(6)-1 Services in employ of United States or instrumentality thereof.

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(a) *In general.* This section relates to services performed in the employ of the United States Government or in the employ of an instrumentality of the United States. Particular services which are not excepted from employment under one rule set forth in this section may nevertheless be excepted under another rule set forth in this section or under §31.3121(b)(5)–1, relating to services in the employ of an instrumentality of the United States specifically exempted from the employer tax. Moreover, services performed in the employ of the United States or of any instrumentality thereof which are not excepted from employment under paragraph (5) or (6) of section 3121(b) may nevertheless be excepted under some other paragraph of such section. For provisions relating generally to the application of the taxes in the case of services performed in the employ of the United States or a wholly owned instrumentality thereof, see 3122. For provisions relating to the computation of remuneration for service performed by an individual as a member of a uniformed service or for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act, see §31.3121(i)–2 and §31.3121(i)–3, respectively.

(b) *Services covered under a retirement system established by a law of the United States.* Services performed in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(A) if such services are covered under a law enacted by the Congress of the United States which specifically provides for the establishment of a retirement system for employees of the United States or of such instrumentality. Determinations as to whether services are covered by a retirement system of the requisite character are to be made as of the time such services are performed. Services of an employee who has an option to have his services covered under a retirement system are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system of the requisite character rather than whether the position in which such services are performed is covered by such retirement system.

(c) *Services performed for an instrumentality not subject to employer tax on December 31, 1950, and covered under a retirement system established by such instrumentality.* (1) Subject to the provisions of subparagraph (4) of this paragraph, services performed in the employ of an instrumentality of the United States are excepted from employment under section 3121(b)(6)(B) if—

(i) The particular instrumentality was not subject on December 31, 1950, to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

(2) If the particular instrumentality was not in existence on December 31, 1950, but is created thereafter under a law which was in effect on December 31, 1950, services performed in the employ of such instrumentality are excepted from employment (unless otherwise provided in paragraph (c)(4) of this section) if—

(i) The instrumentality had it been in existence on December 31, 1950, would not have been subject on that date to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

It is immaterial, for purposes of this exception, whether the exemption from the employer tax on December 31, 1950, resulted, or would have resulted, from a tax exemption as such in effect on December 31, 1950, or from the provisions of section 1426(b) (6) of the Internal Revenue Code of 1939 in effect on that date, relating to the exception from employment of services performed in the employ of certain instrumentalities of the United States.

(3) Determinations as to whether services performed in the employ of an instrumentality referred to in paragraph (c)(1) or (2) of this section are covered by a retirement system established by such instrumentality are to be made as of the time such services are performed. Services of an employee who has an option to have his services covered under a retirement system established by the instrumentality are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system established by the instrumentality rather than whether the position in which such services are performed is covered by such retirement system.

(4) The exception from employment provided in section 3121(b)(6)(B) has no application with respect to any of the following classes of services:

(i) Services performed in the employ of a corporation which is wholly owned by the United States;

(ii) Services performed in the employ of a production credit association, a Federal Reserve Bank, or a Federal Credit Union; services performed before December 31, 1959, in the employ of a national farm loan association; services performed after December 30, 1959, in the employ of a Federal land bank association; services performed after December 31, 1959, in the employ of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives; services performed after December 31, 1972, in the employ of a Federal home loan bank; and services performed after December 31, 1966, and before January 1, 1973, in the employ of a Federal home loan bank, in the case of individuals who are in such employ on the latter date, provided that an amount equal to the taxes imposed by sections 3101 and 3111 with respect to all such services performed by all such individuals are paid under the provisions of section 3122 by July 1, 1973;

(iii) Services performed in the employ of a State, county, or community committee under the Commodity Stabilization Service;

(iv) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Exchanges, Marine Corps Exchanges, or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of Defense, at installations of the Department of Defense for the comfort, pleasure, contentment, and mental and physical improvement of personnel of such Department; or

(v) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Coast Guard Exchanges or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of the Treasury, at installations of the Coast Guard for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Coast Guard.

(d) *Special classes of services.* The following classes of services performed either in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(C):

(1) Services performed as the President or Vice President of the United States or a Member, Delegate, or Resident Commissioner, of or to the Congress of the United States;

(2) Services performed in the legislative branch of the United States Government;

(3) Services performed in a penal institution of the United States by an inmate thereof;

(4) (i) Except as provided in paragraph (d)(4)(ii) of this section, services performed by student nurses, medical or dental interns, residents in training, student dietitians, student physical therapists, or student occupational therapists, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by any department, agency, or instrumentality of the U.S. Government, or by certain other student employees described in section 5351(2) of title 5, United States Code.

(ii) The provisions of paragraph (d)(4)(i) of this section have no application to services performed after 1965 by medical or dental interns or by medical or dental residents in training.

(5) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency; and

(6) (i) Except as provided in paragraph (d)(6)(ii) of this section, services performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not

apply because he is, with respect to such services, subject to another retirement system, established either by a law of the United States or by the agency or instrumentality of the United States for which such services are performed.

(ii) The provisions of paragraph (d)(6)(i) of this section have no application to service performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not apply because such individual is subject to the retirement system of the Tennessee Valley Authority, if such service is subject to the plan approved by the Secretary of Health and Human Services on December 28, 1956, pursuant to section 104 (i)(2) of the Social Security Amendments of 1956 (70 Stat. 827). See section 201(m)(4) of such amendments for provisions relating to the timeliness of payment of tax with respect to remuneration paid before 1957 for such services, and barring the imposition of interest on the amount of any such tax due for any period before December 28, 1956.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(b)(7)-1 Services in employ of States or their political subdivisions or instrumentalities.

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(a) *In general.* Except as provided in other paragraphs of this section, services performed in the employ of any State, any political subdivision of a State, or any instrumentality of one or more States or political subdivisions thereof which is wholly owned by one or more States or political subdivisions are excepted from employment. For the definition of the term “State”, as used in this section, see §31.3121(e)–1.

(b) *Covered transportation service.* The exception from employment under section 3121(b)(7) does not apply to covered transportation service as defined in section 3121(j). See that section and 31.3121 (j)–1.

(c) *Government of American Samoa.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1960 in the employ of the Government of American Samoa, any political subdivision thereof, or any instrumentality of such Government or political subdivision, or combination thereof, which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of such Government or political subdivision).

(d) *District of Columbia.* The exception from employment under section 3121(b)(7) does not apply to services performed after September 30, 1965, in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States. Notwithstanding the preceding sentence the following classes of services performed either in the employ of the District of Columbia or in the employ of any

instrumentality which is wholly owned thereby are excepted from employment:

(1) Services performed in a hospital or penal institution by a patient or inmate thereof.

(2) Services performed by student nurses, student dietitians, student physical therapists, or student occupational therapists assigned or attached to a hospital, clinic, or medical or dental laboratory operated by the District of Columbia or by any wholly owned instrumentality thereof, or by certain other student employees described in section 5351(2) of title 5, United States Code. This subparagraph does not apply to services performed by medical or dental interns or by medical or dental residents in training described in such section 5351(2).

(3) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency.

(4) Services performed by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis.

(e) *Government of Guam.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1972 in the employ of the Government of Guam or any instrumentality which is wholly owned thereby, by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam. The preceding sentence shall not apply to the services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof. For purposes of this paragraph—

(1) Any person whose services as an officer or employee of such Government or instrumentality is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(2) The remuneration for service described in subparagraph (1) (including fees paid to a public official) shall be deemed to have been paid by such Government or instrumentality.

[T.D. 6744, 29 FR 8312, July 2, 1964, as amended by T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(7)-2 Service by employees who are not members of a public retirement system.

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(a) *Table of contents.* This paragraph contains a listing of the major headings of this §31.3121(b)(7)–2.

§31.3121(b)(7)–2 Service by employees who are not members of a public retirement system.

(b) *Introduction.* Under section 3121(b)(7)(F), wages of an employee of a State or local government are generally subject to tax under FlCA after July 1, 1991, unless the employee is a member of a retirement system maintained by the State or local government entity. This section 31.3121(b)(7)–2 provides rules for determining whether an employee is a "member of a retirement system". These rules generally treat an employee as a member of a retirement system if he or she participates in a system that provides retirement benefits, and has an accrued benefit or receives an allocation under the system that is comparable to the benefits he or she would have or receive under Social Security. In the case of part-time, seasonal and temporary employees, this minimum retirement benefit is required to be nonforfeitable.

(c) *General rule*—(1) *Inclusion in employment of service by employees who are not members of a retirement system.* Except in the case of service described in sections 3121(b)(7)(F) (i) through (v), the exception from employment under section 3121(b)(7) does not apply to service in the employ of a State or any political subdivision thereof, or of any instrumentality of one or more of the foregoing that is wholly owned thereby, after July 1, 1991, unless the employee is a member of a retirement system of such State, political subdivision or instrumentality at the time the service is performed. An employee is not a member of a retirement system at the time service is performed unless at that time he or she is a qualified participant (as defined in paragraph (d) of this section) in a retirement system that meets the requirements of paragraph (e) of this section with respect to that employee.

(2) *Treatment of individuals employed in more than one position.* Under section 3121(b)(7)(F), whether an employee is a member of a retirement system is determined on an entity-by-entity rather than a position-by-position basis. Thus, if an employee is a member of a retirement system with respect to service he or she performs in one position in the employ of a State, political subdivision or instrumentality thereof, the employee is generally treated as a member of a retirement system with respect to all service performed for the same State, political subdivision or instrumentality in any other positions. A State is a separate entity from its political subdivisions, and an instrumentality is a separate entity from the State or political subdivision by which it is owned for purposes of this rule. See paragraph (e)(2) of this section, however, for rules relating to service and compensation required to be taken into account in determining whether an employee is a member of a retirement system for purposes of this section. This rule is illustrated by the following examples:

Example 1. An individual is employed full-time by a county and is a qualified participant (as defined in paragraph (d) of this section) in its retirement plan with regard to such employment. In addition to this full-time employment, the individual is employed part-time in another position with the same county. The part-time position is not covered by the county retirement plan, however, and neither the service nor the compensation in the part-time position is considered in determining the employee's retirement benefit under the county retirement plan. Nevertheless, if the retirement plan meets the requirements of paragraph (e) of this section with respect to the individual, the exclusion from employment under section 3121(b)(7) applies to both the employee's full-time and part-time service with the county.

Example 2. An individual is employed full-time by a State and is a member of its retirement plan. The individual is also employed part-time by a city located in the State, but does not participate in the city's retirement plan. The services of the individual for the city are not excluded from employment under section 3121(b)(7), because the determination of whether services constitute employment for such purposes is made separately with respect to each political subdivision for which services are performed.

(d) *Definition of qualified participant*—(1) *General rule*—(i) *Defined benefit retirement systems.* Whether an employee is a qualified participant in a defined benefit retirement system is determined as services are performed. An employee is a qualified participant in a defined benefit retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she is or ever has been an actual participant in the retirement system and, on that day, he or she actually has a total accrued benefit under the retirement system that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee may not be

treated as an actual participant or as actually having an accrued benefit for this purpose to the extent that such participation or benefit is subject to any conditions (other than vesting), such as a requirement that the employee attain a minimum age, perform a minimum period of service, make an election in order to participate, or be present at the end of the plan year in order to be credited with an accrual, that have not been satisfied. The rules of this paragraph (d)(1)(i) are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees in positions covered by the plan must complete 6 months of service before becoming participants. The exception from employment in section 3121(b)(7) does not apply to services of an employee during the employee's 6 months of service prior to his or her initial entry into the plan. The same result occurs even if, upon the satisfaction of this service requirement, the employee is given credit under the plan for all service with the employer (i.e., if service is credited for the 6-month waiting period). This is true even if the employee makes a required contribution in order to gain the retroactive credit. The same result also occurs if the employee can elect to participate in the plan before the end of the 6-month waiting period, but does not elect to do so.

Example 2. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Benefits that accrue only upon satisfaction of this 1,000-hour requirement may not be taken into account in determining whether an employee is a qualified participant in the plan before the 1,000-hour requirement is satisfied.

(ii) *Defined contribution retirement systems.* Whether an employee is a qualified participant in a defined contribution retirement system is determined as services are performed. An employee is a qualified participant in a defined contribution or other individual account retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she has satisfied all conditions (other than vesting) for receiving an allocation to his or her account (exclusive of earnings) that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during any period ending on that day and beginning on or after the beginning of the plan year of the retirement system. This is the case regardless of whether the allocations were made or accrued before the effective date of section 3121(b)(7)(F). This rule is illustrated by the following examples:

Example 1. A State-owned hospital maintains a nonelective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees must be employed on the last day of a plan year in order to receive any allocation for the year. Employees may not be treated as qualified participants in the plan before the last day of the year.

Example 2. Assume the same facts as in *Example 1* except that, under the terms of the plan, an employee who terminates service before the end of a plan year receives a pro rata portion of the allocation he or she would have received at the end of the year, e.g., based on compensation earned since the beginning of the plan year. If the pro rata allocation available on a given day would meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation from the beginning of the plan year through that

day (or some later day), employees are treated as qualified participants in the plan on that day.

Example 3. A political subdivision maintalns an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year and two open seasons—in December and June—when employees can change their contribution elections. In December, an employee elects not to contribute to the plan. In June, the employee elects (beginning July 1) to contribute a uniform percentage of compensation for each pay period to the plan for the remainder of the plan year. The employee is not a qualified participant in the plan during the period January-June, because no allocations are made to the employee's account with respect to compensation during that time, and it is not certain at that time that any allocations will be made. If the level of contributions during the period July-December meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, however, the employee is treated as a qualified participant during that period.

Example 4. Assume the same facts as in *Example 3,* except that the plan allows participants to cancel their elections in cases of economic hardship. In October, the employee suffers an economic hardship and cancels the election (effective November 1). If the contributions during the period July-October are high enough to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, the employee is treated as a qualified participant during that period. In addition, if the contributions during the period July-October are high enough to meet the requirements for the entire period July-December, the employee is treated as a qualified participant in the plan throughout the period July-December, even though no allocations are made to the employee's account in the last two months of the year. There is no requirement that the period used to determine whether an employee is a qualified participant on a given day remain the same from day to day, as long as the period begins on or after the beginning of the plan year and ends on the date the determination is being made.

(2) *Special rule for part-time, seasonal and temporary employees*—(i) *In general.* A part-time, seasonal or temporary employee is generally not a qualified participant on a given day unless any benefit relied upon to meet the requirements of paragraph (d)(1) of this section is 100-percent nonforfeitable on that day. This requirement may be applied solely to the portion of an employee's benefit under the retirement system attributable to compensation and service while an employee is a part-time, seasonal or temporary employee, provided that such service is taken into account with respect to the remaining portion of the benefit for vesting purposes. Rules similar to the rules in section 411(a)(11) are applicable in determining whether a benefit is nonforfeitable. Thus, a benefit does not fail to be nonforfeitable solely because it can be immediately distributed upon separation of service without the consent of the employee, provided that the present value of the benefit does not exceed the cash-out limit in effect under §1.411(a)–11(c)(3)(ii) of this chapter.

(ii) *Treatment of employees entitled to certain distributions upon death or separation from service.* A part-time, seasonal or temporary employee's benefit under a retirement system is considered nonforfeitable within the meaning of paragraph (d)(2)(i) of this section on a given day if on that day the employee is unconditionally entitled under the retirement system to a single-sum distribution on account of death or separation from service of an amount that is at least equal to 7.5 percent of the participant's compensation (within the meaning of paragraph (e)(2)(iii)(B) of this section) for all periods of credited service taken into account in determining whether the employee's benefit under the

retirement system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee will be considered to be unconditionally entitled to a single-sum distribution notwithstanding the fact that the distribution may be forfeitable (in whole or in part) upon a finding of such employee's criminal misconduct. The participant must be entitled to interest on the distributable amount through the date of distribution, at a rate meeting the requirements of paragraph (e)(2)(iii)(C) of this section, as part of the single sum. See paragraph (f)(2)(i)(C) for a transition rule relating to this nonforfeitable benefit safe harbor. The rule of this paragraph (d)(2)(ii) is illustrated by the following example:

Example. An employee is required to contribute 7.5 percent of his or her compensation to a State's defined benefit plan each year. The contribution is "picked up" by the employer in accordance with section 414(h). Under the plan, these amounts plus interest accrued since the date each amount was contributed are refundable to the employee in all cases upon the employee's death or separation from service with the employer. If the interest rate meets the requirements of paragraph (e)(2)(iii)(C) of this section, then the employee's benefits under the plan are considered nonforfeitable and thus meet the requirement of paragraph (d)(2)(i) of this section. Of course, the benefit under the plan must still meet the minimum retirement benefit requirement for defined benefit plans of paragraph (e)(2)(ii) of this section.

(iii) *Definitions of part-time, seasonal and temporary employee*—(A) *Definition of part-time employee.* For purposes of this section, a part-time employee is any employee who normally works 20 hours or less per week. A teacher employed by a post-secondary educational institution (e.g., a community or junior college, post-secondary vocational school, college, university or graduate school) is not considered a part-time employee for purposes of this section if he or she normally has classroom hours of one-half or more of the number of classroom hours designated by the educational institution as constituting full-time employment, provided that such designation is reasonable under all the facts and circumstances. In addition, elected officials and election workers (otherwise described in section 3121(b)(7)(F)(iv) but paid in excess of $100 annually) are not considered part-time, seasonal or temporary employees for purposes of this section. The rules of this paragraph (d)(2)(iii) are illustrated by the following example:

Example. A community college treats a teacher as a full-time employee if the teacher is assigned to work 15 classroom hours per week. A new teacher is assigned to work 8 classroom hours per week. Because the assigned classroom hours of the teacher are at least one-half of the school's definition of full-time teacher, the teacher is not a part-time employee.

(B) *Definition of seasonal employee.* For purposes of this section, a seasonal employee is any employee who normally works on a full-time basis less than 5 months in a year. Thus, for example, individuals who are hired by a political subdivision during the tax return season in order to process incoming returns and work full-time over a 3-month period are seasonal employees.

(C) *Definition of temporary employee.* For purposes of this section, a temporary employee is any employee performing services under a contractual arrangement with the employer of 2 years or less duration. Possible contract extensions may be considered in determining the duration of a contractual

arrangement, but only if, under the facts and circumstances, there is a significant likelihood that the employee's contract will be extended. Future contract extensions are considered significantly likely to occur for purposes of this rule if on average 80 percent of similarly situated employees (i.e., those in the same or a similar job classification with expiring employment contracts) have had bona fide offers to renew their contracts in the immediately preceding 2 academic or calendar years. In addition, future contract extensions are considered significantly likely to occur if the employee with respect to whom the determination is being made has a history of contract extensions with respect to his or her current position. An employee is not considered a temporary employee for purposes of this rule solely because he or she is included in a unit of employees covered by a collective bargaining agreement of 2 years or less duration.

(D) *Treatment of employees participating in certain systems.* Whether an employee is a part-time, seasonal or temporary employee with respect to allocations or benefits under a retirement system is generally determined based on service in the position in which the allocations or benefits were earned, and does not take into account service in other positions with the same or different States, political subdivisions or instrumentalities thereof. All of an employee's service in other positions with the same or different States, political subdivisions or instrumentalities thereof may be taken into account for purposes of determining whether an employee is a part-time, seasonal or temporary employee with respect to benefits under the retirement system, however, *Provided that:* The employee's service in the other positions is or was covered by the retirement system; all service aggregated for purposes of determining whether an employee is a part-time, seasonal or temporary employee (and related compensation) is aggregated under the system for all purposes in determining benefits (including vesting); and the employee is treated at least as favorably as a full-time employee under the retirement system for benefit accrual purposes. The rule of this paragraph (d)(2)(iii)(D) is illustrated by the following example:

Example. Assume that an employee works 15 hours per week for a county and 10 hours per week for a municipality, and that both of these political subdivisions contribute to the same state-wide public employee retirement system. Assume further that the employee's service in both positions is aggregated under the system for all purposes in determining benefits (including vesting). If the employee is covered under the retirement system with respect to both positions and is treated for benefit accrual purposes at least as favorably as full-time employees under the retirement system, then the employee is not considered a part-time employee of either the county or the municipality for purposes of the nonforfeitable benefit requirement of paragraph (d)(2)(i) of this section.

(3) *Alternative lookback rule*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system throughout a calendar year if he or she was a qualified participant in such system (within the meaning of paragraphs (d) (1) and (2) of this section) at the end of the plan year of the system ending in the previous calendar year. This rule is illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section. An employee is a qualified participant within the meaning of paragraph (d)(1) of this section in the plan on the last day of the plan year ending on May 31, 1995. If the alternative lookback

rule is used to determine FICA liability, no such liability exists with respect to the employee or employer for calendar year 1996 by reason of section 3121(b)(7)(F). The same result would apply if the determination is being made with respect to calendar year 1992 and the lookback year was the plan year ending May 31, 1991, even though that plan year ended before the effective date of section 3121(b)(7)(F).

Example 2. A political subdivision maintains an elective defined contribution plan described in section 457(b) of the Code. An employee is eligible to participate in the plan but does not elect to contribute for a plan year. Under the general rule of paragraph (d)(1) of this section, the employee is not a qualified participant in the plan during the plan year because contributions sufficient to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section are not being made. However, if an employee's status as a qualified participant is being determined under the alternative lookback rule, then the employee is a qualified participant for the calendar year in which the determination is being made if he of she was a qualified participant as of the end of the plan year that ended in the previous calendar year.

(ii) *Application in first year of participation.* If the alternative lookback rule is used, an employee who participates in the retirement system may be treated as a qualified participant on any given day during his or her first plan year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable on such day to believe that the employee will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on the last day of such plan year. In the case of a defined contribution retirement system, the determination of whether the employee is actually (or is expected to be) a qualified participant at the end of the plan year must take into account all compensation since the commencement of participation. See paragraph (d)(3)(iv) of this section. If this reasonable belief is correct, and the employee is a qualified participant on the last day of his or her first plan year of participation, then the exception from employment in section 3121(b)(7) will apply without regard to section 3121(b)(7)(F) to services of the employee for the balance of the calendar year in which the plan year ends. For purposes of this paragraph (d)(3)(ii), it is not reasonable to assume the establishment of a new plan until such establishment actually occurs. In addition, the rule in this paragraph (d)(3)(ii) may not be used to treat an employee as a qualified participant until the employee actually becomes a participant in the retirement system. In the case of a retirement system that does not permit a new employee to participate until the first day of the first month beginning after the employee's commencement of service, or some earlier date, a new employee who is not a part-time, seasonal or temporary employee may be treated as a qualified participant until such date. This 1-month rule of administrative convenience applies without regard to whether the employer has a reasonable belief that the employee will be a qualified participant. The rules of this paragraph (d)(3)(ii) are illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section and uses the alternative lookback rule of this paragraph (d)(3). Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Assume that an employee becomes a participant. If it is reasonable to believe that the employee will be credited with 1,000 hours of service by the last day of his or her first year of participation and thereby become a qualified participant by reason of accruing a benefit that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section, the services of the employee are not subject to FICA tax from the date of initial participation until the end of that plan year. If the employee is a

qualified participant on the last day of his or her first plan year of participation, then the exception from employment for purposes of FICA will apply to services of the employee for the balance of the calendar year in which the plan year ended.

Example 2. Assume the same facts as *Example 1,* except that the employee is a newly hired employee and the plan provides that an employee may not participate until the first day of his or her first full month of employment. Under the 1-month rule of convenience, the employee may be treated as a qualified participant until the first date on which he or she could participate in the plan.

(iii) *Application in last year of participation.* If the alternative lookback rule is used, an employee may be treated as a qualified participant on any given day during his or her last year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable to believe on such day that the employee, will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on his or her last day of participation. For purposes of this paragraph (d)(3)(iii), an employee's last year of participation means the plan year that the employer reasonably ascertains is the final year of such employee's participation (e.g., where the employee has a scheduled retirement date or where the employer intends to terminate the plan).

(iv) *Special rule for defined contribution retirement systems.* An employee may not be treated as a qualified participant in a defined contribution retirement system under this paragraph (d)(3) if compensation for less than a full plan year or other 12-month period is regularly taken into account in determining allocations to the employee's account for the plan year unless, under all of the facts and circumstances, such arrangement is not a device to avoid the imposition of FICA taxes. For example, an arrangement under which compensation taken into account is limited to the contribution base described in section 3121(x)(1) is not considered a device to avoid FICA taxes by reason of such limitation. See paragraph (e)(2)(iii)(B) of this section for a rule permitting the use of such limitation. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan that covers all of its full-time employees and is a retirement system within the meaning of paragraph (e)(1) of this section. Under the plan, a portion of each participant's compensation in the final month of every plan year is allocated to the participant's account. Employees covered under the plan generally may not be treated as qualified participants under the alternative lookback rule for any portion of the calendar year following the year in which such allocation is made.

(v) *Consistency requirement.* Beginning with calendar year 1992, if the alternative lookback rule is used to determine whether an employee is a qualified participant, it must be used consistently from year to year and with respect to all employees of the State, political subdivision or instrumentality thereof making the determination. If a retirement system is sponsored by more than one State, political subdivision or instrumentality, this consistency requirement applies separately to each plan sponsor.

(4) *Treatment of former participants*—(i) *In general.* In general, the rules of this paragraph (d) apply equally to former participants who continue to perform service for the same State, political

subdivision or instrumentality thereof or who return after a break in service. Thus, for example, a former employee of a political subdivision with a deferred benefit under a defined benefit retirement system maintained by the political subdivision who is reemployed by the political subdivision but does not resume participation in the retirement system, may continue to be a qualified participant in the system after becoming reemployed if his or her total accrued benefit under the system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section (taking into account all periods of service (including current service) required to be taken into account under that paragraph). See also paragraph (e)(2)(v) of this section for situations in which benefits under a retirement system may be taken into account even though they relate to service for another employer.

(ii) *Treatment of re-hired annuitants.* An employee who is a former participant in a retirement system maintained by a State, political subdivision or instrumentality thereof, who has previously retired from service with the State, political subdivision or instrumentality, and who is either in pay status (i.e., is currently receiving retirement benefits) under the retirement system or has reached nomal retirement age under the retirement system, is deemed to be a qualified participant in the retirement system without regard to whether he or she continues to accrue a benefit or whether the distribution of benefits under the retirement system has been suspended pending cessation of services. This rule also applies in the case of an employee who has retired from service with another State, political subdivision or instrumentality thereof that maintains the same retirement system as the current employer, provided the employee is a former participant in the system by reason of the employee's former employment. Thus, for example, if a teacher retires from service with a school district that participates in a state-wide teachers' retirement system, begins to receive benefits from the system, and later becomes a substitute teacher in another school district that participates in the same state-wide system, the employee is treated as a re-hired annuitant under this paragraph (d)(4)(ii).

(e) *Definition of retirement system*—(1) *Requirement that system provide retirement-type benefits.* For purposes of section 3121(b)(7)(F), a retirement system includes any pension, annuity, retirement or similar fund or system within the meaning of section 218 of the Social Security Act that is maintained by a State, political subdivision or instrumentality thereof to provide retirement benefits to its employees who are participants. Whether a plan is maintained to provide retirement benefits with respect to an employee is determined under the facts and circumstances of each case. For example, a plan providing only retiree health insurance or other deferred welfare benefits is not considered a retirement system for this purpose. The legal form of the system is generally not relevant. Thus, for example, a retirement system may include a plan described in section 401(a), an annuity plan or contract under section 403 or a plan described in section 457(b) or (f) of the Internal Revenue Code. In addition, the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F) and this section. These rules are illustrated by the following examples:

Example 1. Under an employment arrangement, a portion of an employee's compensation is regularly deferred for 5 years. Because a plan that defers the receipt of compensation for a short span of time rather than until retirement is not a plan that provides retirement benefits, this arrangement is not a retirement system for purposes of section 3121(b)(7)(F).

Example 2. An individual holds two positions with the same political subdivision. The wages earned in one position are subject to FICA tax pursuant to an agreement (under section 218 of the Social Security Act) between the Secretary of Health and Human Services and the State in which the political subdivision is located. Because the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F), the exception from employment in section 3121(b)(7) does not apply to service in the other position unless the employee is otherwise a member of a retirement system of such political subdivision.

(2) *Requirement that system provide minimum level of benefits*—(i) *In general.* A pension, annuity, retirement or similar fund or system is not a retirement system with respect to an employee unless it provides a retirement benefit to the employee that is comparable to the benefit provided under the Old-Age portion of the Old-Age, Survivor and Disability Insurance program of Social Security. Whether a retirement system meets this requirement is generally determined on an individual-by-individual basis. Thus, for example, a pension plan that is not a retirement system with respect to an employee may nevertheless be a retirement system with respect to other employees covered by the system.

(ii) *Defined benefit retirement systems.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of this paragraph (e)(2) with respect to an employee on a given day if and only if, on that day, the employee has an accrued benefit under the system that entitles the employee to an annual benefit commencing on or before his or her Social Security retirement age that is at least equal to the annual Primary Insurance Amount the employee would have under Social Security. For this purpose, the Primary Insurance Amount an individual would have under Social Security is determined as it would be under the Social Security Act if the employee had been covered under Social Security for all periods of service with the State, political subdivision or instrumentality, had never performed service for any other employer, and had been fully insured within the meaning of section 214(a) of the Social Security Act, except that all periods of service with the State, political subdivision or instrumentality must be taken into account (i. e., without reduction for low-earning years).

(iii) *Defined contribution retirement systems*—(A) *In general.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of paragraph (e)(2)(i) of this section with respect to an employee if and only if allocations to the employee's account (not including earnings) for a period are at least 7.5 percent of the employee's compensation for service for the State, political subdivision or instrumentality during the period. Matching contributions by the employer may be taken into account for this purpose.

(B) *Definition of compensation.* The definition of compensation used in determining whether a defined contribution retirement system meets the minimum retirement benefit requirement must generally be no less inclusive than the definition of the employee's base pay as designated by the employer or the retirement system, provided such designation is reasonable under all the facts and circumstances. Thus, for example, a defined contribution retirement system will not fail to meet this requirement merely because it disregards for all purposes one or more of the following: overtime pay, bonuses, or single-sum amounts received on account of death or separation from service under a bona fide vacation, compensatory time or sick pay plan, or under severance pay plans. Furthermore, any

compensation remaining after such amounts are disregarded that is in excess of the contribution base described in section 3121(x)(1) at the beginning of the plan year may also be disregarded. The rules of this paragraph are illustrated by the following example:

Example. A political subdivision maintains an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year. In 1995, an employee contributes to the plan at a rate of 7.5 percent of base pay. Assume that the employee will reach the maximum contribution base described in section 3121(x)(1) in October of 1995. The employee is a qualified participant in the plan for all of the 1995 plan year without regard to whether the employee ceases to participate at any time after reaching the maximum contribution base.

(C) *Reasonable interest rate requirement.* A defined contribution retirement system does not satisfy this paragraph (e)(2) with respect to an employee unless the employee's account is credited with earnings at a rate that is reasonable under all the facts and circumstances, or employees' accounts are held in a separate trust that is subject to general fiduciary standards and are credited with actual earnings on the trust fund. Whether the interest rate with which an employee's account is credited is reasonable is determined after reducing the rate to adjust for the payment of any administrative expenses. The rule of this paragraph (e)(2)(iii)(C) is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan described in section 457(b). Under the plan, the accounts of participants are credited annually on the basis of a variable interest rate formula determined as of the beginning of the plan year. The formula requires an interest rate (after adjustment for administrative expense payments) equal to 100 percent of the Applicable Federal Rate for long-term debt instruments. This interest rate constitutes a reasonable rate of interest.

(iv) *Treatment of emloyees employed in more than one position with the same entity.* All service and compensation of an employee with respect to his or her employment with a State, political subdivision or instrumentality thereof must generally be considered in determining whether a benefit meets the requirement of this paragraph (e)(2). However, for individuals employed simultaneously in multiple positions with the same entity, this determination may (but is not required to) be made solely by reference to the service and compensation related to a single position of the employee with the State, political subdivision or instrumentality thereof making the determination, provided that the position is not a part-time, seasonal or temporary position.

(v) *Treatment of employees participating in certain systems.* In general, only compensation from and service for the State, political subdivision or instrumentality thereof that employs the employee (and the allocations or benefits related to such compensation or service) on a given day are considered in determining whether the employee's benefit under the retirement system on that day meets the requirements of this paragraph (e)(2), even if the employee has other allocations or benefits under the same retirement system from service with another State, political subdivision or instrumentality thereof. However, an employee's total allocations or benefits under a retirement system maintained by multiple States, political subdivisions or instrumentalities thereof (including the current employer) may be taken into account if:

(A) The compensation and service on which the additional allocations or benefits are based are also taken into account in determining whether the employee's allocations or benefits satisfy the minimum retirement benefit requirement;

(B) The retirement system takes all service and compensation of the employee in all positions covered by the system into account for all benefit determination purposes; and

(C) If the employee is a part-time, seasonal or temporary employee, he or she is treated under the plan for benefit accrual purposes in as favorable a manner as a full-time employee participating in the system.

(vi) *Additional testing methods.* Additional testing methods may be designated by the Commissioner in revenue procedures, revenue rulings, notices or other documents of general applicability.

(f) *Transition rules*—(1) *Application of qualified participant rules during 1991*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system (within the meaning of paragraph (e)(1) of this section) on a given day during the period July 1 through December 31, 1991, if it is reasonable on that day to believe that he or she will be a qualified participant under the general rule in paragraphs (d) (1) and (2) of this section by January 1, 1992 (taking into account only service and compensation on or after such date). For purposes of this paragraph (f)(1)(i), given the facts and circumstances of a particular case, it may be reasonable to assume that the terms of a plan will be changed or that a new retirement system will be established by the end of calendar year 1991, as long as affirmative steps have been taken to accomplish this result.

(ii) *Extension of reliance period if legislative action required.* If a plan amendment or other action is necessary in order to treat an employee as a member of a retirement system for purposes of this section, such amendment or other action may only be taken by a legislative body that does not convene during the period July 1, 1991, through December 31, 1991, and the other requirements of paragraph (f)(1)(i) of this section are met, the end of the reasonable reliance period (including the rule that service and compensation prior to that date may be disregarded) provided under paragraph (f)(1)(i) of this section is extended from December 31, 1991, to the date that is the last day of the first legislative session commencing after December 31, 1991. These rules are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that meets the requirements of paragraph (e) of this section. The plan does not cover a particular class of full-time employees as of July 1, 1991. However, in light of the enactment of section 3121(b)(7)(F), State officials administering the plan for the State intend to request that the legislature amend the State statute to include that class of employees in the existing plan and otherwise to modify the terms of the plan to meet the requirements of section 3121(b)(7)(F) and this section. The State legislature meets from January through March each year, and legislative action is required to expand coverage under the plan. State officials administering the plan have publicized the proposed amendment providing for the addition of these employees to the plan. Under the transition rule for 1991, if it is reasonable to believe that

the legislature will pass this bill in the 1992 session, service by the employees who will be covered under the plan by reason of the amendment is not treated as employment by reason of section 3121(b)(7)(F) during the period prior to April 1, 1992. This is true regardless of whether the plan provides retroactive coverage for the period July 1, 1991 through March 31, 1992.

Example 2. Assume the same facts as in *Example 1*, except that legislative action is not required in order to expand coverage under the plan, and that publication of the proposed change to the plan occurs in 1991. Assume further that coverage is expanded under the plan to include the new class of full-time employees as of April 1, 1992. Despite this action, in this situation the service by those employees during the period January 1, 1992 through March 31, 1992 is not excluded from "employment" under section 3121(b)(7)(F), and wages for that period are generally subject to FICA taxes even if the plan provides retroactive coverage for any portion of the period July 1, 1991 to March 31, 1992.

(2) *Additional transition rules for plans in existence on November 5, 1990*—(i) *Application of minimum retirement benefit requirement to defined benefit retirement systems in plan years beginning before 1993*—(A) *In general.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, is not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section for any plan year beginning before January 1, 1993, with respect to individuals who were actually covered under the system on November 5, 1990. Such a retirement system is also not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to an employee who becomes a participant after November 5, 1990, if he or she is employed in a position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. A retirement system is not described in this paragraph (f)(2)(i)(A) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under the facts and circumstances of each case. A decrease in benefits is not material to the extent that it does not decrease the benefit payable at normal retirement age. These rules are illustrated by the following examples:

Example 1. The retirement formula under a retirement plan that was in existence on November 5, 1990, is amended to use career average compensation instead of a high 3-year average, without any increase in the benefit formula. This amendment constitutes a material decrease in the level of benefit under the retirement plan. Therefore, the retirement plan is subject to the minimum retirement benefit requirement for the plan year for which the amendment is effective and for all succeeding plan years.

Example 2. A defined benefit retirement plan that was in existence on November 5, 1990, is subsequently amended to include part-time employees. Previously, this class of employees was not covered under the plan either on a mandatory or on an elective basis. The plan is subject to the minimum retirement benefit requirement with respect to the part-time employees because this class of employees was previously excluded from coverage under the retirement plan. Of course, the nonforfeitable benefit rule applies to the benefit relied upon to meet the minimum retirement benefit requirement with respect to any part-time, seasonal or temporary employee covered during this period.

(B) *Treatment in plan years beginning after 1992 of benefits accrued during previous plan years.* The general rule that a defined benefit retirement system meets the minimum retirement benefit requirement on the basis of total benefits and service accrued to date is modified for plans in existence on November 5, 1990. If a defined benefit retirement system in existence on November 5, 1990, does not meet the minimum retirement benefit requirement solely because the benefits accrued for an employee (with respect to whom the system is entitled to relief under paragraph (f)(2)(i)(A) of this section) as of the last day of the last plan year beginning before January 1, 1993, do not meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to service and compensation before that time, then the retirement system will be deemed to comply with the requirements of paragraph (e)(2) of this section if the future service accruals would comply with the requirement of paragraph (e)(2) of this section. If retirement benefits under a retirement system in existence on November 5, 1990 are materially decreased within the meaning of paragraph (f)(2)(i)(A) of this section, then the date the decrease is effective is substituted for January 1, 1993 for purposes of this paragraph. The rule of this paragraph (f)(2)(i)(B) is illustrated by the following example:

Example. A defined benefit plan maintained by a State was in existence on November 5, 1990. It provides a retirement benefit on the last day of the 1992 plan year that is insufficient to meet the requirements of paragraph (e)(2) of this section based on employees' total service and compensation with the State at that time. The plan will nevertheless meet the requirements of paragraph (e)(2) of this section if it is amended to provide benefits sufficient to meet the requirements of paragraph (e)(2) of this section based on employees' service and compensation in plan years beginning after December 31, 1992.

(C) *Treatment of part-time, seasonal or temporary employees.* A defined benefit retirement system is not exempt from the minimum retirement benefit requirement with respect to a part-time, seasonal or temporary employee during the transition period provided in paragraph (f)(2)(i)(A) of this section unless any retirement benefit provided to the employee is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. In determining whether the benefit is nonforfeitable, the special rule in paragraph (d)(2)(ii) of this section is modified in two respects during the transition period: first, the percentage of compensation required to be available for distribution is reduced from 7.5 percent to 6 percent; and second, the period of service with respect to which compensation must be determined is modified to include all periods of participation by the employee in the system since July 1, 1991.

(ii) *Application of minimum retirement benefit requirement to defined contribution retirement systems in plan years beginning before 1993.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, meets the minimum retirement benefit requirement of paragraph (e) (2) of this section with respect to an employee for any plan year beginning before January 1, 1993, if mandatory allocations to the employee's account (not including earnings) for a period are at least 6 percent (rather than 7.5 percent) of the employee's compensation for service to the State, political subdivision or instrumentality during the period, and the plan otherwise meets the requirements of paragraph (e)(2)(iii) of this section. This transition rule is only available with respect to an employee who is actually covered under the system on November 5, 1990, and to an employee who becomes a participant after November 5, 1990, if he or she is employed in a

position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. In addition, this transition rule is not available with respect to a part-time, seasonal or temporary employee unless the mandatory allocation required under this paragraph (f)(2)(ii) is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. A retirement system is not described in this paragraph (f)(2)(ii) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under all the facts and circumstances.

(iii) *Application of qualified participant rules.* A participant with respect to whom relief is granted under paragraph (f)(2)(i)(A) of this section may be treated as a qualified participant in the defined benefit retirement system on a given day if, on that day, he or she is actually a participant in the retirement system, and, on that day, it is reasonable to believe that the participant will actually accrue a benefit before the end of the plan year of such retirement system in which the determination is made. A participant is not treated as accruing a benefit for purposes of this rule if his or her accrued benefits increase solely as a result of an increase in compensation. However, an employee is treated as a qualified participant for a plan year if the employee meets all of the applicable conditions for accruing the maximum current benefit for such year but fails to accrue a benefit solely because of a uniformly applicable benefit limit under the plan. In addition, an employee may be treated as a qualified participant in the system on a given day if the employee is a re-hired annuitant within the meaning of paragraph (d)(4)(ii) of this section. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section but does not meet the requirements of paragraph (e)(2) of this section. If the plan is not subject to the minimum retirement benefit requirement, an employee who is a participant in the retirement plan as of the end of a plan year beginning before January 1, 1993, and may reasonably be expected to accrue a benefit under the plan by the end of such plan year may be treated as a qualified participant in the plan throughout the plan year regardless of the actual amount of the accrual.

[T.D. 8354, 56 FR 29570, June 28, 1991; 56 FR 40246, Aug. 14, 1991, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998; T.D. 8891, 65 FR 44682, July 19, 2000]

§ 31.3121(b)(8)-1 Services performed by a minister of a church or a member of a religious order.

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(a) *In general.* Services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of his duties required by such order, are excluded from employment, except that services performed by a member of such an order in the exercise of such duties (whether performed for the order or for another employer) are included in employment if an election of coverage under section 3121(r) and §31.3121 (r)–1 is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs. For provisions relating to the election available to certain ministers and

members of religious orders with respect to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed by them, see Part 1 of this chapter (Income Tax Regulations).

(b) *Service by a minister in the exercise of his ministry.* Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination. The following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(1) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of the particular religious body constituting his church or church denomination.

(2) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term “religious organization” has the same meaning and application as is given to the term for income tax purposes.

(3) (i) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

(ii) The rule in paragraph (b)(3)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(4) (i) If a minister is performing service for an organization which is operated as an integral agency, of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control conduct, and maintenance of such organization (see paragraph (b)(2) of this section) is in the exercise of his ministry.

(ii) The rule in paragraph (b)(4)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(5) (i) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry.

(ii) The rule in paragraph (b)(5)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1) Section 3121(b)(8)(A) does not except from employment service performed by a duly ordained, commissioned, or licensed minister of a church which is not in the exercise of his ministry.

(2) (i) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, paragraph (c)(3) of this section.

(ii) The rule in paragraph (c)(2)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither a religious organization nor operated as an integral agency of a religious organization. M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the taxes, even though such service may involve the ministration of sacerdotal function or the conduct of religious worship. Thus, for

example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order.* Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such service is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(8)-2 Services in employ of religious, charitable, educational, or certain other organizations exempt from income tax.

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(a) Services performed by an employee in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a) are excepted from employment. However, this exception does not apply to services with respect to which a certificate, filed pursuant to section 3121 (k) or (r), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. For provisions relating to the services with respect to which such a certificate is in effect, see §§31.3121(k)–1 and 31.3121(r)–1.

(b) For provisions relating to exemption from income tax of an organization described in section 501 (c)(3), see Part 1 of this chapter (Income Tax Regulations). For provisions relating to waiver by an organization of its exemption from the taxes imposed by sections 3101 and 3111, see §31.3121(k)–1. See also §31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; §31.3121(b)(10)–1, relating to services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax; §31.3121(b)(10)–2, relating to services performed in the employ of a school, college, or university by certain students; and §31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(9)-1 Railroad industry; services performed by an employee or an employee representative as defined in section 3231.

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Services performed by an individual as an "employee" or as an "employee representative", as those terms are defined in section 3231, are excepted from employment. For definitions of employee and employee representatives, see §§31.3231(b)–1 and 31.3231(c)–1.

§ 31.3121(b)(10)-1 Services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax.

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(a) Services performed by an employee in a calendar quarter in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 are excepted from employment if the remuneration for the services is less than $50. The test relating to remuneration of $50 is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. The exception applies separately with respect to each organization for which the employee renders services in a calendar quarter. The type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed and the amount of the remuneration for services performed by the employee in the calendar quarter. For provisions relating to exemption from income tax under section 501(a) or 521, see Part 1 of this chapter (Income Tax Regulations).

Example 1. X is a local lodge of a fraternal organization and is exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(8). X has two paid employees, A, who serves exclusively as recording secretary for the lodge, and B, who performs services for the lodge as janitor of its clubhouse. For services performed during the first calendar quarter of 1955 (that is, January 1, 1955, through March 31, 1955, both dates inclusive) A earns a total of $30. For services performed by certain student quarter B earns $180. Since the remuneration for the services performed by A during such quarter is less than $50, all of such services are expected, and the taxes do not attach with respect to any of the remuneration for such services. Since the remuneration for the services performed by B during such quarter, however, is not less than $50, none of such services are excepted, and the taxes attached with respect to all of the remuneration for such services (that is, $180) as and when paid.

Example 2. The facts are the same as in example 1, above, except that on April 1, 1955, A's salary is increased and, for services performed during the calendar quarter beginning on that date (that is, April 1, 1955, through June 30, 1955, both dates inclusive), A earns a total of $60. Although all of the services performed by A during the first quarter were excepted, none of A's services performed during the second quarter are excepted since the remuneration for such services is not less than $50. The taxes attach with respect to all of the remuneration for services performed during the second quarter (that is, $60) as and when paid.

Example 3. The facts are the same as in example 1, above, except that A earns $120 for services performed during the year 1955, and such amount is paid to him in a lump sum at the end of the year. The services

performed by A in any calendar quarter during the year are excepted if the portion of the $120 attributable to services performed in that quarter is less than $50. If, however, the portion of the $120 attributable to services performed in any calendar quarter during the year is not less than $50, the services during that quarter are not excepted, and the taxes attach with respect to that portion of the remuneration attributable to his services in that quarter.

(b) See §31.3121(b)(8)–2, relating to services performed in the employ of religious, charitable, educational, and certain other organizations exempt from income tax; §31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; §31.3121(b)(10)–2, relating to services performed by certain students in the employ of a school, college, or university or of a nonprofit organization auxiliary to a school, college, or university; and §31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(10)-2 Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

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(a) *General rule.* (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

(2) Services performed in the employ of an organization which is—

(i) Described in section 509(a)(3) and §1.509(a)–4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university within the meaning of paragraph (c) of this section; and

(iii) Operated, supervised, or controlled by or in connection with the school, college, or university; are excepted from employment, if the services are performed by a student who is enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218 (c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the

agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act. For the definitions of "operated, supervised, or controlled by", "supervised or controlled in connection with", and "operated in connection with", see paragraphs (g), (h), and (i), respectively, of §1.509(a)–4.

(b) *Statutory tests.* For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is affiliated within the meaning of paragraph (a)(2) of this section.

(c) *School, College, or University.* An organization is a *school, college, or university* within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) *Student Status—general rule.* Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the employee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) *Enrolled and regularly attending classes.* An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which

the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) *Course of study.* An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) *Incident to and for the purpose of pursuing a course of study.* (i) *General rule.* An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

(ii) *Student status determined with respect to each academic term.* Whether an employee's services are

incident to and for the purpose of pursuing a course of study is determined separately with respect to each academic term. If the relevant facts and circumstances with respect to an employee's relationship with the employer change significantly during an academic term, whether the employee's services are incident to and for the purpose of pursuing a course of study is reevaluated with respect to services performed during the remainder of the academic term.

(iii) *Full-time employee.* The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) *Evaluating educational aspect.* The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) *Evaluating service aspect.* The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) *Normal work schedule and hours worked.* If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) *Professional employee.* (*1*) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(*i*) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(*ii*) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(*iii*) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(*2*) *Licensed, professional employee.* If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) *Employment Benefits.* Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d)(5) provided to a teaching or research assistant who is a graduate student), or benefits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional weight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) *Examples.* The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this *example,* C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this *example,* D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this *example,* D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized

organization in the medical specialty. E's normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week.

(ii) In this *example,* E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B. S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this *example,* F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcontractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this *example,* G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this *example,* H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly,

H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this *example,* J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) *Effective date.* Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

(g) For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see §31.3121(b)(2)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975; T.D. 9167, 69 FR 76407, Dec. 21, 2004]

§ 31.3121(b)(11)-1 Services in the employ of a foreign government.

top

(a) Services performed by an employee in the employ of a foreign government are excepted from employment. The exception includes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, or as a nondiplomatic representative thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial. It is also

immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

§ 31.3121(b)(12)-1 Services in employ of wholly owned instrumentality of foreign government.

top

(a) Services performed by an employee in the employ of certain instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if—

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial.

§ 31.3121(b)(13)-1 Services of student nurse or hospital intern.

top

(a) Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.

(b) Services performed before 1966 as an intern (as distinguished from a resident doctor), in the employ of a hospital are excepted from employment, if the intern has completed a 4 years' course in a medical school chartered or approved pursuant to State law.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18017, Dec. 4, 1968]

§ 31.3121(b)(14)-1 Services in delivery or distribution of newspapers, shopping news, or magazines.

top

(a) *Services of individuals under age 18.* Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, are excepted from employment. Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted from employment. The services are excepted irrespective of the form or method of compensation. Incidental services by the employees who makes the house-to-house delivery, such as services in assembling newspapers, are considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, are excepted from employment. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not within the exception. Thus, the services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer are not within the exception. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, are considered to be within the exception.

§ 31.3121(b)(15)-1 Services in employ of international organization.

top

(a) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 7701(a)(18) provides as follows:

Sec. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(2) Section 1 of the International Organizations Immunities Act provides as follows:

Sec. 1 [*International Organizations Immunities Act.*] For the purposes of this title [International Organizations Immunities Act], the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The president shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3121(b)(16)-1 Services performed under share-farming arrangement.

top

(a) The term "employment" does not include services performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(1) Such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(2) The agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(3) The amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced.

For purposes of this exception, the arrangement pursuant to which the individual's services are performed must meet the specified statutory conditions.

(b) If the arrangement between the parties provides that the individual who undertakes to produce a crop or livestock is to be compensated at a specified rate of pay or is to receive a fixed sum of money or a stipulated quantity of the commodities to be produced, without regard to the amount actually produced, as distinguished from a proportionate share of the crop or livestock, or the proceeds therefrom, the services performed by such individual in the production of such crop or livestock is not within the exception.

(c) For provisions relating to the status, under the Self-Employment Contributions Act of 1954, of the services which are excepted from "employment" under this section, see the regulations under section 1402(a) in Part 1 of this chapter (Income Tax Regulations).

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(17)-1 Services in employ of Communist organization.

top

The term "employment" does not include services performed in the employ of any organization in any calendar quarter beginning after June 30, 1956, and during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950 (50 U.S.C. 781 et seq.), as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization.

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(18)-1 Services performed by a resident of the Republic of the Philippines while temporarily in Guam.

top

(a) Services performed after 1960 by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101) are excepted from employment.

(b) Section 101(a)(15)(H) of the Immigration and Nationality Act provides as follows:

Sec. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter—

* * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(19)-1 Services of certain nonresident aliens.

top

(a) (1) Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, are excepted from employment if the services are performed to carry out a purpose for which the individual was admitted. For purposes of this section an alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (F) or (J) is deemed to be a nonresident alien individual. The preceding sentence does not apply to the extent it is inconsistent with section 7701(b) and the regulations under that section. A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (J) includes an alien individual admitted to the United States as an “exchange visitor” under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) If services are performed by a nonresident alien individual's alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, the services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry out such purpose.

(b) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides in part as follows:

Sec. 101. *Definitions.* [Immigration and Nationality Act (68 Stat. 166)]

(a) As used in this chapter— * * *

(15) The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

* * * * *

(Sec. 101, Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534)

[T.D. 6744, 29 FR 8313, July 2, 1964, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3121(b)(20)-1 Service performed on a boat engaged in catching fish.

top

(a) *In general.* (1) Service performed on or after December 31, 1954, by an individual on a boat engaged in catching fish or other forms of aquatic animal life (hereinafter “fish”) are excepted from employment if—

(i) The individual receives a share of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish or a share of the proceeds from the sale of the catch,

(ii) The amount of the individual's share depends solely on the amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish.

(iii) The individual does not receive and is not entitled to receive, any cash remuneration, other than remuneration that is described in sub-division (1) of this subparagraph, and

(iv) The crew of the boat (or of each boat from which the individual receives a share of the catch) normally is made up of fewer than 10 individuals.

(2) The requirement of paragraph (a)(1)(ii) is not satisfied if there exists an agreement with the boat's (or boats') owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.*, a collective agreement which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than a share of the catch and their services are not excepted from employment by section 3121(b)(20).

(3) The operating crew of a boat includes all persons on the boat (including the captain) who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish. See §1.6050A–1 for reporting requirements for the operator of a boat engaged in catching fish with respect to individuals performing services described in this section.

(4) During the same return period, service performed by a crew member may be excepted from employment by section 3121(b)(20) and this section for one voyage and not so excepted on a subsequent voyage on the same or on a different boat.

(5) During the same voyage, service performed by one crew member may be excepted from employment by section 3121(b)(20) and this section but service performed by another crew member may not be so excepted.

(b) *Special rule.* Services performed after December 31, 1954, and before October 4, 1976, on a boat by an individual engaged in catching fish are not excepted from employment for any voyage (for purposes of section 3121(b) and the corresponding regulations), even though the individual satisfies the requirements of paragraphs (a)(1)(i) through (iv) of this section, if the owner or operator of the boat engaged in catching fish treated the individual as an employee. For purposes of this subparagraph, the individual was treated as an employee if—

(1) Form 941 was voluntarily filed by the boat operator or owner, regardless of whether the tax imposed by chapter 21 was withheld. For purposes of this subdivision, the filing of Form 941 is not voluntary if the filing was the result of action taken by the Service pursuant to section 6651(a) (relating to addition to the tax for failure to file tax return or to pay tax);

(2) The boat owner or operator withheld from the individual's share the tax imposed by chapter 21,

regardless of whether the tax was paid over to the Service; or

(3) The boat owner or operator made full or partial payment of the tax imposed by chapter 21, unless the payment was made pursuant to section 7422(a) (relating to no civil actions for refund prior to filing claim for refund). However, for purposes of this paragraph crew members whose services, but for paragraphs (a)(1)(i) through (iii), would have been excepted from employment by section 3121(b)(20) are not required to pay self-employment tax on income earned in performing those services. See §1.1402(c)–3(g). Moreover, in such cases the employer is not entitled to a refund of the employer's share of any tax imposed by chapter 21 that was paid.

[T.D. 7716, 45 FR 57123, Aug. 27, 1980]

§ 31.3121(c)-1 Included and excluded services.

top

(a) If a portion of the services performed by an employee for an employer during a pay period constitutes employment, and the remainder does not constitute employment, all the services performed by the employee for the employer during the period shall for purposes of the taxes be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3121(b) constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period shall be deemed to be employment.

(c) If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following example:

Example. The AB Club, which is a local college club within the meaning of section 3121(b)(2), employs D, a student who is enrolled and is regularly attending classes at a university, to perform domestic service for the club and to keep the club's books. The domestic services performed by D for the AB Club do not constitute employment, and his services as the club's bookkeeper constitute employment. D receives a payment at the end of each month for all services which he performs for the club. During a particular month D spends 60 hours in performing domestic service for the club and 40 hours as the club's bookkeeper. None of D's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes

employment. During another month D spends 35 hours in the performance of domestic services and 60 hours in keeping the club's books. All of D's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

(e) For purposes of this section, a "pay period" is the period (of not more than 31 consecutive calendar days) for which a payment of remuneration is ordinarily made to the employee by the employer. Thus, if the periods for which payments of remuneration are made to the employee by the employer are of uniform duration, each such period constitutes a "pay period". If, however, the periods occasionally vary in duration, the "pay period" is the period for which a payment of remuneration is ordinarily made to the employee by the employer, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the "pay period" is still the calendar week; or if, instead, that employee is sent on a trip by such employer and receives at the end of the third week a single remuneration payment for three weeks' services, the "pay period" is still the calendar week.

(f) If there is only one period (and such period does not exceed 31 consecutive calendar days) for which a payment of remuneration is made to the employee by the employer, such period is deemed to be a "pay period" for purposes of this section.

(g) The rules set forth in this section do not apply (1) with respect to any services performed by the employee for the employer if the periods for which such employer makes payments of remuneration to the employee vary to the extent that there is no period "for which a payment of remuneration is ordinarily made to the employee", or (2) with respect to any services performed by the employee for the employer if the period for which a payment of remuneration is ordinarily made to the employee by such employer exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the employer during a pay period if any of such service is excepted by section 3121 (b)(9) (see §31.3121(b)(9)–1).

(h) If during any period for which a person makes a payment of remuneration to an employee only a portion of the employee's services constitutes employment, but the rules prescribed in this section are not applicable, the taxes attach with respect to such services as constitute employment as defined in section 3121(b).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(d)-1 Who are employees.

top

(a) *In general.* (1) Whether an individual is an employee with respect to services performed after 1954

is determined in accordance with section 3121(d) and (o) and section 3506. This section of the regulations applies with respect only to services performed after 1954. Whether an individual is an employee with respect to services performed after 1936 and before 1940 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether an individual is an employee with respect to services performed after 1939 and before 1951 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether an individual is an employee with respect to services performed after 1950 and before 1955 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart whether or not he is an employee under any of the other tests.

(3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see §31.3121(b)–3).

(b) *Corporate officers.* Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be

accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) *Special classes of employees.* (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an

employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

(3) The factual situations set forth below are illustrative of some of the individuals falling within each of the above enumerated occupational groups. The illustrative factual situations are as follows:

(i) *Agent-driver or commission-driver.* This occupational group includes agent-drivers or commission-drivers who are engaged in distributing meat or meat products, vegetables or vegetable products, fruit or fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for their principals. An agent-driver or commission-driver includes an individual who operates his own truck or the truck of the person for whom he performs services, serves customers designated by such person as well as those solicited on his own, and whose compensation is a commission on his sales or the difference between the price he charges his customers and the price he pays to such person for the product or service.

(ii) *Full-time life insurance salesman.* An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

(iii) *Home workers.* This occupational group includes a worker who performs services off the premises of the person for whom the services are performed, according to specifications furnished by such person, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him. For provisions relating to the determination of wages in the case of a home worker to whom this subdivision is applicable, see §31.3121(a)(10)–1.

(iv) *Traveling or city salesman.* (*a*) This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to

retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity.

(*b*) In order for a city or traveling salesman to be included within this occupational group, his entire or principal business activity must be devoted to the solicitation of orders for one principal. Thus, the multiple-line salesman generally is not within this occupational group. However, if the salesman solicits orders primarily for one principal, he is not excluded from this occupational group solely because of side-line sales activities on behalf of one or more other persons. In such a case, the salesman is within this occupational group only with respect to the services performed for the person for whom he primarily solicits orders and not with respect to the services performed for such other persons. The following examples illustrate the application of the foregoing provisions:

Example 1. Salesman A's principal business activity is the solicitation of orders from retail pharmacies on behalf of the X Wholesale Drug Company. A also occasionally solicits orders for drugs on behalf of the Y and Z Companies. A is within this occupational group with respect to his services for the X Company but not with respect to his services for either the Y Company or the Z Company.

Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R Tool Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this occupational group with respect to the services performed for either the R Company or the S Company.

Example 3. Salesman C's principal business activity is the house-to-house solicitation of orders on behalf of the T Brush Company. C occasionally solicits such orders from retail stores and restaurants. C is not within this occupational group.

(4)(i) The fact that an individual falls within one of the enumerated occupational groups, however, does not make such individual an employee under this paragraph unless (*a*) the contract of service contemplates that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by such individual, (*b*) such individual has no substantial investment in the facilities used in connection with the performance of such services (other than in facilities for transportation) and (*c*) such services are part of a continuing relationship with the person for whom the services are performed and are not in the nature of a single transaction.

(ii) The term “contract of service”, as used in this paragraph, means an arrangement, formal or informal, under which the particular services are performed. The requirement that the contract of service shall contemplate that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by the individual means that it is not contemplated that any material part of the services to which the contract relates in such occupation will be delegated to any other person by the individual who undertakes under the contract to perform such services.

(iii) The facilities to which reference is made in this paragraph include equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment in an automobile by an individual which is used primarily for his own transportation in connection with the performance of services for another person has no significance under this paragraph, since such investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for the transportation of the goods or commodities to which the services relate is to be excluded in determining the investment in a particular case. If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of this paragraph, since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the employee concept under this paragraph.

(iv) If the services are not performed as part of a continuing relationship with the person for whom the services are performed, but are in the nature of a single transaction, the individual performing such services is not an employee of such person within the meaning of this paragraph. The fact that the services are not performed on consecutive workdays does not indicate that the services are not performed as part of a continuing relationship.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964; T.D. 7691, 45 24129, Apr. 9, 1980]

§ 31.3121(d)-2 Who are employers.

 top

(a) Every person is an employer if he employs one or more employees. Neither the number of employees employed nor the period during which any such employee is employed is material for the purpose of determining whether the person for whom the services are performed is an employer.

(b) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. A trust or estate, rather than the fiduciary acting for on behalf of the trust or estate, is generally the employer.

(c) Although a person may be an employer under this section, services performed in his employ may be of such a nature, or performed under such circumstances, as not to constitute employment (see §31.3121(b)–3).

§ 31.3121(e)-1 State, United States, and citizen.

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(a) When used in the regulations in this subpart, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to services performed after 1960) Guam and American Samoa.

(b) When used in the regulations in this subpart, the term "United States", when used in a geographical sense, means the several states (including the Territories of Alaska and Hawaii before their admission as States), the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. When used in the regulations in this subpart with respect to services performed after 1960, the term "United States" also includes Guam and American Samoa when the term is used in a geographical sense. The term "citizen of the United States" includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

[T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(f)-1 American vessel and aircraft.

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(a) The term "American vessel" means any vessel which is documented (that is, registered, enrolled, or licensed) or numbered in conformity with the laws of the United States. It also includes any vessel which is neither documented nor numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. (For provisions relating to the terms "State" and "citizen", see §31.3121 (e)–1.)

(b) The term "American aircraft" means any aircraft registered under the laws of the United States.

(c) For provisions relating to services performed outside the United States on or in connection with an American vessel or American aircraft, see paragraph (c)(2) of §31.3121(b)–3.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(g)-1 Agricultural labor.

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(a) *In general.* (1) The term "agricultural labor" as defined in section 3121(g) includes services of the

character described in paragraph (b), (c), (d), (e), and (f) of this section. In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(2) The term "farm" as used in the regulations in this subpart includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets) do not constitute "farms".

(3) For provisions relating to the exception from employment provided with respect to services performed by certain foreign agricultural workers and to services performed before 1959 in connection with the production or harvesting of certain oleoresinous products, see §31.3121(b)(1)–1. For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for agricultural labor and to the test for determining whether cash remuneration paid for agricultural labor constitutes wages, see §31.3121(a)(8)–1.

(b) *Services described in section 3121(g)(1).* (1) Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(i) The cultivation of the soil;

(ii) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(iii) The raising or harvesting of any other agricultural or horticultural commodity.

(2) Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm. Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.

(c) *Services described in section 3121(g)(2).* (1) The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms constitute agricultural labor, provided the major part of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

(2) The services described in paragraph (c)(1)(i) of this section may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

(3) Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the term "agricultural labor" does not include services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

(d) *Services described in section 3121(g)(3).* Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying or storing water for farming purposes; or

(3) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 3121(g)(4).* (1) Services performed by an employee in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity constitute agricultural labor if:

(i) Such services are performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization);

(ii) Such services are performed with respect to the commodity in its unmanufactured state; and

(iii) Such operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period.

(2) The term "operator of a farm" as used in this paragraph means an owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.

(3) The services described in this paragraph do not constitute agricultural labor if performed in the employ of a cooperative organization. The term "organization" includes corporations, joint-stock companies, and associations which are treated as corporations pursuant to section 7701(a)(3) of the Internal Revenue Code. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which the services involved are performed.

(4) Processing services which change the commodity from its raw or natural state do not constitute agricultural labor. For example the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor. Likewise, services performed in the processing of maple sap into maple sirup or maple sugar do not constitute agricultural labor. On the other hand, services rendered in the cutting and drying of fruits or vegetables are processing operations which do not change the character of the fruits or vegetables and, therefore, constitute agricultural labor, if the other requisite conditions are met. Services performed with respect to a commodity after its character has been changed from its raw or natural state by a processing operation do not constitute agricultural labor.

(5) The term "commodity" refers to a single agricultural or horticultural product, for example, all apples are to be treated as a single commodity, while apples and peaches are to be treated as two separate commodities. The services with respect to each such commodity are to be considered separately in determining whether the condition set forth in paragraph (e)(1)(iii) of this section has been satisfied. The portion of the commodity produced by an operator or group of operators with respect to which the services described in this paragraph are performed by a particular employee shall be determined on the basis of the pay period in which such services were performed by such employee.

(6) The services described in this paragraph do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in this paragraph must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

(f) *Services described in section 3121(g)(5).* (1) Service not in the course of the employer's trade or business (see paragraph (a)(1) of §31.3121(a)(7)–1) or domestic service in a private home of the employer (see paragraph (a)(2) of §31.3121(a)(7)–1) constitutes agricultural labor if such service is performed on a farm operated for profit. The determination whether remuneration for any such service performed on a farm operated for profit constitutes wages is to be made under §31.3121(a)(8)–1 rather

than under §31.3121(a)(7)–1. For provisions relating to the exception from employment provided with respect to any such service performed after 1960 by a father or mother in the employ of his or her son or daughter, see §31.3121(b)(3)–1.

(2) Generally, a farm is not operated for profit if it is occupied by the employer primarily for residential purposes, or is used primarily for the pleasure of the employer or his family such as for the entertainment of guests or as a hobby of the employer or his family.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(h)-1 American employer.

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(a) The term "American employer" means an employer which is (1) the United States or any instrumentality thereof, (2) an individual who is a resident of the United States, (3) a partnership, if two-thirds or more of the partners are residents of the United States, (4) a trust, if all of the trustees are residents of the United States, or (5) a corporation organized under the laws of the United States or of any State. For provisions relating to the terms "State" and "United States", see §31.3121(e)–1.

(b) For provisions relating to services performed outside the United States by a citizen of the United States as an employee for an American employer, see paragraph (c)(3) of §31.3121(b)–3 and paragraph (e) of §31.3121(b)(4)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)-1 Computation to nearest dollar of cash remuneration for domestic service.

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(a) An employer may, for purposes of the act, elect to compute to the nearest dollar any payment of cash remuneration for domestic service described in section 3121(a)(7)(B) (see §31.3121(a)(7)–1) which is more or less than a whole-dollar amount. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to one dollar. For example, any amount actually paid between $4.50 and $5.49, inclusive, may be treated as $5 for purposes of the taxes imposed by the act. If an employer elects this method of computation with respect to any payment of cash remuneration made in a calendar year for domestic service in his private home, he must use the same method in computing each payment of cash remuneration of more or less than a whole-dollar amount made to each of his employees in such calendar year for domestic service in his private home. Moreover, if an employer elects this method of computation with respect to payments of the prescribed character made in any calendar year, the amount of each payment of cash remuneration so

computed to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of the act. Thus, the amount of cash payments so computed to the nearest dollar shall be used for purposes of determining whether such payments constitute wages; for purposes of applying the employee and employer tax rates to the wage payments; for purposes of any required record keeping; and for purposes of reporting and paying the employee tax and employer tax with respect to such wage payments.

(b) The provisions of this section apply to any cash payment for domestic service in a private home of the employer made on or after January 1, 1994. For rules applicable to any cash payment for domestic service in a private home of the employer made prior to January 1, 1994, *see* §31.3121(i)–1 in effect at such time (*see* 26 CFR part 31 contained in the edition of 26 CFR parts 30 to 39, revised as of April 1, 2006).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 9266, 71 FR 35157, June 19, 2006]

§ 31.3121(i)-2 Computation of remuneration for service performed by an individual as a member of a uniformed service.

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In the case of an individual performing service after December 31, 1956, as a member of a uniformed service (see section 31.3121(n)), to which the provisions of section 3121(m)(1) (see §31.3121(m)) are applicable, the term “wages” shall, subject to the provisions of section 3121(a)(1) (see §31.3121(a)–1), include as the individual's remuneration for such service only his basic pay as described in section 102(10) of the Servicemen's and Veterans' Survivor Benefits Act (38 U.S.C. 401(1), 403; 72 Stat. 1126).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)-3 Computation of remuneration for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.

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In the case of an individual performing service in his capacity as a volunteer or volunteer leader within the meaning of the Peace Corps Act (see section 31.3121(p)), the term “wages” shall, subject to the provisions of section 3121(a)(1) (see §31.3121(a)–1), include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act (22 U.S. C. 2501; 75 Stat. 612).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)-4 Computation of remuneration for service performed by certain members of religious orders.

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In any case where an individual is a member of a religious order (as defined in section 3121(r)(2) and paragraph (b) of §31.3121(r)–1) performing service in the exercise of duties required by such order, and an election of coverage under section 3121(r) and §31.3121(r)–1 is in effect with respect to such order or the autonomous subdivision thereof to which such member belongs, the term "wages" shall, subject to the provisions of section 3121(a)(1) (relating to definition of wages), include as such individual's remuneration for such service the fair market value of any board, lodging, clothing, and other perquisites furnished to such member by such order or subdivision or by any other person or organization pursuant to an agreement (whether written or oral) with such order or subdivision. Such other perquisites shall include any cash either paid by such order or subdivision or paid by another employer and not required by such order or subdivision to be remitted to it. For purposes of this section, perquisites shall be considered to be furnished over the period during which the member receives the benefit of them. (See example 4 of this section.) In no case shall the amount included as such individual's remuneration under this paragraph be less than $100 a month. All relevant facts and elements of value shall be considered in every case. Where the fair market value of any board, lodging, clothing, and other perquisites furnished to all members of an electing religious order or autonomous subdivision (or to all in a group of members) does not vary significantly, such order or subdivision may treat all of its members (or all in such group of members) as having a uniform wage. The provisions of this section may be illustrated by the following examples of the treatment of particular perquisites:

Example 1. M is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Under section 3121(i)(4), M must include in the wages of its members the fair market value of the clothing it provides for its members. M and several other religious orders using essentially the same type of religious habit purchase clothing for their members from either of two suppliers in arms-length transactions. The fair market value of such clothing (*i.e.*, the price at which such items would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell) is determined by reference to the actual sales price of these suppliers to the religious orders.

Example 2. N is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). N operates a seminary adjacent to a university. Students at the university obtain lodging and board on campus from the university for its fair market value of $2,000 for the school year. Such lodging and board is essentially the same as that provided by N at its seminary to N's members subject to a vow of poverty. Accordingly, the amount to be included in the "wages" of such members with respect to lodging and board for the same period of time is $2,000.

Example 3. O is a religious order which requires its members to take a vow of poverty and to observe silence, and which has made an election under section 3121(r). O operates a monastery in a remote rural area. Under section 3121(i)(4), O must include in the wages of its members assigned to this monastery the fair market

value of the board and lodging furnished to them. In making a determination of the fair market value of such board and lodging, the remoteness of the monastery, as well as the smallness of the rooms and the simplicity of their furnishings, affect this determination. However, the facts that the facility is used by a religious order as a monastery and that the order's members maintain silence do not affect the fair market value of such items.

Example 4. P is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Several of P's members are attending a university on a full-time basis. The fair market value of the board and lodging of each of such members at the university is $1,000 per semester. P pays the university $1,000 at the beginning of each semester for the board and lodging of each of such members. In addition, P gives each such member a $400 cash advance to cover his miscellaneous expenses during the semester. Under section 3121(i)(4), P must prorate the fair market value of such members' board and lodging, as well as the miscellaneous items, over the semester and include such value in the determination of “wages”.

Example 5. Q is a religious order which is a corporation organized under the laws of Wisconsin, which requires its members to take a vow of poverty, and which has made an election under section 3121(r). Q has convents in rural South America and in suburbs and central city areas of the United States. Characteristically, in the United States its suburban convents provide somewhat larger and newer rooms for its members than do its convents in city areas. Moreover, its suburban convents have more extensive grounds and somewhat more elaborate facilities than do its older convents in city areas. However, both types of convents limit resident members to a single, plainly furnished room and provide them meals which are comparable. Q's members in South America live in extremely primitive dwellings and otherwise have extremely modest perquisites. Under section 3121(i)(4), Q may report a uniform wage for its members who live in suburban convents and city convents in the United States, as the board, lodging, and perquisites furnished these members do not vary significantly from one convent to the other. Q may report another uniform wage (but not less than $100 per month apiece) for its members who are citizens of the United States and who reside in South America based on the fair market value of the perquisites furnished these individuals, as the fair market value of the perquisites furnished these individuals varies significantly from that of those furnished its members who live in its domestic convents but does not vary significantly among members in South America whose wages are subject to tax.

[T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(j)-1 Covered transportation service.

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(a) *Transportation systems acquired in whole or in part after 1936 and before 1951*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, all service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and before 1951. For purposes of this subparagraph, it is immaterial whether any part of the transportation system was acquired before 1937 or after 1950, whether the employee was hired before, during, or after 1950, or whether the employee had been employed by the employer from whom the State or political subdivision acquired its transportation system or any part

thereof.

(2) *General retirement system protected by State constitution.* Except as provided in paragraph (a)(3) of this section, service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system acquired in whole or in part from private ownership after 1936 and before 1951 does not constitute covered transportation service, if substantially all service in connection with the operation of the transportation system was, on December 31, 1950, covered under a general retirement system providing benefits which are protected from diminution or impairment under the State constitution by reason of an express provision, dealing specifically with retirement systems established by the State or political subdivisions of the State, which forbids such diminution or impairment.

(3) *Additions to certain transportation systems by acquisition after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was acquired in whole or in part by a State or political subdivision thereof from private ownership after 1936 and before 1951 and then only in case service for such existing transportation system did not constitute covered transportation service by reason of the provisions of subparagraph (2) of this paragraph. Service in connection with the operation of such transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(b) *Transportation systems in operation on December 31, 1950, no part of which was acquired after 1936 and before 1951*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, no service performed in the employ of a State or a political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if no part of such transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and before 1951.

(2) *Additions acquired after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was operated by a State or political subdivision on December 31, 1950, but no part of which was acquired from private ownership after 1936 and before 1951. Service in connection with the operation of such

transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(c) *Transportation systems acquired after 1950.* All service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if the transportation system was not operated by the State or political subdivision before 1951 and, at the time of its first acquisition after 1950 from private ownership of any part of its transportation system, the State or political subdivision did not have a general retirement system covering substantially all service performed in connection with the operation of the transportation system.

(d) *Definitions.* For purposes of this section:

(1) The term “general retirement system” means any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both; but such term does not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.

(2) A transportation system or a part thereof is considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by the employees in connection with the operation of the system or an acquired part thereof constituted employment under the act or under subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement entered into pursuant to section 218 of the Social Security Act (42 U.S.C. 418), and some of such employees became employees of the State or political subdivision in connection with and at the time of such acquisition.

(3) The term “political subdivision” includes an instrumentality of a State, of one or more political subdivisions of a State, or of a State and one or more of its political subdivisions.

(4) The term “employment” includes service covered by an agreement entered into pursuant to section 218 of the Social Security Act.

§ 31.3121(k)-1 Waiver of exemption from taxes.

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(a) *Who may file a waiver certificate*—(1) *In general.* If services performed in the employ of an organization are excepted from employment under section 3121(b)(8)(B), the organization may file a waiver certificate on Form SS–15, together with a list on Form SS–15a, certifying that it desires to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to services performed by its employees. (For provisions relating to the exception under section 3121(b)(8)(B), see that section and §31.3121(b)(8)–2.) A certificate in effect under section 1426(1) of the Internal Revenue Code of 1939 on December 31, 1954, remains in effect under, and is subject to the provisions of, section 3121(k). If the period covered by a certificate filed under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, is terminated by an organization, a certificate may not thereafter be filed by the organization under section 3121(k). For regulations relating to certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).

(2) *Organizations having two separate groups of employees.* If an organization is eligible to file a certificate under section 3121(k), and the organization employs both individuals who are in positions covered by a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof and individuals who are not in such positions, the organization shall divide its employees into two separate groups for purposes of any certificate filed after August 28, 1958. One group shall consist of all employees who are in positions covered by such a fund or system and (i) are members of such fund or system, or (ii) are not members of such fund or system but are eligible to become members thereof. The other group shall consist of all remaining employees. An organization which has so divided its employees into two groups may file a certificate after August 28, 1958, with respect to the employees in either group, or may file a separate certificate after such date with respect to employees in each group.

(3) *Certificates filed before September 14, 1960.* A certificate filed before September 14, 1960, is void unless at least two-thirds of the employees, determined on the basis of the facts which existed as of the date the certificate was filed, concurred in the filing of the certificate, and the organization certified to such concurrence in the certificate. All individuals who were employees of the organization within the meaning of section 3121(d) (see §31.3121(d)–1) shall be included in determining whether two-thirds of the employees of the organization concurred in the filing of the certificate; except that there shall not be included (i) those employees who at the time of the filing of the certificate were performing for the organization services only of the character specified in paragraphs (8)(A), (10)(B), and (13) of section 3121(b) (see §§31.3121(b)(8)–1, 31.3121(b)(10)–2, and 31.3121(b)(13)–1, respectively), (ii) those alien employees who at the time of the filing of the certificate were performing services for such organization under an arrangement which provided for the performance only of services outside the United States not on or in connection with an American vessel or American aircraft, and (iii) in connection with certificates filed after August 28, 1958, those employees who at the time of the filing

of the certificate were in a group to which such certificate was not applicable because of the provisions of section 3121(k)(1)(E). (See paragraph (a)(2) of this section.) As used in this subparagraph, the term "alien employee" does not include an employee who was a citizen of the Commonwealth of Puerto Rico or a citizen of the Virgin Islands, and the term "United States" includes Puerto Rico and the Virgin Islands.

(b) *Execution and amendment of certificate*—(1) *Use of prescribed forms.* An organization filing a certificate pursuant to section 3121(k) shall use Form SS–15, in accordance with the regulations and instructions applicable thereto. The certificate may be filed only if it is accompanied by a list on Form SS–15a, containing the signature, address, and social security account number, if any, of each employee, if any, who concurs in the filing of the certificate. (For provisions relating to account numbers, see §31.6011(b)–2.) If no employee concurs in a certificate filed after September 13, 1960, that fact should be stated on the Form SS–15a. (For provisions relating to the concurrence of employees in certificates filed before September 14, 1960, see paragraph (a)(3) of this section.)

(2) *Amendment of list on Form SS– 15a*—(i) *Certificate filed after August 28, 1958.* The list on Form SS–15a accompanying a certificate filed after August 28, 1958, under section 3121(k), may be amended at any time before the expiration of the twenty-fourth month following the calendar quarter in which the certificate is filed, by filing a supplemental list or lists on Form SS–15a Supplement, containing the signature, address, and social security account number, if any, of each additional employee who concurs in the filing of the certificate.

(ii) *Certificate filed before August 29, 1958.* The list on Form SS–15a which accompanied a certificate filed before August 29, 1958, under section 3121(k) or under section 1426(l) of the Internal Revenue Code of 1939, may be amended by filing a supplemental list or lists on Form SS–15a Supplement at any time after August 31, 1954, and before the expiration of the twenty-fourth month following the first calendar quarter for which the certificate was in effect, or before January 1, 1959, whichever is the later.

(3) *Where to file certificate or amendment.* The certificate on Form SS–15 and accompanying list on Form SS–15a of an organization which is required to make a return on Form 941 pursuant to §31.6011 (a)–1 or §31.6011(a)–4 shall be filed with the internal revenue officer designated in the instructions applicable to Form SS–15 and Form SS–15a. The Form SS–15 and Form SS–15a of any other organization shall be filed in accordance with the provisions of §31.6091–1 which are otherwise applicable to returns. Each Form SS–15a Supplement shall be filed with the internal revenue officer with whom the related Forms SS–15 and SS–15a were filed.

(c) *Effect of waiver*—(1) *In general.* The exception from employment under section 3121(b)(8)(B) does not apply to services with respect to which a certificate, filed pursuant to section 3121(k), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. (See §§31.3121(b)(8) and 31.3121 (b)(8)–2). If an organization has divided its employees into two groups, as set forth in paragraph (a)(2) of this section, a certificate filed with respect to either group shall have no effect with respect to

services performed by an employee as a member of the other group; and the provisions of this subparagraph shall apply as if each group were separately employed by a different organization. A certificate is not terminated if the organization loses its exemption under section 501(a) as an organization of the character described in section 501(c)(3), but continues effective with respect to any subsequent periods during which the organization is so exempt. The certificate of an organization may be in effect without being applicable to services performed by every employee of the organization. Subparagraph (2) of this paragraph relates to the beginning of the period for which a certificate is in effect. Subparagraph (3) of this paragraph relates to the services with respect to which a certificate is in effect. Even though a certificate is in effect with respect to the services of an employee, such services may be excepted from employment under some provision of section 3121(b) other than paragraph (8)(B) thereof. For example, service performed in any calendar quarter in the employ of an organization described in section 501(c)(3) and exempt from income tax under section 501(a) is excepted from employment under section 3121(b)(10)(A) if the remuneration for such service is less than $50, regardless of whether the organization files a certificate.

(2) *Beginning of effective period of waiver*—(i) *Certificate filed after July 30, 1965.* A certificate filed after July 30, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(*a*) The first day of the calendar quarter in which the certificate is filed,

(*b*) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(*c*) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed. Thus, a certificate filed in December 1965 may be made effective, pursuant to this paragraph (c)(2)(i)(*c*), for the period beginning with the first day of the calendar quarter beginning October 1, 1960, or the first day of any other calendar quarter beginning after October 1, 1960, and before October 1, 1965.

(ii) *Certificate filed after August 28, 1958, and before July 31, 1965.* A certificate filed after August 28, 1958, and before July 31, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(*a*) The first day of the calendar quarter in which the certificate is filed,

(*b*) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(*c*) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that, in the case of a certificate filed before 1960, such date may not be earlier than January 1, 1956, and in the case of a certificate filed after 1959 (but before July 31, 1965), such date may not be earlier than the first day of the fourth calendar quarter preceding the quarter in which the certificate is filed. Thus, a certificate filed in December 1959 may be made effective for the calendar quarter beginning January 1, 1956; but a certificate filed in January 1960 may not be made effective for a calendar quarter beginning before January 1, 1959.

(iii) *Certificate filed after 1956 and before August 29, 1958.* A certificate filed by an organization after 1956 and before August 29, 1958 pursuant to section 3121(k), became effective for the period beginning with one of the following dates, as designated by the organization on the certificate:

(*a*) The first day of the calendar quarter in which the certificate was filed, or

(*b*) The first day of the calendar quarter immediately following the quarter in which the certificate was filed.

(iv) *Certificate filed before 1957.* A certificate filed before 1957 pursuant to section 3121(k) became effective for the period beginning with the first day following the close of the calendar quarter in which the certificate was filed. In no case, however, shall a certificate filed under the provisions of section 3121(k) be in effect with respect to services performed before January 1, 1955. (For regulations relating to waiver certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).)

(3) *Services to which certificate applies*—(i) *In general.* If an organization's certificate is in effect (see paragraph (c)(2) of this section), the certificate becomes effective with respect to services performed in its employ by each individual (*a*) who enters the employ of the organization after the calendar quarter in which the certificate is filed, as set forth in paragraph (c)(3)(ii) of this section, or (*b*) whose signature appears on the list on Form SS–15a, as set forth in paragraph (c)(3)(iii) of this section, or (*c*) whose signature appears on a Form SS–15a Supplement, as set forth in paragraph (c)(3)(iv) or (v) of this section. The first date on which such a certificate becomes effective with respect to an employee's services shall be the earliest date applicable under this subparagraph. An organization's certificate is not effective with respect to the services of an employee who is in its employ in the calendar quarter in which the certificate is filed and who does not sign Form SS–15a or Form SS–15a Supplement, so long as his employment relationship with the organization, at the close of the calendar quarter in which the certificate is filed and thereafter, continues without interruption.

(ii) *Employee hired after quarter in which certificate is filed.* If an individual enters the employ of an organization on or after the first day following the close of the calendar quarter in which the organization files a certificate pursuant to section 3121(k), the certificate shall be in effect with respect to services performed by the individual in the employ of the organization on and after the day he enters the employ of the organization. A former employee of the organization who is rehired on or

after the first day following the close of the calendar quarter in which such a certificate is filed shall be considered to have entered the employ of the organization after such calendar quarter, regardless of whether such individual concurred in the filing of the certificate.

(iii) *Employee who signs Form SS–15a.* A certificate on Form SS–15 filed by an organization pursuant to section 3121(k) shall be in effect with respect to services performed by an individual in the employ of the organization on and after the first day for which the certificate is in effect, if such individual's signature appears on the list on Form SS–15a which accompanies such certificate.

(iv) *Employee who signs Form SS–15a Supplement to concur in certificate filed after August 28, 1958.* If the list on Form SS–15a accompanying a certificate filed after August 28, 1958, by an organization pursuant to section 3121(k) is amended in accordance with paragraph (b)(2)(i) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(*a*) On and after the first day for which the certificate is in effect, if the supplemental list is filed on or before the last day of the month following the calendar quarter in which the certificate is filed, or

(*b*) On and after the first day of the calendar quarter in which the supplemental list is filed, if such list is filed after the close of the first month following the calendar quarter in which the certificate is filed.

(v) *Employee who signed Form SS–15a Supplement to concur in certificate filed before August 29, 1958.* If the list on Form SS–15a which accompanied a certificate filed before August 29, 1958, by an organization pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, was amended in accordance with paragraph (b)(2)(ii) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(*a*) On and after the first day for which the certificate is in effect, if the supplemental list was filed on or before the last day of the month following the first calendar quarter for which the certificate was in effect, or

(*b*) On and after the first day following the close of the calendar quarter in which the supplemental list was filed, but not before January 1, 1955, if such list was filed after the close of the first month following the first calendar quarter for which the certificate is in effect.

(4) *Administrative provisions applicable when certificate has retroactive effect.* For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), in any case in which a certificate filed pursuant to section 3121(k)(1) is effective pursuant to section 3121(k)(1)(B)(iii) (as originally enacted and as amended by section 316(a) of the Social

Security Amendments of 1965) for one or more calendar quarters prior to the quarter in which the certificate is filed, the due date for the return and payment of the tax for such prior calendar quarters resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date. A waiver certificate (as described in section 3121(k)(1) and this section) furnished to the Internal Revenue Service after February 12, 1976, shall not be considered filed with the Internal Revenue Service unless interest paid to the organization (or credited to its account) in connection with a claim for credit or refund of taxes, which claim was based upon the exemption from taxes the organization is waiving by such certificate, is repaid. The interest so paid must be repaid only to the extent such interest relates to any taxes for which the organization or its employees would be liable by reason of the waiver certificate. Furthermore, when a waiver certificate has been filed prior to the payment of a refund of taxes based upon the exemption from taxes the organization in waiving, no credit or refund in respect of the taxes for which the exemption has been waived shall be allowed. If repayment of the interest is made as required by this subparagraph, on or before the last day of the calendar month following the calendar quarter in which the certificate is furnished to the Internal Revenue Service, such certificate shall be considered to have been filed on the date it was originally furnished. If repayment occurs after that day, such certificate shall be considered to have been filed on the date of the repayment. References in this subparagraph to a waiver certificate refer also to any supplement to such a certificate.

(d) *Termination of waiver by organization.* (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the organization upon giving to the district director with whom the organization is filing returns 2 years' advance notice in writing of its desire to terminate the effect of the certificate at the end of a specified calendar quarter, but only if, at the time of the receipt of such notice by the district director, the certificate has been in effect for a period of not less than 8 years. The notice of termination shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the organization, (iii) the district director with whom the certificate was filed, (iv) the date on which the certificate became effective, and (v) the date on which the certificate is to be terminated. No particular form is prescribed for the notice of termination.

(2) In computing the effective period which must precede the date of receipt of the notice of termination, there shall be disregarded any period or periods as to which the organization was not exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(3) or under section 101(6) of the Internal Revenue Code of 1939.

(3) The notice of termination may be revoked by the organization by giving, prior to the close of the calendar quarter specified in the notice of termination, a written notice of such revocation. The notice of revocation shall be filed with the district director with whom the notice of termination was filed. The notice of revocation shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name,

address, and identification number of the organization, and (iii) the date of the notice of termination to be revoked. No particular form is prescribed for the notice of revocation.

(e) *Termination of waiver by Commissioner.* (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, upon a finding by the Commissioner that the organization has failed to comply substantially with the requirements applicable with respect to the taxes imposed by the act (or the corresponding provisions of prior law) or is no longer able to comply therewith. The Commissioner shall give the organization not less than 60 days' advance notice in writing that the period covered by the certificate will terminate at the end of the calendar quarter specified in the notice of termination.

(2) The notice of termination may be revoked by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, by giving written notice of revocation to the organization before the close of the calendar quarter specified in the notice of termination.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18018, Dec. 4, 1968; T.D. 7012, 34 FR 7693, May 15, 1969; T.D. 7476, 42 FR 17874, Apr. 4, 1977]

§ 31.3121(k)-2 Waivers of exemption; original effective date changed retroactively.

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(a) *Certificates filed after 1955 and before August 29, 1958.* (1) An organization which filed a certificate under section 3121(k) after 1955 and before August 29, 1958, may file a request on Form SS–15b at any time before 1960 to have such certificate made effective, with respect to the services of individuals who concurred in the filing of such certificate (initially, or by signing a supplemental list on Form SS–15a Supplement which was filed before Aug. 29, 1958) and whose signatures also appeared on such request on Form SS–15b, for the period beginning with the first day of any calendar quarter after 1955 which preceded the first calendar quarter for which the certificate originally was effective.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of a request referred to in paragraph (a)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the request is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(b) *Certificate filed before 1966.* (1) An organization which filed a certificate on Form SS–15 under section 3121(k)(1)(A) before January 1, 1966, may amend such certificate during 1965 or 1966 to make the certificate effective beginning with the first day of a calendar quarter preceding the date designated by the organization on the certificate (see paragraph (c)(2) of §31.3121(k)–1). The

amendment of the certificate shall be made by filing a Certificate For Retroactive Coverage on Form SS–15b. A certificate on Form SS–15 may be amended to be effective for the period beginning with the first day of any calendar quarter which precedes the calendar quarter for which the certificate was originally effective, except that such a certificate may not be made effective, through an amendment, for any calendar quarter which begins earlier than the 20th calendar quarter preceding the calendar quarter in which the organization files a Certificate For Retroactive Coverage on Form SS–15b. Thus, if a Certificate For Retroactive Coverage is filed in May 1966 in respect of a certificate on Form SS–15 filed in 1965, the certificate on Form SS–15 may not be made effective for a calendar quarter preceding the quarter beginning April 1, 1961. A certificate on Form SS–15 which is amended by a Certificate For Retroactive Coverage on Form SS–15b will be effective for the period preceding the first calendar quarter for which the certificate originally was effective only with respect to the services of individuals who concurred in the filing of the certificate (initially, or by signing a supplemental list on Form SS–15a Supplement which was filed prior to the date on which the Certificate For Retroactive Coverage was filed) and whose signatures also appear on the Certificate For Retroactive Coverage on Form SS–15b. A Certificate For Retroactive Coverage shall be filed with the district director with whom the related Form SS–15 was filed.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of an amendment referred to in paragraph (b)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the amendment is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

[T.D. 6983, 33 FR 18018, Dec. 4, 1968]

§ 31.3121(k)-3 Request for coverage of individual employed by exempt organization before August 1, 1956.

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(a) *Application of this section.* This section is applicable to requests made after July 31, 1956, and before September 14, 1960, under section 403 of the Social Security Amendments of 1954, as amended, except that nothing in this section shall render invalid any act performed pursuant to, and in accordance with, Revenue Ruling 57–11, Cumulative Bulletin 1957–1, page 344, or Revenue Ruling 58–514, Cumulative Bulletin 1958–2, page 733. (For regulations relating to requests made before August 1, 1956, under section 403 of the Social Security Amendments of 1954, see 26 CFR (1939) 408.216(c) and (d) (Regulations 128).)

(b) *Organization which did not have waiver certificate in effect*—(1) *Coverage requested by employee before August 27, 1958.* Pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, any individual who, as an

employee, performed services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which failed to file, before August 1, 1956, a valid waiver certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, may request after July 31, 1956, and before August 27, 1958, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1, 1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith and upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes had been obtained by either the employee or the employer, exclusive of any refund (or credit) which would have been allowable if the services performed by the individual had constituted employment.

(2) *Coverage requested by employee after August 26, 1958, and before September 14, 1960.* Requests may be made after August 26, 1958, and before September 14, 1960, pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, by the Act of August 27, 1958 (Pub. L. 85–785, 72 Stat. 938), and by section 105(b)(6) of the Social Security Amendments of 1960. Any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which did not have in effect during the entire period in which the individual was so employed a valid waiver certificate under section 3121 (k), or under section 1326(l) of the Internal Revenue Code of 1939, may request after August 26, 1958, and before September 14, 1960, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1,

1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services performed during the period in which the organization did not have a valid waiver certificate in effect;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith, and either without knowledge that a waiver certificate was necessary or upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes has been obtained by either the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by the individual had constituted employment.

(3) *Execution and filing of request.* (i) Except where the alternative procedure set forth in paragraph (b)(3)(ii) of this section is followed, the request of an individual under section 403(a) of the Social Security Amendments of 1954, as amended, is required to be made and filed as provided in this subdivision. The request shall be made in writing, be signed and dated by the individual, and include:

(*a*) The name and address of the organization for which the services were performed;

(*b*) The name, address, and social security account number of the individual;

(*c*) A statement that the individual has not obtained refund or credit (other than a refund or credit which would have been allowable if the services had constituted employment) from the district director of any part of the employee tax paid with respect to remuneration received by him from the organization for services performed after 1950 and before 1957; and

(*d*) A request that all remuneration received by him from the organization for such services with respect to which employee and employer taxes had been paid shall be deemed to constitute remuneration for employment to the extent authorized by section 403(a) of the Social Security Amendments of 1954, as amended.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the five conditions listed in paragraph (b)(1) or (2), whichever is appropriate, of this section. The statement of the organization shall show also that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization was an

organization described in section 501(c)(3) which was exempt from income tax under section 501(a) or was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, and the district director with whom returns on Form 941 were filed. The organization's statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit the statement. Other information may be required, but should be submitted only upon receipt of a specific request therefore. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such person's authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(a) of the Social Security Amendments of 1954, as amended, is applicable may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as required to be included in a request (see paragraph (b)(3)(i) of this section). Any such form used by more than one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (b)(3)(i) of this section), to the district director with whom the organization files its returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of paragraph (b)(3)(i) of this section.

(4) *Optional tax payments by organization.* An organization which prior to August 1, 1956, reported and paid employee and employer taxes with respect to any portion of the remuneration paid to an individual, who is eligible to file a request under section 403(a) of the Social Security Amendments of 1954, as amended, for services performed by him after 1950 and before 1957, may report and pay such taxes before September 14, 1960, with respect to any remaining portion of such remuneration which would have constituted wages if a certificate had been in effect with respect to such services. Such taxes may be reported as an adjustment without interest in the manner prescribed in Subpart G of the regulations in this part.

(5) *Effect of request.* If a request is made and filed under the conditions stated in this paragraph with respect to one or more individuals, remuneration for services performed by each such individual after 1950 and before 1957, with respect to which the employee and employer taxes are paid on or before the date on which the request was filed with the district director, will be deemed to constitute remuneration for employment to the extent that such services would have constituted employment as defined in section 3121(b), or in section 1426(b) of the Internal Revenue Code of 1939, if a certificate had been in effect with respect to such services. However, the provisions of section 3121(a) and §§31.3121(a)–1 to 31.3121(a)(10)–1, inclusive, of the regulations in this part or the provisions of

section 1426(a) of the Internal Revenue Code of 1939 and the regulations in 26 CFR (1939) 408.226 and 408.227 (Regulations 128), as the case may be, are applicable in determining the extent to which such remuneration for employment constitutes wages for purposes of the employee and employer taxes.

(c) *Individual who failed to sign list of concurring employees*—(1) *In general.* Pursuant to section 403 (b) of the Social Security Amendments of 1954, as amended, any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization which filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, but who failed to sign the list of employees concurring in the filing of such certificate, may request on or before January 1, 1959, that the remuneration received by him for such services be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before August 1, 1956, would have constituted employment if the signature of such individual had appeared on the list of employees who concurred in the filing of the certificate;

(ii) The employee and employer taxes were paid before August 1, 1956, with respect to any part of the remuneration received by the individual from the organization for such services; and

(iii) No refund (or credit) of such taxes has been obtained either by the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by the individual had constituted employment.

(2) *Execution and filing of request.* (i) Except where the alternative procedure set forth in subdivision (ii) of this subparagraph is followed, the request of an individual under section 403(b) of the Social Security Amendments of 1954, as amended, shall be made and filed as provided in this subdivision. The request shall be filed on or before January 1, 1959, be made in writing, be signed and dated by the individual, and include:

(*a*) The name and address of the organization for which the services were performed;

(*b*) The name, address, and social security account number of the individual;

(*c*) A statement that the individual has not obtained a refund or credit (other than a refund or credit which would be allowable if the services had constituted employment) from the district director of any part of the employee tax paid before August 1, 1956, with respect to remuneration received by him from the organization;

(*d*) A request that all remuneration received by the individual from the organization for services performed after 1950 and before August 1, 1956, with respect to which employee and employer taxes were paid before August 1, 1956, shall be deemed to constitute remuneration for employment to the

extent authorized by section 403(b) of the Social Security Amendments of 1954, as amended; and

(*e*) A statement that the individual understands that, upon the filing of such request with the district director, (*1*) he will be deemed to have concurred in the certificate which was previously filed by the organization, and (*2*) the employee and employer taxes will be applicable to all wages received, and to be received, by him for services performed for the organization on or after the effective date of such certificate to the extent that such taxes would have been applicable if he had signed the list on Form SS–15a submitted with the certificate.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the three conditions listed in paragraph (c)(1) of this section. The statement of the organization should also show that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and the district director with whom returns on Form 941 are filed. Such statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit such statement. Other information may be required, but should be submitted only upon receipt of a specific request therefor. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such persons' authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(b) of the Social Security Amendments of 1954, as amended, is applicable, may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as is required by paragraph (c)(1)(i) of this section to be included in a request. Any such form used by more than one individual, and any such form used by one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (c)(1)(i) of this section), to the district director with whom the organization files returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of subdivisions (i) of this subparagraph.

(3) *Effect of request.* An individual who makes and files a request under the conditions stated in this paragraph with respect to services performed as an employee of an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, will be deemed to have signed the list accompanying the certificate filed by the organization under section 3121(k), or under section

1426(l) of the Internal Revenue Code of 1939. Accordingly, all services performed by the individual for the organization on and after the effective date of the certificate will constitute employment to the same extent as if he had, in fact, signed the list. The employee tax and employer tax are applicable with respect to any remuneration paid to the employee by the organization which constitutes wages. If less than the correct amount of such taxes has been paid, the additional amount due should be reported as an adjustment without interest within the time specified in subpart G of the regulations in this part.

[T.D. 6744, 29 FR 8318, July 2, 1964]

§ 31.3121(k)-4 Constructive filing of waivers of exemption from social security taxes by certain tax-exempt organizations.

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(a) *Constructive filing of waiver certificate where no refund or credit has been allowed.* (1) This paragraph applies (except as provided in subparagraph (3) of this paragraph) to an organization if all of the following four conditions are met.

(i) The organization is one described in section 501(c)(3) of the Internal Revenue Code of 1954, which is exempt from income tax under section 501(a) of the Code.

(ii) The organization did not file a valid waiver certificate under section 3121(k)(1) of the Internal Revenue Code of 1954 (or the corresponding provision of prior law) as of the later of October 19, 1976, or the earliest date on which it satisfies paragraph (a)(1)(iii) of this section.

(iii) The taxes imposed by sections 3101 and 3111 of the Code were paid with respect to remuneration paid by the organization to its employees, as though such certificate had been filed, during any period that includes all or part of at least three consecutive calendar quarters and that did not terminate before the end of the third calendar quarter of 1973.

(iv) The Internal Revenue Service did not allow (or erroneously allowed) a refund or credit of any part of the taxes paid as described in subdivision (iii) of this subparagraph with respect to remuneration for services performed on or after April 1, 1973. For purposes of the previous sentence, a refund or credit which would have been allowed, even if a valid waiver certificate filed under section 3121(k)(1) had been in effect, shall be disregarded. A refund or credit will be regarded as having been erroneously allowed if it was credited by the Internal Revenue Service to the taxpayer account of the organization or any of its employees on or after September 9, 1976, even though it was properly made under the law in effect when made.

(2) (i) An organization to which this paragraph applies shall be deemed to have filed a valid waiver certificate under section 3121(k)(1) (or the corresponding provision of prior law) for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). The waiver certificate shall

be deemed to have been filed on the first day of the period described in paragraph (a)(1)(iii) of this section and shall be effective on the first day of the calendar quarter in which such period began. However, such waiver is effective only with respect to remuneration for services performed after 1950.

(ii) The waiver certificate shall be deemed to have been accompanied by a list containing the signature, address, and social security number (if any) of each employee with respect to whom the taxes imposed by sections 3101 and 3111 were paid as described in paragraph (a)(1)(iii) of this section. Each such employee shall be deemed to have concurred in the filing of the certificate for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). A statement containing the name, address, and employer identification number of the organization, and the name, last known address, and social security number (if any) of each employee described in the preceding sentence shall be filed by the organization at the request of the Internal Revenue Service.

(iii) The services of all employees entering or reentering the employ of an organization on or after the first day following the close of the calendar quarter in which the organization is deemed to have filed the waiver certificate, performed on or after the day of such entry or reentry, shall be covered by the certificate.

(3) This paragraph (a) shall not apply to an organization if—

(i) Prior to the end of the period referred to in paragraph (a)(1)(iii) (and, in addition, in the case of an organization organized on or before October 9, 1969, prior to October 19, 1976), the organization had applied for a ruling or determination letter acknowledging it to be exempt from income tax under section 501(c)(3);

(ii) The organization subsequently received such ruling or determination letter;

(iii) The organization did not pay any taxes under sections 3101 and 3111 with respect to any employee for any calendar quarter ending after the twelfth month following the date of mailing of the ruling or determination letter; and

(iv) The organization did not pay any taxes under sections 3101 and 3111 with respect to any calendar quarter beginning after the later of December 31, 1975, or the date on which the ruling or determination letter was issued.

(4) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the period with respect to which the taxes imposed by sections 3101 and 3111 were paid by the organization (as described in paragraph (a)(1)(iii) of this section) terminated prior to October 1, 1976, taxes under sections 3101 and 3111 with respect to remuneration paid by the organization after the termination of such period and prior to July 1, 1977, which remained unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). Similarly, an organization that

received a refund or credit of the taxes described in paragraph (a)(1)(iii) of this section after September 8, 1976, shall not be liable for the taxes imposed by sections 3101 and 3111 with respect to remuneration paid by it prior to July 1, 1977, for which the organization received the refund or credit. The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to the remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(5) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the taxes imposed by sections 3101 and 3111 were not paid during the period referred to in paragraph (a)(1)(iii) of this section (whether the period has terminated or not) with respect to remuneration paid by the organization to individuals who became its employees after the close of the calendar quarter in which such period began, taxes under sections 3101 and 3111 with respect to remuneration paid prior to July 1, 1977, to such employees, which remain unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(6) This subparagraph allows certain employees to obtain social security coverage for service not covered by a deemed-filed waiver certificate by reason of section 3121(k)(4)(C) and paragraph (a)(4) or (5) of this section. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service as an employee of an organization which is deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), on or after the first day of the period described in paragraph (a)(1)(iii) of this section and before July 1, 1977.

(ii) The service performed by the individual does not constitute employment (as defined in section 210 (a) of the Social Security Act and section 3121(b) of the Code) because the waiver certificate which the organization is deemed to have filed is inapplicable to such service by reason of section 3121(k)(4)(C), but would constitute employment (as so defined) in the absence of section 3121(k)(4)(C).

(iii) The individual files a request on or before April 15, 1980, in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act.

(iv) That request is accompanied by full payment of the taxes, which would have been paid under section 3101 with respect to the remuneration for the service described in paragraph (a)(6)(ii) of this section but for the application of section 3121(k)(4)(C) (or by satisfactory evidence that appropriate arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section).

If these conditions are satisfied, the remuneration paid for the service described in paragraph (a)(6)(i)

of this section shall be deemed to constitute remuneration for employment. In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment, such organization shall be liable (notwithstanding any other provision of the Code or regulations) for payment of the taxes it would have been required to pay under section 3111 with respect to such remuneration but for the application of section 3121(k)(4)(C). The due date for the return and payment by the organization of the taxes described in the preceding sentence shall be the last day of the calendar month following the calendar quarter in which the organization is notified in writing of the employee's request. However, see paragraph (d) of this section which permits the payment of these taxes in installments.

(b) *Constructive filing of waiver certificate where refund or credit has been allowed and new certificate is not filed.* (1) This paragraph applies to an organization which meets two conditions. First, it must be an organization to which paragraph (a) of this section would apply but for its failure to satisfy the requirement of paragraph (a)(1)(iv) of this section because a refund or credit of taxes was allowed before September 9, 1976. Second, it must not have filed an actual valid waiver certificate under section 3121(k)(1) in accordance with the requirements of paragraph (c) of this section.

(2) An organization to which this paragraph applies shall be deemed, for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B), to have filed a valid waiver certificate under section 3121(k)(1) on April 1, 1978. Such certificate shall be effective for the period beginning on the first day of the first calendar quarter with respect to which the refund or credit referred to in paragraph (b)(1) of this section was allowed (or, if later, on July 1, 1973).

(3) If an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the provisions of paragraph (a)(2)(ii) and (iii) of this section (relating to employees covered by a deemed-filed waiver certificate) shall apply. Such certificate shall supersede any certificate which may have been actually filed by such organization prior to that date.

(4) Where an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the due date for the return and payment of the taxes imposed by sections 3101 and 3111 for wages paid prior to April 1, 1978, with respect to services constituting employment by reason of such certificate shall be August 1, 1978. However, see paragraph (d) of this section which permits the payment of these taxes in installments. Such taxes (along with the amount of any interest paid in connection with the refund or credit described in paragraph (b)(1) of this section) shall be a liability of such organization, payable from its own funds. No portion of such taxes (or interest) shall be deducted from the wages of (or otherwise collected from) the individuals who performed such services, and those individuals shall have no liability for the payment thereof.

(5) This subparagraph allows certain employees of organizations covered under this paragraph to obtain social security coverage for periods prior to those covered by a deemed-filed waiver certificate. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service, as an employee of an organization deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), at any time prior to the period for which such certificate is effective.

(ii) The taxes imposed by sections 3101 and 3111 were paid with respect to remuneration paid for such service, but such service (or any part thereof) does not constitute employment (as defined in section 210(a) of the Social Security Act and section 3121(b)) because the applicable taxes so paid were refunded or credited (otherwise than through a refund or credit which would have been allowed if a valid waiver certificate filed under section 3121(k)(1) had been in effect) prior to September 9, 1976.

(iii) Any portion of such service (with respect to which taxes were paid and refunded or credited as described in paragraph (b)(5)(ii) of this section) would constitute employment (as so defined) if the organization had actually filed under section 3121(k)(1) a valid waiver certificate effective as provided in paragraph (c)(2) of this section (with such individual's signature appearing on the accompanying list).

If this subparagraph applies, the remuneration paid for the portion of such service described in paragraph (b)(5)(iii) of this section shall be deemed to constitute remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121(b)), where such individual filed a request on or before April 15, 1980 (in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act), accompanied by full repayment of the taxes which were paid under section 3101 with respect to such remuneration and were refunded or credited (or by satisfactory evidence that arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section). In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment such organization shall be liable (notwithstanding any other provision of the Code or regulations) for repayment of any taxes which it paid under section 3111 with respect to such remuneration and which were refunded or credited to it. Any interest received by the organization or its employees in connection with a refund or credit with respect to such taxes shall be remitted with the repayment of taxes pursuant to this subparagraph.

(c) *Actual filing of waiver certificate by April 1, 1978, where refund or credit has been allowed.* (1) An organization may file an actual waiver certificate in accordance with paragraphs (c)(2) and (3) of this section if it is an organization to which paragraph (a) of this section would apply but for its failure to meet the condition set forth in paragraph (a)(1)(iv) of this section.

(2) An organization described in paragraph (c)(1) of this section was permitted to file an actual waiver certificate on or before April 1, 1978. This certificate must be effective for the period beginning on or before the first day of the first calendar quarter with respect to which a refund or credit described in paragraph (b)(1) of this section was allowed (or, if later, with the first day of the earliest calendar quarter for which such certificate may be in effect under section 3121(k)(1)(B)(iii)). Such waiver

certificate must have been accompanied by a list described in section 3121(k)(1)(A), containing the signature, address, and social security number of each concurring employee (if any).

(3) Such a waiver certificate shall be valid only if the organization complied with the following notification requirements and, on or before April 30, 1978, filed (with the service center of the Internal Revenue Service with which the waiver certificate was filed) a certification that it had complied with these notification requirements. However, these requirements shall be conclusively presumed to have been met with respect to any employees who concurred in the filing of the waiver certificate.

(i) Written notification of the option to obtain social security coverage for the retroactive period covered by the waiver certificate is required to have been given to all current and former employees of the organization with respect to whose remuneration taxes imposed by sections 3101 and 3111 were paid for any part of the period covered by the waiver certificate. For purposes of the preceding sentence, in the case of a former employee a mailing of notification to his or her last known address shall constitute delivery to the former employee. This notification must have been given at least 30 days prior to the date by which the employee was required to inform the organization whether he or she elects the retroactive social security coverage.

(ii) The notification required by this subparagraph must have stated the earliest date for which the waiver certificate is effective and the date by which the employee must have informed the organization of a decision to elect the retroactive coverage. In addition, the notification must have advised the employee how to obtain information as to the quarters of social security coverage to be obtained and any taxes or interest for which the employee would be liable if the election was made. The organization must have provided this information to any interested employee at least 14 days prior to the last day on which such employee was to have informed the organization of any election.

(iii) If the notification resulted in any employee electing the retroactive coverage whose signature did not appear on the list of concurring employees which accompanied a previously filed waiver certificate, the certification that was supplied on or before April 30, 1978, must have been accompanied by a special amendment to that list. Any employee whose name appears on this special amended list shall be treated as if his or her name appeared on the list of concurring employees filed with the waiver certificate. The preceding sentence shall only apply with respect to amended lists of concurring employees filed to comply with the requirements of this subparagraph.

(4) Any interest received in connection with a refund or credit described in paragraph (b)(1) of this section must have been repaid on or before April 30, 1978, with respect to each employee who concurs in the filing of a waiver certificate pursuant to this paragraph. Notwithstanding the provisions of paragraph (c)(4) of §31.3121(k)–1, if such interest was repaid on or before April 30, 1978, the waiver certificate shall be considered to have been filed on the date it was originally furnished to the Internal Revenue Service.

(d) *Installment payment of taxes for retroactive coverage.* This paragraph applies if—

(1) An organization is deemed under paragraph (a) of this section to have filed a valid waiver certificate, but the applicable period described in paragraph (a)(1)(iii) has terminated and all or part of the taxes imposed by sections 3101 and 3111, with respect to remuneration paid by such organization to its employees after the close of such period, remains payable notwithstanding section 3121(k)(4)(C) and paragraph (a)(4) of this section; or

(2) An organization described in paragraph (c) files a valid waiver certificate by March 31, 1978, or, not having filed the certificate by that date, is seemed to have filed the certificate on April 1, 1978, under paragraph (b); or

(3) An individual files a request under paragraph (a)(6) or (b)(5) to have service treated as constituting remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121 (b)).

If this paragraph applies, the taxes due under sections 3101 and 3111 (together with any additions to tax or interest other than interest described in paragraph (c)(4)) with respect to service constituting employment by reason of the waiver certificate for any period prior to the first day of the calendar quarter in which the certificate is filed or deemed filed, or with respect to service constituting employment by reason of an employee request, may be paid in installments over an appropriate period of time, as determined by the district director. In determining the appropriate period of time, the district director shall exercise forbearance and, to the extent possible, grant the organization an installment agreement that will allow it sufficient funds to carry out its basic mission. If any installment is not paid on or before the date fixed for its payment, the total unpaid amount shall become payable immediately and shall be paid upon notice and demand.

(e) *Application of certain provisions to cases of constructive filing.* (1) Except as provided in paragraphs (e)(2) and (3) of this section, all of the provisions of section 3121(k) (other than subparagraphs (B), (F), and (H) of section 3121(k)(1)) and the regulations thereunder (including the provisions requiring the payment of taxes under sections 3101 and 3111 with respect to the services involved), shall apply with respect to any certificate which is deemed to have been filed under paragraph (a) or (b) of this section, in the same way they would apply if the certificate had been actually filed on that day under section 3121(k)(1).

(2) The provisions of section 3121(k)(1)(E) shall not apply unless the taxes described in paragraph (a)(1)(iii) of this section were paid by the organization as though a separate certificate had been filed with respect to one or both of the groups to which such provisions relate.

(3) The action of the organization in obtaining the refund or credit described in paragraph (b)(1) of this section shall not be considered a termination of such organization's coverage period for purposes of section 3121(k)(3).

(4) Any organization which is deemed to have filed a waiver certificate under paragraph (a) or (b) of

this section shall be considered for purposes of section 3102(b) to have been required to deduct the taxes imposed by section 3101 with respect to the services involved.

[T.D. 7647, 44 FR 59524, Oct. 16, 1979]

§ 31.3121(l)-1 Agreements entered into by domestic corporations with respect to foreign subsidiaries.

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For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see the Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries (part 36 of this chapter).

§ 31.3121(o)-1 Crew leader.

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The term "crew leader" means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person. For purposes of this chapter a crew leader is deemed to be the employer of the individuals furnished by him to perform agricultural labor, after 1956, for another person, and the crew leader is deemed not to be an employee of such other person with respect to the performance of services by him after 1956 in furnishing such individuals or as a member of the crew. An individual is not a crew leader within the meaning of section 3121(o) and of this section if he does not pay the agricultural workers furnished by him to perform agricultural labor for another person, or if there is an agreement between such individual and the person for whom the agricultural labor is performed whereby such individual is designated as an employee of such person. Whether or not such individual is an employee will be determined under the usual common-law rules (see paragraph (c) of §31.3121 (d)–1).

[T.D. 6744, 29 FR 8320, July 2, 1964]

§ 31.3121(q)-1 Tips included for employee taxes.

top

(a) *In general.* Except as otherwise provided in paragraph (b) of this section, tips received after 1965

by an employee in the course of his employment shall be considered remuneration for employment. (For definition of the term "employee" see 3121(d) and §31.3121(d)–1.) Tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) (see §31.6053–1) shall be deemed to be paid to the employee at the time the written statement is furnished to the employer. Tips received by an employee which are not reported to his employer in a written statement furnished pursuant to section 6053(a) shall be deemed to be paid to the employee at the time the tips are actually received by the employee. For provisions relating to the collection of employee tax in respect of tips from the employee, see §31.3102–3.

(b) *Tips not included for employer taxes.* Tips received after 1965 by an employee in the course of his employment do not constitute remuneration for employment for purposes of computing wages subject to the taxes imposed by subsections (a) and (b) of section 3111.

(c) *Tips received by an employee in course of his employment.* Tips are considered to be received by an employee in the course of his employment for an employer regardless of whether the tips are received by the employee from a person other than his employer or are paid to the employee by the employer. However, only those tips which are received by an employee on his own behalf (as distinguished from tips received on behalf of another employee) shall be considered as remuneration paid to the employee. Thus, where employees practice tip splitting (for example, where waiters pay a portion of the tips received by them to the busboys), each employee who receives a portion of a tip left by a customer of the employer is considered to have received tips in the course of his employment.

(d) *Computation of annual wage limitation.* In connection with the application of the annual wage limitation (see §31.3121(a)(1)–1), tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) shall be taken into account for purposes of the tax imposed by section 3101. However, since tips received by an employee in the course of his employment do not constitute remuneration for employment for purposes of the tax imposed by section 3111, they are disregarded for purposes of the annual wage limitation in respect of such tax. Accordingly, separate computations for purposes of the annual wage limitation may be required in respect of an employee who receives tips. The provisions of this paragraph may be illustrated by the following example:

Example. During 1966, A is employed as a waiter by X restaurant and is paid wages by X restaurant at the rate of $100 a week. At the end of October 1966, A has been paid weekly wages in the amount of $4,300 and has reported tips in the amount of $2,200. On November 6, 1966, A is paid an additional week's wages in the amount of $100 and on November 9, 1966, A furnishes X restaurant a report of tips actually received by him during October. The annual wage limitation of $6,600 (weekly wages of $4,400 ($4,300 plus $100) and tips of $2,200) had been reached for purposes of the tax imposed by section 3101 prior to November 9 and, accordingly, no portion of the tips included in the report furnished on that date constitutes wages. However, since tips do not constitute remuneration for employment for purposes of the tax imposed by section 3111, the weekly wages paid to A during the remainder of 1966 will be subject to the tax imposed by section 3111.

[T.D. 7001, 34 FR 1000, Jan. 23, 1969]

§ 31.3121(r)-1 Election of coverage by religious orders.

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(a) *In general.* A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such an order, may elect to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to services performed by its members in the exercise of duties required by such order or subdivision. See section 3121(i)(4) and §31.3121(i)–4 for provisions relating to the computation of the amount of remuneration of such members. For purposes of this section, a subdivision of a religious order is autonomous if it directs and governs its members, if it is responsible for its members' care and maintenance, if it is responsible for the members' support and maintenance in retirement, and if the members live under the authority of a religious superior who is elected by them or appointed by higher authority.

(b) *Definition of member*—(1) *In general.* For purposes of section 3121(r) and this section, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order, who performs tasks usually required (and to the extent usually required) of an active member of such order, and who is not considered retired because of old age or total disability.

(2) *Retirement because of old age*—(i) *In general.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of old age if (A) in view of all the services performed by the individual and the surrounding circumstances it is reasonable to consider him to be retired, and (B) his retirement occurred by reason of old age. Even though an individual performs some services in the exercise of duties required by the religious order, the first test (the retirement test) is met where it is reasonable to consider the individual to be retired.

(ii) *Factors to be considered.* In determining whether it is reasonable to consider an individual to be retired, consideration is first to be given to all of the following factors:

(A) *Nature of services.* Consideration is given to the nature of the services performed by the individual in the exercise of duties required by his religious order. The more highly skilled and valuable such services are, the more likely the individual rendering such services is not reasonably considered retired. Also, whether such services are of a type performed principally by retired members of the individual's religious order may be significant.

(B) *Amount of time.* Consideration is also given to the amount of time the individual devotes to the performance of services in the exercise of duties required by his religious order. This time includes all the time spent by him in any activity in connection with services that might appropriately be performed in the exercise of duties required of active members by the order. Normally, an individual who, solely by reason of his advanced age, performs services of less than 45 hours per month shall be considered retired. In no event shall an individual who, solely by reason of his advanced age, performs

services of less than 15 hours per month not be considered retired.

(C) *Comparison of services rendered before and after retirement.* In addition, consideration is given to the nature and extent of the services rendered by the individual before he "retired," as compared with the services performed thereafter. A large reduction in the importance or amount of services performed by the individual in the exercise of duties required by his religious order tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired. Normally, an individual who reduces by at least 75 percent the amount of services performed shall be considered retired.

Where consideration of the factors described in paragraph (b)(2)(ii) of this section does not establish whether an individual is or is not reasonably considered retired, all other factors are considered.

(iii) *Examples.* The rules of this subparagraph may be illustrated by the following examples:

Example 1. A is a member of a religious order who is subject to a vow of poverty. A's religious order is principally engaged in providing nursing services, and A has been fully trained in the nursing profession. In accordance with the practices of her order, upon attaining the age of 65, A is relieved of her nursing duties by reason of her age, and is assigned to a mother house where she is required to perform only such duties as light housekeeping and ordinary gardening. A is reasonably considered retired since the services she is performing are simple in nature, are markedly less skilled than those professional services which she previously performed, are of a type performed principally by retired members of her order, and are performed at a location to which members frequently retire.

Example 2. Assume the same facts as in example 1 except that A is not reassigned to a mother house. Instead, she is reassigned to full-time duties in a hospital not utilizing her nursing skills. Whether A has met the retirement test requires consideration of the nature of her work. If A's new duties are almost entirely of a make-work nature primarily to occupy her body and mind, she is reasonably considered retired. However, if they are essential to the operation of the hospital, she is not reasonably considered retired.

Example 3. B is a member of a religious order who is subject to a vow of poverty. As such, he provides supportive services to his order, such as housekeeping, cooking, and gardening. By reason of having attained the age of 62, he reduces the number of hours spent per day in these services from 8 hours to 2 hours. B is reasonably considered retired in view of the large reduction in the amount of time he devotes to his duties.

Example 4. C is a member of a religious order who is subject to a vow of poverty. In his capacity as a member of the order, he performs duties as president of a university. Upon attaining the age of 65, C is relieved of his duties as president of the university and instead becomes a member of its faculty, teaching two courses whereas full-time members of the faculty normally teach four comparable courses. Although C's duties are no longer as demanding as those he previously performed, and although the amount of his time required for them is less than full time, he is nonetheless performing duties requiring a high degree of skill for a substantial amount of time. Accordingly, C is not reasonably considered retired.

Example 5. Assume the same facts as in example 4, except that C teaches only one course upon being relieved

of his position as president by reason of age. C is reasonably considered retired.

Example 6. D is a member of a contemplative order who is subject to a vow of poverty. In accordance with the practices of his order, upon attaining the age of 70, D reduces by 50 percent the amount of time spent performing the normal duties of active members of his order. D is not reasonably considered retired.

Example 7. Assume the same facts as in example 6, except that because of his age D no longer participates in the more rigorous liturgical services of the order and that the amount of time which he spends in all duties which might appropriately be performed by active members of his order is reduced by 75 percent. D is reasonably considered retired in view of the large reduction in his participation in the usual devotional routine of his order.

(3) *Retirement because of total disability.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of total disability (i) if he is unable, by reason of a medically determinable physical or mental impairment, to perform the tasks usually required of an active member of his order to the extent necessary to maintain his status as an active member, and (ii) if such impairment is reasonably expected to prevent his resumption of the performance of such tasks to such extent. A physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Statements of the individual, including his own description of his impairment (symptoms), are, alone, insufficient to establish the presence of a physical or mental impairment.

(4) *Evidentiary requirements with respect to retirement.* There shall be attached to the return of taxes paid pursuant to an election under section 3121(r) a summary of the facts upon which any determination has been made by the religious order or autonomous subdivision that one or more of its members retired during the period covered by such return. Each summary shall contain the name and social security number of each such retired member as well as the date of his retirement. Such order or subdivision shall maintain records of the details relating to each such "retirement" sufficient to show whether or not such member or members has in fact retired.

(c) *Certificates of election*—(1) *In general.* A religious order or an autonomous subdivision of such an order desiring to make an election of coverage pursuant to section 3121(r) and this section shall file a certificate of election on Form SS–16 in accordance with the instructions thereto. However, in the case of an election made before August 9, 1973, a document other than Form SS–16 shall constitute a certificate of election if it purports to be a binding election of coverage and if it is filed with an appropriate official of the Internal Revenue Service. Such a document shall be given the effect it would have if it were a certificate of election containing the provisions required by paragraph (c)(2) of this section. However, it should subsequently be supplemented by a Form SS–16.

(2) *Provisions of certificates.* Each certificate of election shall provide that—

(i) Such election of coverage by such order or subdivision shall be irrevocable,

(ii) Such election shall apply to all current and future members of such order, or in the case of a subdivision thereof to all current and future members of such order who belong to such subdivision,

(iii) All services performed by a member of such order or subdivision in the exercise of duties required by such order or subdivision shall be deemed to have been performed by such member as an employee of such order or subdivision, and

(iv) The wages of each member, upon which such order or subdivision shall pay the taxes imposed on employees and employers by sections 3101 and 3111, will be determined as provided in section 3121 (i)(4).

(d) *Effective date of election*—(1) *In general.* Except as provided in paragraph (e) of this section, a certificate of election of coverage filed by a religious order or its subdivision pursuant to section 3121 (r) and this section shall be in effect, for purposes of section 3121(b)(8)(A) and for purposes of section 210(a)(8)(A) of the Social Security Act, for the period beginning with whichever of the following may be designated by the electing religious order or subdivision:

(i) The first day of the calendar quarter in which the certificate is filed,

(ii) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(iii) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed.

(2) *Retroactive elections.* Whenever a date is designated as provided in paragraph (d)(1)(iii) of this section, the election shall apply to services performed before the quarter in which the certificate is filed only if the member performing such services was a member at the time such services were performed and is living on the first day of the quarter in which such certificate is filed. Thus, the election applies to an individual who is no longer a member of a religious order on the first day of such quarter if he performed services as a member at any time on or after the date so designated and is living on the first day of the quarter in which such certificate is filed. For purposes of computing interest and for purposes of section 6651 (relating to additions to tax for failure to file tax return or to pay tax), in any case in which such a date is designated the due date for the return and payment of the tax, for calendar quarters prior to the quarter in which the certificate is filed, resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date.

(e) *Coordination with coverage of lay employees.* If at the time the certificate of election of coverage

is filed by a religious order or autonomous subdivision, a certificate of waiver of exemption under section 3121(k) (extending coverage to any lay employees) is not in effect, the certificate of election shall not become effective unless the order or subdivision files a Form SS–15, and a Form SS–15a to accompany the certificate on Form SS–15, as provided by section 3121(k) and §§31.3121(k)–1 through 31.3121(k)–3. The preceding sentence applies even though an order or subdivision has no lay employees at the time it files a certificate of election of coverage. The effective date of the certificate of waiver of exemption must be no later than the date on which the certificate of election becomes effective, and it must be specified on the certificate of waiver of exemption that such certificate is irrevocable. The certificate of waiver of exemption required under this paragraph shall be filed notwithstanding the provisions of section 3121(k)(3) (relating to no renewal of the waiver of exemption) which otherwise would prohibit the filing of a waiver of exemption if an earlier waiver of exemption had previously been terminated. If at the time the certificate of election of coverage is filed a certificate of waiver of exemption is in effect with respect to the electing religious order or autonomous subdivision, the filing of the certificate of election shall constitute an amendment of the certificate of waiver of exemption making the latter certificate irrevocable.

[T.D. 7280, 38 FR 18370, July 10, 1973]

§ 31.3121(s)-1 Concurrent employment by related corporations with common paymaster.

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(a) *In general.* For purposes of sections 3102, 3111, and 3121(a)(1), except as otherwise provided in paragraph (c) of this section, when two or more related corporations concurrently employ the same individual and compensate that individual through a common paymaster which is one of the related corporations that employs the individual, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual. This rule applies whether the remuneration was paid with respect to the employment relationship of the individual with the disbursing corporation or was paid on behalf of another related corporation. Accordingly, if all of the remuneration to the individual from the related corporations is disbursed through the common paymaster, the total amount of taxes imposed with respect to the remuneration under sections 3102 and 3111 is determined as though the individual has only one employer (the common paymaster). The common paymaster is responsible for filing information and tax returns and issuing Forms W-2 with respect to wages it is considered to have paid under this section. Section 3121(s) and this section apply only to remuneration disbursed in the form of money, check or similar instrument by one of the related corporations or its agent.

(b) *Definitions.* The definitions contained in this paragraph are applicable only for purposes of this section and §31.3306(p)–1.

(1) *Related corporations.* Corporations shall be considered related corporations for an entire calendar quarter (as defined in §31.0–2(a)(9)) if they satisfy any one of the following four tests at any time

during that calendar quarter:

(i) The corporations are members of a "controlled group of corporations", as defined in section 1563 of the Code, or would be members if section 1563(a)(4) and (b) did not apply and if the phrase "more than 50 percent" were substituted for the phrase "at least 80 percent" wherever it appears in section 1563(a).

(ii) In the case of a corporation that does not issue stock, either fifty percent or more of the members of one corporation's board of directors (or other governing body) are members of the other corporation's board of directors (or other governing body), or the holders of fifty percent or more of the voting power to select such members are concurrently the holders of more than fifty percent of that power with respect to the other corporation.

(iii) Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

(iv) Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

The following examples illustrate the application of this paragraph:

Example 1. (a) X Corporation employs individuals A, B, D, E, F, G, and H. Y Corporation employs individuals A, B, and C. Z Corporation employs individuals A, C, I, J, K, L, and M. X Corporation is the paymaster for all thirteen individuals. The corporations have no officers or stockholders in common.

(b) X and Y are related corporations because at least 30 percent of Y's employees are also employees of X. Y and Z are related corporations because at least 30 percent of Y's employees are also employees of Z. X and Z are not related corporations because neither corporation has 30 percent of its employees concurrently employed by the other corporation.

(c) For purposes of determining the amount of the tax liability under sections 3102 and 3111, individual B is treated as having one employer. Individual C has two employers for these purposes, although Y and Z are related corporations, because C is not employed by X Corporation, the common paymaster. Individual A also is treated as having two employers for the purposes of these sections because X and Y Corporations are treated as one employer, and Z Corporation is treated as a second employer (since it is not related to the paymaster, X Corporation). Of course, individuals D, E, F, G, H, I, J, K, L, and M are not concurrently employed by two or more corporations, and, accordingly, section 3121 (s) is inapplicable to them.

Example 2. M and N Corporations are both related to Corporation O but are not related to each other. Individual A is concurrently employed by all three corporations and paid by O, their common paymaster. Although M and N are not related, O is treated as the employer for A's employment with M, N, and O.

Example 3. Corporations X, Y, and Z meet the definition of related corporations for the first time on April 12,

1979, and cease to meet it on July 5, 1979. A is concurrently employed by X, Y, and Z throughout 1979. In each of the four calendar quarters of 1979, A's remuneration from X, Y, and Z is $2,000, $10,000, and $30,000, respectively. All of the remuneration to A from X, Y, and Z for the year is disbursed by X, the common paymaster. Under these circumstances, the amount of wages subject to sections 3102 and 3111 is as follows:

For the first calendar quarter

X	Y	Z
$2,000	$10,000	$22,900

For the second calendar quarter

X	Y	Z
$20,900	0	0

($22,900-$2,000)

For the third calendar quarter

X	Y	Z

0	0	0

For the fourth calendar quarter

X	Y	Z
0	$10,000	0

Of course, if the corporations had been related throughout all of 1979, only $22,900 of X's first quarter disbursement would have constituted wages subject to sections 3102 and 3111.

(2) *Common paymaster*—(i) *In general.* A common paymaster of a group of related corporations is any member thereof that disburses remuneration to employees of two or more of those corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees. The common paymaster is not required to disburse remuneration to all the employees of those two or more related corporations, but the provisions of this section do not apply to any remuneration to an employee that is not disbursed through a common paymaster. The common paymaster may pay concurrently employed individuals under this section by one combined paycheck, drawn on a single bank account, or by separate paychecks, drawn by the common paymaster on the accounts of one or more employing corporations.

(ii) *Multiple common paymasters.* A group of related corporations may have more than one common paymaster. Some of the related corporations may use one common paymaster and others of the related corporations use another common paymaster with respect to a certain class of employees. A corporation that uses a common paymaster to disburse remuneration to certain of its employees may use a different common paymaster to disburse remuneration to other employees.

(iii) [Reserved] For further guidance, see §31.3121(s)–1T(c)(2)(iii).

(3) *Concurrent employment.* For purposes of this section, the term "concurrent employment" means the contemporaneous existence of an employment relationship (within the meaning of section 3121 (b)) between an individual and two or more corporations. Such a relationship contemplates the performance of services by the employee for the benefit of the employing corporation (not merely for the benefit of the group of corporations), in exchange for remuneration which, if deductible for the purposes of Federal income tax, would be deductible by the employing corporation. The contemporaneous existence of an employment relationship with each corporation is the decisive factor; if it exists, the fact that a particular employee is on leave or otherwise temporarily inactive is immaterial. However, employment is not concurrent with respect to one of the related corporations if the employee's employment relationship with that corporation is completely nonexistent during periods when the employee is not performing services for that corporation. An employment relationship is completely nonexistent if all rights and obligations of the employer and employee with respect to employment have terminated, other than those that customarily exist after employment relationships terminate. Examples of rights and obligations that customarily exist after employment relationships terminate include those with respect to remuneration not yet paid, employer's property used by the employee not yet returned to the employer, severance pay, and lump-sum termination payments from a deferred compensation plan. Circumstances that suggest that an employment relationship has become completely nonexistent include unconditional termination of participation in deferred compensation plans of the employer, forfeiture of seniority claims, and forfeiture of unused fringe benefits such as vacation or sick pay. Of course, the continued existence of an employment relationship between an individual and a corporation is not necessarily established by the individual's continued participation in a deferred compensation plan, retention of seniority rights, etc., since continuation of those benefits may be attributable to employment with a second corporation related to the first corporation if the corporations have common benefits plans or if the benefits are continued as a matter of corporate reciprocity. An individual who does not perform substantial services in exchange for remuneration from a corporation is presumed not employed by that corporation. Concurrent employment need not exist for any particular length of time to meet the requirements of this section, but this section only applies to remuneration disbursed by a common paymaster to an individual who is concurrently employed by the common paymaster and at least one other related corporation at the time the individual performs the services for which the remuneration is paid. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30-percent test set forth in paragraph (b)(1)(iv) of this section; however, even if the employment relationship is nonexistent, section 3121(s) of the Code would apply to remuneration paid to the former employee for services rendered while the employee was a common employee. The principles of this subparagraph are illustrated by the following examples.

Example 1. M, N, and O are related corporations which use N as a common paymaster with respect to officers. Their respective headquarters are located in three separate cities several hundred miles apart. A is an officer of M, N, and O who performs substantial services for each corporation. A does not work a set length of time at each corporate headquarters, and when A leaves one corporate headquarters, it is not known when A will return, although it is expected that A will return. Under these facts, A is concurrently employed by the three corporations.

Example 2. P, Q, and R are related corporations whose geographical zones of business activity do not overlap. P, Q, and R have a common pension plan and arrange for Q to be a common paymaster for managers and executives. All three corporations maintain cafeterias for the use of their employees. B is a cafeteria manager who has worked at P's headquarters for 3 years. On June 1, 1980, B is transferred from P to the position of cafeteria manager of R. There are no plans for B's return to P. B's accrued pension benefits, vacation and sick pay, do not change as a result of the transfer. The decision to transfer B was made by Q, the parent corporation. Under these facts, B is not concurrently employed by P and R, because B's employment relationship with P was completely nonexistent during B's employment with R. Furthermore, section 3121(s) is inapplicable since B also was not employed by Q, the common paymaster, because B never contracted to perform services for remuneration from Q, and Q did not have the right to control the day-to-day duties of B's work.

Example 3. C is employed by two related corporations, S and T. C was concurrently employed by these corporations between April 1, 1979, and June 30, 1979. The corporations used T as the common paymaster with respect to C's wages between May 1, 1979, and September 30, 1979. T pays C on May 15 for services performed between April 1 and April 30, on July 15 for services performed between June 1 and June 30, and on August 15 for services performed between July 1 and July 31. Section 3121 (s) applies to the first two payments but does not apply to the third payment (there was no concurrent employment). However, if the third payment was made by T for services performed for T, T counts the amounts previously disbursed to C in 1979 while C was concurrently employed by S and T towards the wage base (see section 3121 (a)(1)).

(c) *Allocation of employment taxes*—(1) *Responsibility to pay tax.* If the requirements of this section are met, the common paymaster has the primary responsibility for remitting taxes pursuant to sections 3102 and 3111 with respect to the remuneration it disburses as the common paymaster. The common paymaster computes these taxes as though it were the sole employer of the concurrently employed individuals. If the common paymaster fails to remit these taxes (in whole or in part), it remains liable for the full amount of the unpaid portion of these taxes. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these taxes. That share is an amount equal to the lesser of:

(i) The amount of the liability of the common paymaster under section 3121(s), after taking account of any tax payments made, or

(ii) The amount of the liability under sections 3102 and 3111 which, but for section 3121(s), would have existed with respect to the remuneration from such other related corporation, reduced by an allocable portion of any taxes previously paid by the common paymaster with respect to that remuneration.

The portion of taxes previously paid by the common paymaster that is allocable to each related corporation is determined by multiplying the amount of taxes paid by a fraction, the numerator of which is the portion of the amount of employment tax liability of the common paymaster under section 3121(s) that is allocable to such related corporation under paragraph (c)(2) of this section, and the denominator of which is the total amount of the common paymaster's liability under section 3121 (s), both determined without regard to any prior tax payments. These rules apply whether or not the tax on employees was withheld from the employees' wages.

(2) *Allocation of tax*—(i) *In general.* If the related corporations maintain a record of the remuneration disbursed to the employee for services performed for each corporation, the remuneration-based allocation rules of paragraph (c)(2)(ii) of this section apply. If the related corporations do not maintain this record of remuneration, the group-wide allocation rules of paragraph (c)(2)(iii) of this section apply. In all cases, allocations must be made with respect to each payment of wages. The allocation of employment tax liabilities pursuant to this subparagraph also determines which related corporation may be entitled to income tax deductions with respect to the payments of those taxes.

(ii) *Remuneration-based allocation rules.* Under the remuneration-based method of allocation, each related corporation that remunerates an employee through a common paymaster has allocated to it for each pay period an amount of tax determined according to the following formula:

Portion of wage payment constituting remuneration to the employee for services performed for the corporation	.....	Tax on employees under section 3102 and tax

____________________ _______	x..............................	on employers under section 3111 that the common paymaster is required to remit with respec
Total wage payment constituting remu-	....	

neration to the employee for all services performed for the related corporations using the common paymaster	t to th e wa ge pa y- m en t

If the remuneration disbursed to an employee for services performed for a corporation is inappropriate, the district director may adjust the remuneration records of the related corporations to reflect appropriate remuneration. The district director may use the principles of §1.482–2(b) in making the adjustments.

Example. (i) X and Y are related corporations which use Y as common paymaster for their executives. A is a concurrently employed executive who performs services during the first quarter of 1979 for X and Y. Y remunerates $4,000 gross pay every week to A, calculated as follows:

Remuneration				Tax on	
				Tax on employees	
Total payments employers	Wage payments withheld	Total	X	Y	
Total	under section 3111	under section 3102			

1		$3,000	$1,000	
$4,000	$245.20	$245.20	$490.40	
2-3			8,000	
8,000	490.40	490.40	980.80	
4		1,000	3,000	
4,000	245.20	245.20	490.40	
5		4,000		
4,000	245.20	245.20	490.40	
6		2,000	2,000	
4,000	177.77	177.77	355.54	
7-13		10,000	18,000	
28,000	0	0	0	
Total		20,000	32,000	
52,000	1,403.77	1,403.77	2,807.54	

The amounts of remuneration to A are determined by the district director to be appropriate. Under these facts, the tax is allocated to X and Y in the following amounts:

Wage payments	X	Y
1	$\frac{\$3,000}{\$4,000} \times \$490.40 = \$367.80$	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$
2-3	--	$\frac{\$8,000}{\$8,000} \times \$980.00 = \$980.80$
4	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$	$\frac{\$3,000}{\$4,000} \times \$490.00 = \$367.80$
5	$\frac{\$4,000}{\$4,000} \times \$490.40 = \$490.40$	--
6	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$
7-13	$\frac{\$10,000}{\$28,000} \times -0- = -0-$	$\frac{\$18,000}{\$28,000} \times -0- = -0-$
	$1,158.57	$1,648.97

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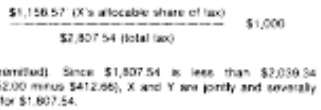
(ii) If Y remits none of the taxes to the Internal Revenue Service, X is liable for $2,452.00 (the entire amount due pursuant to sections 3102 and 3111 with respect to the remuneration to A from X) (12.26% × $20,000). Any amount remitted by X to the Internal Revenue Service under these circumstances is also credited against the liability of the common paymaster, Y. However, only the portion of the employment taxes allocated to X under (i) above may be deducted by X as employment taxes paid by it in respect of wages paid by it to its employees.

(iii) If Y remits $1,000.00 of the total $2,807.54 due, Y as common paymaster remains liable for

$1,807.54 ($2,807.54 minus $1,000). X's liability is the lesser of $1,807.54 (the liability of the common paymaster), or X's total liability, in the absence of section 3121 (s), on wages paid through the common paymaster ($2,452.00) minus a credit for an allocable part of the amount remitted by Y. The part is $412.66



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(iii) *Group-wide allocation rules.* Under the group-wide method of allocation, the district director may allocate the taxes imposed by sections 3102 and 3111 in an appropriate manner to a related corporation that remunerates an employee through a common paymaster if the common paymaster fails to remit the taxes to the Internal Revenue Service. Allocation in an appropriate manner varies according to the circumstances. It may be based on sales, property, corporate payroll, or any other basis that reflects the distribution of the services performed by the employee, or a combination of the foregoing bases. To the extent practicable, the district director may use the principles of §1.482–2(b) in making the allocations.

(d) [Reserved] For further guidance, see §31.3121(s)–1T(d).

[T.D. 7660, 44 FR 75139, Dec. 19, 1979; 45 FR 17986, Mar. 20, 1980, as amended by T.D. 9278, 71 FR 44519, Aug. 4, 2006]

§ 31.3121(s)-1T Concurrent employment by related corporations with common paymaster (temporary).

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(a) through (c)(2)(ii) [Reserved] For further guidance, see §31.3121(s)–1(a) through (c)(2)(ii).

(c)(2)(iii) *Group-wide allocation rules.* Under the group-wide method of allocation, the district director may allocate the taxes imposed by sections 3102 and 3111 in an appropriate manner to a related corporation that remunerates an employee through a common paymaster if the common paymaster fails to remit the taxes to the Internal Revenue Service. Allocation in an appropriate manner varies according to the circumstances. It may be based on sales, property, corporate payroll, or any other basis that reflects the distribution of the services performed by the employee, or a combination of the foregoing bases. To the extent practicable, the Commissioner may use the principles of §1.482–2(b) of this chapter in making the allocations with respect to wages paid after December 31, 1978, and on or before December 31, 2006. To the extent practicable, the Commissioner may use the principles of §1.482–9T of this chapter in making the allocations with respect to wages paid after December 31, 2006.

(d) *Effective date*—(1) *In general.* This section is applicable with respect to wages paid after December 31, 1978. [§31.3121(s)–1]. The fourth sentence of paragraph (c)(2)(iii) of this section is applicable with respect to wages paid after December 31, 1978, and on or before December 31, 2006. The fifth sentence of paragraph (c)(2)(iii) of this section is applicable with respect to wages paid after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the fifth sentence of paragraph (c)(2)(iii) of this section to earlier taxable years in accordance with the rules set forth in §1.482–9T(n)(2).

(3) The applicability of §31.3121(s)–1T expires on or before July 31, 2009.

[T.D. 9278, 71 FR 44519, Aug. 4, 2006]

§ 31.3121(v)(2)-1 Treatment of amounts deferred under certain nonqualified deferred compensation plans.

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(a) *Timing of wage inclusion*—(1) *General timing rule for wages.* Remuneration for employment that constitutes wages within the meaning of section 3121(a) generally is taken into account for purposes of the Federal Insurance Contributions Act (FICA) taxes imposed under sections 3101 and 3111 at the time the remuneration is actually or constructively paid. See §31.3121(a)-2(a).

(2) *Special timing rule for an amount deferred under a nonqualified deferred compensation plan*—(i) *In general.* To the extent that remuneration deferred under a nonqualified deferred compensation plan constitutes wages within the meaning of section 3121(a), the remuneration is subject to the special timing rule described in this paragraph (a)(2). Remuneration is considered deferred under a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and this section only if it is provided pursuant to a plan described in paragraph (b) of this section. The amount deferred under a nonqualified deferred compensation plan is determined under paragraph (c) of this section.

(ii) *Special timing rule.* Except as otherwise provided in this section, an amount deferred under a nonqualified deferred compensation plan is required to be taken into account as wages for FICA tax purposes as of the later of—

(A) The date on which the services creating the right to that amount are performed (within the meaning of paragraph (e)(2) of this section); or

(B) The date on which the right to that amount is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section).

(iii) *Inclusion in wages only once (nonduplication rule).* Once an amount deferred under a nonqualified deferred compensation plan is taken into account (within the meaning of paragraph (d)(1) of this section), then neither the amount taken into account nor the income attributable to the amount taken into account (within the meaning of paragraph (d)(2) of this section) is treated as wages for FICA tax purposes at any time thereafter.

(iv) *Benefits that do not result from a deferral of compensation.* If a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) provides both a benefit that results from the deferral of compensation (within the meaning of paragraph (b)(3) of this section) and a benefit that does not result from the deferral of compensation, the benefit that does not result from the deferral of compensation is not subject to the special timing rule described in this paragraph (a)(2). For example, if a nonqualified deferred compensation plan provides retirement benefits which result from the deferral of compensation and disability pay (within the meaning of paragraph (b)(4)(iv)(C) of this section) which does not result from the deferral of compensation, the retirement benefits provided under the plan are subject to the special timing rule in this paragraph (a)(2) and the disability pay is not.

(v) *Remuneration that does not constitute wages.* If remuneration under a nonqualified deferred compensation plan does not constitute wages within the meaning of section 3121(a), then that remuneration is not taken into account as wages for FICA tax purposes under either the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2). For example, benefits under a death benefit plan described in section 3121(a)(13) do not constitute wages for FICA tax purposes. Therefore, these benefits are not included as wages under the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2), even if the death benefit plan would otherwise be considered a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section.

(b) *Nonqualified deferred compensation plan*—(1) *In general.* For purposes of this section, the term *nonqualified deferred compensation plan* means any plan or other arrangement, other than a plan described in section 3121(a)(5), that is established (within the meaning of paragraph (b)(2) of this section) by an employer for one or more of its employees, and that provides for the deferral of compensation (within the meaning of paragraph (b)(3) of this section). A nonqualified deferred compensation plan may be adopted unilaterally by the employer or may be negotiated among or agreed to by the employer and one or more employees or employee representatives. A plan may constitute a nonqualified deferred compensation plan under this section without regard to whether the deferrals under the plan are made pursuant to an election by the employee or whether the amounts deferred are treated as deferred compensation for income tax purposes (e.g., whether the amounts are subject to the deduction rules of section 404). In addition, a plan may constitute a nonqualified deferred compensation plan under this section whether or not it is an employee benefit plan under section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended (29 U.S. C. 1002(3)). For purposes of this section, except where the context indicates otherwise, the *term* plan includes a plan or other arrangement.

(2) *Plan establishment*—(i) *Date plan is established.* For purposes of this section, a plan is established on the latest of the date on which it is adopted, the date on which it is effective, and the date on which the material terms of the plan are set forth in writing. For purposes of this section, a plan will be deemed to be set forth in writing if it is set forth in any other form that is approved by the Commissioner. The material terms of the plan include the amount (or the method or formula for determining the amount) of deferred compensation to be provided under the plan and the time when it may or will be provided.

(ii) *Plan amendments.* In the case of an amendment that increases the amount deferred under a nonqualified deferred compensation plan, the plan is not considered established with respect to the additional amount deferred until the plan, as amended, is established in accordance with paragraph (b)(2)(i) of this section.

(iii) *Transition rule for written plan requirement.* For purposes of this section, an unwritten plan that was adopted and effective before March 25, 1996, is treated as established under this section as of the later of the date on which it was adopted or became effective, provided that the material terms of the plan are set forth in writing before January 1, 2000.

(3) *Plan must provide for the deferral of compensation*—(i) *Deferral of compensation defined.* A plan provides for the *deferral of compensation* with respect to an employee only if, under the terms of the plan and the relevant facts and circumstances, the employee has a legally binding right during a calendar year to compensation that has not been actually or constructively received and that, pursuant to the terms of the plan, is payable to (or on behalf of) the employee in a later year. An employee does not have a legally binding right to compensation if that compensation may be unilaterally reduced or eliminated by the employer after the services creating the right to the compensation have been performed. For this purpose, compensation is not considered subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of the plan, such as the application of an objective provision creating a substantial risk of forfeiture (within the meaning of section 83). Similarly, an employee does not fail to have a legally binding right to compensation merely because the amount of compensation is determined under a formula that provides for benefits to be offset by benefits provided under a plan that is qualified under section 401(a), or because benefits are reduced due to investment losses or, in a final average pay plan, subsequent decreases in compensation.

(ii) *Compensation payable pursuant to the employer's customary payment timing arrangement.* There is no deferral of compensation (within the meaning of this paragraph (b)(3)) merely because compensation is paid after the last day of a calendar year pursuant to the timing arrangement under which the employer ordinarily compensates employees for services performed during a payroll period described in section 3401(b).

(iii) *Short-term deferrals.* If, under a nonqualified deferred compensation plan, there is a deferral of

compensation (within the meaning of this paragraph (b)(3)) that causes an amount to be deferred from a calendar year to a date that is not more than a brief period of time after the end of that calendar year, then, at the employer's option, that amount may be treated as if it were not subject to the special timing rule described in paragraph (a)(2) of this section. An employer may apply this option only if the employer does so for all employees covered by the plan and all substantially similar nonqualified deferred compensation plans. For purposes of this paragraph (b)(3)(iii), whether compensation is deferred to a date that is not more than a brief period of time after the end of a calendar year is determined in accordance with §1.404(b)–1T, Q&A–2, of this chapter.

(4) *Plans, arrangements, and benefits that do not provide for the deferral of compensation*—(i) *In general.* Notwithstanding paragraph (b)(3)(i) of this section, an amount or benefit described in any of paragraphs (b)(4)(ii) through (viii) of this section is not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2) and this section and, thus, is not subject to the special timing rule of paragraph (a)(2) of this section.

(ii) *Stock options, stock appreciation rights, and other stock value rights.* The grant of a stock option, stock appreciation right, or other stock value right does not constitute the deferral of compensation for purposes of section 3121(v)(2). In addition, amounts received as a result of the exercise of a stock option, stock appreciation right, or other stock value right do not result from the deferral of compensation for purposes of section 3121(v)(2) if such amounts are actually or constructively received in the calendar year of the exercise. For purposes of this paragraph (b)(4)(ii), a *stock value right* is a right granted to an employee with respect to one or more shares of employer stock that, to the extent exercised, entitles the employee to a payment for each share of stock equal to the excess, or a percentage of the excess, of the value of a share of the employer's stock on the date of exercise over a specified price (greater than zero).

Thus, for example, the term stock value right does not include a phantom stock or other arrangement under which an employee is awarded the right to receive a fixed payment equal to the value of a specified number of shares of employer stock.

(iii) *Restricted property.* If an employee receives property from, or pursuant to, a plan maintained by an employer, there is no deferral of compensation (within the meaning of section 3121(v)(2)) merely because the value of the property is not includible in income (under section 83) in the year of receipt by reason of the property being nontransferable and subject to a substantial risk of forfeiture. However, a plan under which an employee obtains a legally binding right to receive property (whether or not the property is restricted property) in a future year may provide for the deferral of compensation within the meaning of paragraph (b)(3) of this section and, accordingly, may constitute a nonqualified deferred compensation plan, even though benefits under the plan are or may be paid in the form of property.

(iv) *Certain welfare benefits*—(A) *In general.* Vacation benefits, sick leave, compensatory time, disability pay, severance pay, and death benefits do not result from the deferral of compensation for

purposes of section 3121(v)(2), even if those benefits constitute wages within the meaning of section 3121(a).

(B) *Severance pay.* Benefits that are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) that satisfies the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii) are considered severance pay for purposes of this paragraph (b)(4)(iv). If benefits are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA), but do not satisfy one or more of the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii), then whether those benefits are severance pay within the meaning of this paragraph (b)(4)(iv) depends upon the relevant facts and circumstances. For this purpose, relevant facts and circumstances include whether the benefits are provided over a short period of time commencing immediately after (or shortly after) termination of employment or for a substantial period of time following termination of employment and whether the benefits are provided after any termination or only after retirement (or another specified type of termination). Benefits provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) are in all cases severance pay within the meaning of this paragraph (b)(4)(iv) if the benefits payable under the plan upon an employee's termination of employment are payable only if that termination is involuntary.

(C) *Death benefits and disability pay*—(*1*) *General definition.* Payments made under a nonqualified deferred compensation plan in the event of death are death benefits within the meaning of this paragraph (b)(4)(iv), but only to the extent the total benefits payable under the plan exceed the lifetime benefits payable under the plan. Similarly, payments made under a nonqualified deferred compensation plan in the event of disability are disability pay within the meaning of this paragraph (b)(4)(iv), but only to the extent the disability benefits payable under the plan exceed the lifetime benefits payable under the plan. Accordingly, any benefits that a nonqualified deferred compensation plan provides in the event of death or disability that are associated with an amount deferred under this section are disregarded in applying this section to the extent the benefits payable under the plan in the event of death or in the event of disability have a value in excess of the lifetime benefits payable under the plan.

(*2*) *Total benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *total benefits payable* under a plan means the present value of the total benefits payable to or on behalf of the employee (including benefits payable in the event of the employee's death) under the plan, disregarding any benefits that are payable only in the event of disability and determined separately with respect to each form of distribution or other election that may apply with respect to the employee.

(*3*) *Disability benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *disability benefits payable* under a plan means the present value of the benefits payable to or on behalf of the employee under the plan, including benefits payable in the event of the employee's disability but excluding death benefits within the meaning of this paragraph (b)(4)(iv).

(*4*) *Lifetime benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the

term *lifetime benefits payable* under a plan means the present value of the benefits that could be payable to the employee under the plan during the employee's lifetime, determined under the plan's optional form of distribution or other election that is or was available to the employee at any time with respect to the amount deferred and that provides the largest present value to the employee during the employee's lifetime of any such form or election so available.

(*5*) *Rules of application.* For purposes of determining present value under this paragraph (b)(4)(iv)(C), present value is determined as of the time immediately preceding the time the amount deferred under a nonqualified deferred compensation plan is required to be taken into account under paragraph (e) of this section, using actuarial assumptions that are reasonable as of that date but taking into consideration only benefits that result from the deferral of compensation, as determined under this paragraph (b), and benefits payable in the event of death or disability. In addition, for purposes of paragraph (b)(4)(iv)(C)(*4*) of this section, present value must be determined without any discount for the probability that the employee may die before benefit payments commence and without regard to any benefits payable solely in the event of disability.

(v) *Certain benefits provided in connection with impending termination*—(A) *In general.* Benefits provided in connection with impending termination of employment under paragraph (b)(4)(v)(B) or (C) of this section do not result from the deferral of compensation within the meaning of section 3121 (v)(2).

(B) *Window benefits*—(*1*) *In general.* For purposes of this paragraph (b)(4)(v), except as provided in paragraph (b)(4)(v)(B)(*3*) of this section, a window benefit is provided in connection with impending termination of employment. For this purpose, a window benefit is an early retirement benefit, retirement-type subsidy, social security supplement, or other form of benefit made available by an employer for a limited period of time (no greater than one year) to employees who terminate employment during that period or to employees who terminate employment during that period under specified circumstances.

(*2*) *Special rule for recurring window benefits.* A benefit will not be considered a window benefit if an employer establishes a pattern of repeatedly providing for similar benefits in similar situations for substantially consecutive, limited periods of time. Whether the recurrence of these benefits constitutes a pattern of amendments is determined based on the facts and circumstances. Although no one factor is determinative, relevant factors include whether the benefits are on account of a specific business event or condition, the degree to which the benefits relate to the event or condition, and whether the event or condition is temporary or discrete or is a permanent aspect of the employer's business.

(*3*) *Transition rule for window benefits.* In the case of a window benefit that is made available for a period of time that begins before January 1, 2000, an employer may choose to treat the window benefit as a benefit that results from the deferral of compensation if the sole reason the window benefit would otherwise fail to be provided pursuant to a nonqualified deferred compensation plan is the application of paragraph (b)(4)(v)(B)(*1*) of this section.

(*C*) *Termination within 12 months of establishment of a benefit or plan.* For purposes of this paragraph (b)(4)(v), a benefit is provided in connection with impending termination of employment, without regard to whether it constitutes a window benefit, if—

(*1*) An employee's termination of employment occurs within 12 months of the establishment of the plan (or amendment) providing the benefit; and

(*2*) The facts and circumstances indicate that the plan (or amendment) is established in contemplation of the employee's impending termination of employment.

(vi) *Benefits established after termination.* Benefits established with respect to an employee after the employee's termination of employment do not result from a deferral of compensation within the meaning of section 3121(v)(2). However, cost-of-living adjustments on benefit payments under a nonqualified deferred compensation plan (within the meaning of paragraph (b) of this section) shall not be considered benefits established after the employee's termination of employment for purposes of this paragraph (b)(4)(vi) merely because the employee does not obtain the right to the adjustment until after the employee's termination of employment. For purposes of the preceding sentence, *cost-of-living adjustments* are payments that satisfy conditions similar to those of 29 CFR 2510.3–2(g)(1)(ii) and (iii).

(vii) *Excess parachute payments.* An excess parachute payment (as defined in section 280G(b)) under an agreement entered into or renewed after June 14, 1984, in taxable years ending after such date, does not result from the deferral of compensation within the meaning of section 3121(v)(2). For this purpose, any contract entered into before June 15, 1984, that is amended after June 14, 1984, in any relevant significant aspect, is treated as a contract entered into after June 14, 1984.

(viii) *Compensation for current services.* A plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2) if, based on the relevant facts and circumstances, the compensation is paid for current services.

(5) *Examples.* This paragraph (b) is illustrated by the following examples:

Example 1: (i) In December of 2001, Employer L tells Employee A that, if specified goals are satisfied for 2002, Employee A will receive a bonus on July 1, 2003, equal to a specified percentage of 2002 compensation. Because Employee A meets the specified goals, Employer L pays the bonus to Employee A on July 1, 2003, consistent with its oral commitment.

(ii) This arrangement is not a nonqualified deferred compensation plan under this section because its terms were not set forth in writing and, therefore, it was not established in accordance with paragraph (b)(2) of this section.

Example 2: (i) In 2004, Employer M establishes a compensation arrangement for Employee B under which

Employer M agrees to pay Employee B a specified amount based on a percentage of his salary for 2004. The amount due is to be paid out of the general assets of Employer M and is payable in 2008.

(ii) Employee B has a legally binding right during 2004 to an amount of compensation that has not been actually or constructively received and that, pursuant to the terms of the arrangement, is payable in a later year. Therefore, the arrangement provides for the deferral of compensation.

Example 3: (i) Employer N establishes a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) for Employee C in 1984. The plan is amended on January 1, 2001, to increase benefits, and the amendment provides that the increase in benefits is on account of Employee C's performance of services for Employer N from 1985 through 2000.

(ii) The additional benefits that resulted from the plan amendment cannot be taken into account as amounts deferred for 1985 through 2000, even though the plan was established before then. Pursuant to paragraphs (b)(2)(ii) and (e)(1) of this section, the additional benefits cannot be taken into account before the latest of the date on which the amendment is adopted, the date on which the amendment is effective, or the date on which the material terms of the plan, as amended, are set forth in writing.

Example 4: (i) In 2002, Employer O, a state or local government, establishes a plan for certain employees that provides for the deferral of compensation and that is subject to section 457(a).

(ii) Paragraph (b)(1) of this section provides that nonqualified deferred compensation plan means any plan that is established by an employer and that provides for the deferral of compensation, other than a plan described in section 3121(a)(5). Section 3121(a)(5) lists, among other plans, an exempt governmental deferred compensation plan as defined in section 3121(v)(3). Under section 3121(v)(3)(A), this definition does not include any plan to which section 457(a) applies. Thus, the plan established by Employer O is not an exempt governmental deferred compensation plan described in section 3121(v)(3) and, consequently, is not a plan described in section 3121(a)(5). Accordingly, the plan is a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and paragraph (b)(1) of this section.

(iii) However, the general timing rule of paragraph (a)(1) of this section and the special timing rule of paragraph (a)(2) of this section apply only to remuneration for employment that constitutes wages. Under section 3121(b)(7), certain service performed in the employ of a state, or any political subdivision of a state, is not employment. Thus, even though the plan is a nonqualified deferred compensation plan, the extent to which section 3121(v)(2) applies to a participating employee will depend on whether or not the service performed for Employer O is excluded from the definition of employment under section 3121(b)(7).

Example 5: (i) In 2000, Employer P establishes a plan that provides for bonuses to be paid to employees based on an objective formula that takes into account the employees' performance for the year. Employer P does not have the discretion to reduce the amount of any employee's bonus after the end of the year. The bonus is not actually calculated until March 1 of the following year, and is paid on March 15 of that following year.

(ii) The plan provides for the deferral of compensation because the employees have a legally binding right, as of the last day of a calendar year, to an amount of compensation that has not been actually or constructively received and, pursuant to the terms of the plan, that compensation is payable in a later year. However, because

the bonuses under the plan are paid within a brief period of time after the end of the calendar year from which they are deferred, Employer P may choose, pursuant to paragraph (b)(3)(iii) of this section, to treat all the bonuses as if they are not subject to the special timing rule of paragraph (a)(2) of this section.

(iii) If the employer uses the special timing rule, the amount deferred would be taken into account as wages on December 31, 2000. If the employer chooses not to use the special timing rule, the amount of the bonus is wages on the date it is actually or constructively paid, March 15, 2000.

Example 6: (i) Employer Q establishes a plan under which bonuses based on performance in one year may be paid on February 1 of the following year at the discretion of the board of directors. The board of directors meets in January of each year to determine the amount, if any, of the bonuses to be paid based on performance in the prior year.

(ii) Because an employee does not have a legally binding right to any bonus until January of the year in which the bonus is paid, any bonus paid under the plan in that year is not deferred from the preceding calendar year, and the plan does not provide for the deferral of compensation within the meaning of paragraph (b)(3)(i) of this section.

Example 7: (i) Employer R maintains a plan for employees that provides nonqualified stock options described in §1.83–7(a) of this chapter. Under the plan, employees are granted in 2001 the option to acquire shares of employer stock at the fair market value of the shares on the date of grant ($50 per share). The options can be exercised at any time from the date of grant through 2010. The options do not have a readily ascertainable fair market value for purposes of section 83 at the date of grant, and shares are issued upon the exercise of the options without being subject to a substantial risk of forfeiture within the meaning of section 83. In 2005, when the fair market value of a share of employer stock is $80, Employee D exercises an option to acquire 1,000 shares.

(ii) Under paragraph (b)(4)(ii) of this section, neither the grant of a stock option nor amounts received currently as a result of the exercise of a stock option result from the deferral of compensation for purposes of section 3121(v)(2). Thus, under the general timing rule of paragraph (a)(1) of this section, the $30,000 spread between the amount paid for the shares ($50,000) and the fair market value of the shares on the date of exercise ($80,000) is taken into account as wages for FICA tax purposes in the year of exercise.

(iii) If the options had been granted at $45 per share, $5 per share below the fair market value on date of grant, the $35,000 spread between the amount paid for the shares ($45,000) and the fair market value of the shares on the date of exercise ($80,000) would similarly be taken into account as wages for FICA tax purposes in the year of exercise.

Example 8: (i) Employer T establishes a phantom stock plan for certain employees. Under the plan, an employee is credited on the last day of each calendar year with a dollar amount equal to the fair market value of 1,000 shares of employer stock. Upon termination of employment for any reason, each employee is entitled to receive the value on the date of termination, in cash or employer stock, of the shares with which he or she has been credited.

(ii) Because compensation to which the employee has a legally binding right as of the last day of one year is

paid in a subsequent year, the phantom stock plan provides for the deferral of compensation. The phantom stock plan does not provide stock value rights within the meaning of paragraph (b)(4)(ii) of this section because it provides for awards equal in value to the full fair market value of a specified number of shares of Employer T stock, rather than the excess of that fair market value over a specified price.

Example 9: (i) Employer U establishes a severance pay arrangement (within the meaning of section 3(2)(b)(i) of ERISA) which provides for payments solely upon an employee's death, disability, or dismissal from employment. The amount of the payments to an employee is based on the length of continuous active service with Employer U at the time of dismissal, and is paid in monthly installments over a period of three years.

(ii) Because benefits payable under the plan upon termination of employment are payable only upon an employee's involuntary termination, the plan is a severance pay plan within the meaning of paragraph (b)(4)(iv)(B) of this section. Thus, the benefits are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 10: (i) Employer V establishes a nonqualified deferred compensation plan under which employees will receive benefit payments commencing at age 65 as a life annuity or in one of several actuarially equivalent annuity forms. If an employee dies before benefit payments commence under the plan, a benefit is payable to the employee's designated beneficiary in a single lump sum payment equal to the present value of the employee's annuity benefit. This benefit (sometimes called a full reserve death benefit) is calculated using the applicable interest rate specified in section 417(e) and, for the period after age 65, the applicable mortality table specified in section 417(e), both of which are reasonable actuarial assumptions. During 2002, Employee E obtains a legally binding right to an annuity benefit under the plan, payable at age 65. This annuity benefit has a present value of $10,000 at the end of 2002, determined using the same assumptions as are used under the plan to calculate the full reserve death benefit.

(ii) The present value, at the end of 2002, of the total benefits payable to or on behalf of Employee E (i.e., the sum of the present value of the annuity benefit commencing at age 65, and the present value of the full reserve death benefit, with both determined using the actuarial assumptions described in paragraph (i) of this *Example 10*, except also taking into account the probability of death prior to age 65) is $10,000. This present value does not exceed the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime determined without a discount for the possibility that Employee E might die before age 65 (also $10,000). Thus, the benefit payable in the event of Employee E's death is not a death benefit for purposes of paragraph (b)(4)(iv) of this section.

(iii) The same result would apply in the case of a plan that bases benefits on an interest bearing account balance and pays the account balance at termination of employment or death (because the sum of the deferred benefits payable in the future if the employee terminates employment before death with a discount for the probability of death before that date plus the present value of the benefit payable in the event of death necessarily equals the present value of the deferred benefits payable with no discount for the probability of death).

Example 11: (i) The facts are the same as in Example 10, except that, in lieu of the full reserve death benefit, the plan provides a monthly life annuity benefit to an employee's spouse in the event of the employee's death before benefit payments commence equal to 100 percent of the monthly annuity that would be payable to the

employee at age 65 under the life annuity form. Employee E is age 63 and has a spouse who is age 51. The sum of the present value of Employee E's annuity benefit commencing at age 65 determined with a discount for the possibility that Employee E might die before age 65 and the present value of the 100 percent annuity death benefit for Employee E's spouse exceeds $10,000.

(ii) The amount deferred for 2002 is $10,000 (because the 100 percent annuity death benefit for Employee E's spouse is disregarded to the extent that the total benefits payable to or on behalf of Employee E exceeds the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime without a discount for the probability of Employee E's death before benefit payments commence).

Example 12: (i) On January 1, 2001, Employer W establishes a plan that covers only Employee F, who owns a significant portion of the business and who has 30 years of service as of that date. The plan provides that, upon Employee F's termination of employment at any time, he will receive $200,000 per year for each of the immediately succeeding five years. Employee F terminates employment on March 1, 2001.

(ii) Because Employee F terminates employment within 12 months of the establishment of the plan and the facts and circumstances set forth above indicate that the plan was established in contemplation of impending termination of employment, the plan is considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Therefore, the benefits provided under the plan are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 13: (i) Employer X establishes a plan on January 1, 2004, to supplement the qualified retirement benefits of recently hired 55-year old Employee G, who forfeited retirement benefits with her former employer in order to accept employment with Employer X. The plan provides that Employee G will receive $50,000 per year for life beginning at age 65, regardless of when she terminates employment. On April 15, 2004, Employee G unexpectedly terminates employment.

(ii) The facts and circumstances indicate that the plan was not established in contemplation of impending termination. Thus, even though Employee G terminated employment within 12 months of the establishment of the plan, the plan is not considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Benefits provided under the plan are treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 14: (i) Employer Y establishes a plan to provide supplemental retirement benefits to a group of management employees who are at various stages of their careers. All employees covered by the plan are subject to the same benefit formula. Employee H is planning to (and actually does) retire within six months of the date on which the plan is established.

(ii) Even though Employee H terminated employment within 12 months of the establishment of the plan, the plan is not considered to have been established in connection with Employee H's impending termination within the meaning of paragraph (b)(4)(v) of this section because the facts and circumstances indicate otherwise.

Example 15: (i) Employee J owns 100 percent of Employer Z, a corporation that provides consulting services. Substantially all of Employer Z's revenue is derived as a result of the services performed by Employee J. In each of 2001, 2002, and 2003, Employer Z has gross receipts of $180,000 and expenses (other than salary) of

$80,000. In each of 2001 and 2002, Employer Z pays Employee J a salary of $100,000 for services performed in each of those years. On December 31, 2002, Employer Z establishes a plan to pay Employee J $80,000 in 2003. The plan recites that the payment is in recognition of prior services. In 2003, Employer Z pays Employee J a salary of $20,000 and the $80,000 due under the plan.

(ii) The facts and circumstances described above indicate that the $80,000 paid pursuant to the plan is based on services performed by Employee J in 2003 and, thus, is paid for current services within the meaning of paragraph (b)(4)(viii) of this section. Accordingly, the plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2), and the $80,000 payment is included as wages in 2003 under the general timing rule of paragraph (a)(1) of this section.

(c) *Determination of the amount deferred*—(1) *Account balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is an account balance plan, the amount deferred for a period equals the principal amount credited to the employee's account for the period, increased or decreased by any income attributable to the principal amount through the date the principal amount is required to be taken into account as wages under paragraph (e) of this section.

(ii) *Definitions*—(A) *Account balance plan.* For purposes of this section, an account balance plan is a nonqualified deferred compensation plan under the terms of which a principal amount (or amounts) is credited to an individual account for an employee, the income attributable to each principal amount is credited (or debited) to the individual account, and the benefits payable to the employee are based solely on the balance credited to the individual account.

(B) *Income.* For purposes of this section, *income* means any increase or decrease in the amount credited to an employee's account that is attributable to amounts previously credited to the employee's account, regardless of whether the plan denominates that increase or decrease as income.

(iii) *Additional rules*—(A) *Commingled accounts.* A plan does not fail to be an account balance plan merely because, under the terms of the plan, benefits payable to an employee are based solely on a specified percentage of an account maintained for all (or a portion of) plan participants under which principal amounts and income are credited (or debited) to such account.

(B) *Bifurcation permitted.* An employer may treat a portion of a nonqualified deferred compensation plan as a separate account balance plan if that portion satisfies the requirements of this paragraph (c)(1) and the amount payable to employees under that portion is determined independently of the amount payable under the other portion of the plan.

(C) *Actuarial equivalents.* A plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form of benefit other than payment of the account balance, provided the amount of benefit payable in that other form is actuarially equivalent to payment of the account balance using actuarial assumptions that are reasonable. Conversely, a plan is not an account balance plan if it provides an optional form of benefit

that is not actuarially equivalent to the account balance using actuarial assumptions that are reasonable. For this purpose, the determination of whether forms are actuarially equivalent using actuarial assumptions that are reasonable is determined under the rules applicable to nonaccount balance plans under paragraph (c)(2)(iii) of this section.

(2) *Nonaccount balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is not an account balance plan (a nonaccount balance plan), the amount deferred for a period equals the present value of the additional future payment or payments to which the employee has obtained a legally binding right (as described in paragraph (b)(3)(i) of this section) under the plan during that period.

(ii) *Present value defined.* For purposes of this section, *present value* means the value as of a specified date of an amount or series of amounts due thereafter, where each amount is multiplied by the probability that the condition or conditions on which payment of the amount is contingent will be satisfied, and is discounted according to an assumed rate of interest to reflect the time value of money. For purposes of this section, the present value must be determined as of the date the amount deferred is required to be taken into account as wages under paragraph (e) of this section using actuarial assumptions and methods that are reasonable as of that date. For this purpose, a discount for the probability that an employee will die before commencement of benefit payments is permitted, but only to the extent that benefits will be forfeited upon death. In addition, the present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk associated with any deemed or actual investment of amounts deferred under the plan, the risk that the employer, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments, the possibility of a future change in the law, or similar risks or contingencies. Nor is the present value affected by the possibility that some of the payments due under the plan will be eligible for one of the exclusions from wages in section 3121(a).

(iii) *Treatment of actuarially equivalent benefits*—(A) *In general.* In the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, the amount deferred is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied. Accordingly, in the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, unless the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the amount deferred is treated as not reasonably ascertainable under the rules of paragraph (e)(4)(i)(B) of this section until a form of benefit and a time of commencement are selected.

(B) *Use of normal form commencing at normal commencement date.* The requirements of this paragraph (c)(2)(iii)(B) are satisfied by a nonaccount balance plan if the plan has a single normal form of benefit commencing at normal commencement date for the amount deferred and each other optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date using actuarial assumptions that are reasonable. For this purpose, each form of benefit for payment of the amount deferred commencing at a date is a separate optional form. For purposes of this

paragraph (c)(2)(iii)(B), each optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date only if the terms of the plan in effect when the amount is deferred provide for every optional form to be actuarially equivalent and further provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected, without regard to whether market interest rates are higher or lower at the time the optional form is selected than at the time the amount is deferred. Thus, a plan that provides for every optional form to be actuarially equivalent satisfies this paragraph (c)(2)(iii)(B) if it provides for actuarial equivalence to be determined—

(*1*) When an optional form is selected or when benefit payments under the optional form commence, based on assumptions that are reasonable then;

(*2*) Based on an index that reflects market rates of interest from time to time (for example, the plan specifies that all benefits will be actuarially equivalent using the applicable interest rate and applicable mortality table specified in section 417(e)); or

(*3*) Based on actuarial assumptions specified in the plan and provides for those assumptions to be revised to be reasonable assumptions if they cease to be reasonable assumptions.

(C) *Fixed mortality assumptions permitted.* A plan does not fail to satisfy paragraph (c)(2)(iii)(B) of this section merely because the plan specifies a fixed mortality assumption that is reasonable at the time the amount is deferred, even if that assumption is not reasonable at the time the optional form is selected. (But see paragraph (c)(2)(iii)(E) of this section for additional rules that apply if the mortality assumption is not reasonable at the time the optional form is selected.)

(D) *Normal form of benefit commencing at normal commencement date defined.* For purposes of this paragraph (c)(2)(iii), the normal form of benefit commencing at normal commencement date under the plan is the form, and date of commencement, under which the payments due to the employee under the plan are expressed, prior to adjustments for form or timing of commencement of payments.

(E) *Rule applicable if actuarial assumptions cease to be reasonable.* If the terms of the plan in effect when an amount is deferred provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected or payments commence as provided in paragraph (c)(2)(iii)(B) of this section, but, at that time, the actuarial assumptions used under the plan are not reasonable, the employee will be treated as obtaining a legally binding right at that time (or, if earlier, at the date on which the plan is amended to provide actuarial assumptions that are not reasonable) to any additional benefits that result from the use of an unreasonable actuarial assumption. This might occur, for example, if the plan specifies that the actuarial assumptions will be reasonable assumptions to be set at the time the optional form is selected and the assumptions used are in fact not reasonable at that time.

(3) *Separate determination for each period.* The amount deferred under this paragraph (c) is

determined separately for each period for which there is an amount deferred under the plan. In addition, paragraphs (d) and (e) of this section are applied separately with respect to the amount deferred for each such period. Thus, for example, the fraction described in paragraph (d)(1)(ii)(B) of this section and the amount of the true-up at the resolution date described in paragraph (e)(4)(ii)(B) of this section are determined separately with respect to each amount deferred. See paragraph (e)(4)(ii)(D) of this section for special rules for allocating amounts deferred over more than one year.

(4) *Examples.* This paragraph (c) is illustrated by the following examples. (The examples illustrate the rules in this paragraph (c) and include various interest rate and mortality table assumptions, including the applicable section 417(e) mortality table, the GAM 83 (male) mortality table, and UP–84 mortality table. These tables can be obtained from the Society of Actuaries at its internet site at *http://www.soa.org.*) The examples are as follows:

Example 1: (i) Employer M establishes a nonqualified deferred compensation plan for Employee A. Under the plan, 10 percent of annual compensation is credited on behalf of Employee A on December 31 of each year. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee A as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested and the benefits payable to Employee A are based solely on the balance credited to Employee A's account.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year is equal to 10 percent of annual compensation.

Example 2: (i) Employer N establishes a nonqualified deferred compensation plan for Employee B. Under the plan, 2.5 percent of annual compensation is credited quarterly on behalf of Employee B. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee B's account as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested, and the benefits payable to Employee B are based solely on the balance credited to Employee B's account. As permitted by paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages on the last day of the year.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year equals 10 percent of annual compensation (i.e., the sum of the principal amounts credited to Employee B's account for the year) plus the interest credited with respect to that 10 percent principal amount through the last day of the calendar year. If Employer N had not chosen to apply paragraph (e)(5) of this section and, thus, had taken into account 2.5 percent of compensation quarterly, the interest credited with respect to those quarterly amounts would not have been treated as part of the amount deferred for the year.

Example 3: (i) Employer O establishes a nonqualified deferred compensation plan for a group of five employees. Under the plan, a specified sum is credited to an account for the benefit of the group of employees on July 31 of each year. Income on the balance of the account is credited annually at a rate that is reasonable for each year. The benefit payable to an employee is equal to one-fifth of the account balance and is payable, at the employee's option, in a lump sum or in 10 annual installments that reflect income on the balance.

(ii) The plan is an account balance plan notwithstanding the fact that the employee's benefit is equal to a

specified percentage of an account maintained for a group of employees.

Example 4: (i) The facts are the same as in *Example 3*, except that the plan also permits an employee to elect a life annuity that is actuarially equivalent to the account balance based on the applicable interest rate and applicable mortality table specified in section 417(e) at the time the benefit is elected by the employee.

(ii) Under paragraphs (c)(1)(iii)(C) and (c)(2)(iii) of this section, the plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form that is actuarially equivalent to payment of the account balance using actuarial assumptions that are reasonable at the time the form is selected.

Example 5: (i) Employer P establishes a nonqualified deferred compensation plan for a group of employees. Under the plan, each participating employee has a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and the employee's highest average annual compensation for any 3-year period. The plan also provides that, if an employee dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. As of December 31, 2002, Employee C is age 60, has 25 years of service, and high 3-year average compensation of $100,000 (the average for the years 2000 through 2002). As of December 31, 2003, Employee C is age 61, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2004, Employee C is age 62, has 27 years of service, and has high 3-year average compensation of $105,000. The assumptions that Employer P uses to determine the amount deferred for 2003 (a 7 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) and for 2004 (a 7.5 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions.

(ii) As of December 31, 2002, Employee C has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee C has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee C has earned a legally binding right to additional lifetime payments of $4,080 ($54,080−$50,000) per year beginning at age 65. The amount deferred for 2003 is the present value, as of December 31, 2003, of these additional payments, which is $28,767 ($4,080 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2003). Similarly, during 2004, Employee C has earned a legally binding right to additional lifetime payments of $2,620 (2 percent × 27 years × $105,000, minus $54,080) per year beginning at age 65. The amount deferred for 2004 is the present value, as of December 31, 2004, of these additional payments, which is $18,845 ($2,620 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2004).

Example 6: (i) Employer Q establishes a nonqualified deferred compensation plan for Employee D on January 1, 2001, when Employee D is age 63. During 2001, Employee D obtains a fully vested right to receive a life annuity under the nonqualified deferred compensation plan equal to the excess of $200,000 over the life annuity benefits payable to Employee D under a qualified defined benefit pension plan sponsored by Employer Q. The life annuity benefit payable annually under the qualified plan is the lesser of $200,000 and the section 415(b)(1)(A) limitation in effect for the year, where the section 415(b)(1)(A) limitation is automatically adjusted to reflect changes in the cost of living. Benefits under both the qualified and nonqualified plan are

payable monthly beginning at age 65. For purposes of this example, the section 415(b)(1)(A) limit for 2001 is assumed to be $140,000. The nonqualified plan provides no benefits in the event Employee D dies prior to commencement of benefit payments. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. The assumptions that Employer Q uses to determine the amount deferred for 2001 (a 7 percent interest rate, a 3 percent increase in the cost of living and the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions. As of December 31, 2001, Employee D has a legally binding right to receive lifetime payments as set forth in the following table:

Year	Net annual payment (based on cost of living)	Assumed qualified plan payment under nonqualified plan	Annual amount
2003	$200,000	$145,000	$55,000
2004	200,000	150,000	50,000
2005	200,000	155,000	45,000
2006	200,000	160,000	40,000
2007	200,000	165,000	35,000
2008	200,000	170,000	30,000
2009	200,000	175,000	25,000
2010	200,000	180,000	20,000
2011	200,000	185,000	15,000
2012	200,000	190,000	10,000
2013	200,000	195,000	5,000

2014 and thereafter	200,000	205,000 or greater	0

(ii) The amount deferred for 2001 is the present value, as of December 31, 2001, of the net lifetime payments under the nonqualified plan, or $223,753.

(d) *Amounts taken into account and income attributable thereto*—(1) *Amounts taken into account*—(i) *In general.* For purposes of this section, an amount deferred under a nonqualified deferred compensation plan is taken into account as of the date it is included in computing the amount of *wages* as defined in section 3121(a), but only to the extent that any additional FICA tax that results from such inclusion (including any interest and penalties for late payment) is actually paid before the expiration of the applicable period of limitations for the period in which the amount deferred was required to be taken into account under paragraph (e) of this section. Because an amount deferred for a calendar year is combined with the employee's other wages for the year for purposes of computing FICA taxes with respect to the employee for the year, if the employee has other wages that equal or exceed the wage base limitations for the Old-Age, Survivors, and Disability Insurance (OASDI) portion (or, in the case of years before 1994, the Hospital Insurance (HI) portion) of FICA for the year, no portion of the amount deferred will actually result in additional OASDI (or HI) tax. However, because there is no wage base limitation for the HI portion of FICA for years after 1993, the entire amount deferred (in addition to all other wages) is subject to the HI tax for the year and, thus, will not be considered taken into account for purposes of this section unless the HI tax relating to the amount deferred is actually paid. In determining whether any additional FICA tax relating to the amount deferred is actually paid, any FICA tax paid in a year is treated as paid with respect to an amount deferred only after FICA tax is paid on all other wages for the year.

(ii) *Amounts not taken into account*—(A) *Failure to take an amount deferred into account under the special timing rule.* If an amount deferred for a period (as determined under paragraph (c) of this section) is not taken into account, then the nonduplication rule of paragraph (a)(2)(iii) of this section does not apply, and benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. For example, if an amount deferred is required to be taken into account in a particular year under paragraph (e) of this section, but the employer fails to pay the additional FICA tax resulting from that amount, then the amount deferred and the income attributable to that amount must be included as wages when actually or constructively paid.

(B) *Failure to take a portion of an amount deferred into account under the special timing rule.* If, as of the date an amount deferred is required to be taken into account, only a portion of the amount deferred (as determined under paragraph (c) of this section) has been taken into account, then a

portion of each subsequent benefit payment that is attributable to that amount is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section and the balance is subject to the general timing rule of paragraph (a)(1) of this section. The portion that is excluded from wages is fixed immediately before the attributable benefit payments commence (or, if later, the date the amount deferred is required to be taken into account) and is determined by multiplying each such payment by a fraction, the numerator of which is the amount that was taken into account (plus income attributable to that amount determined under paragraph (d)(2) of this section through the date the portion is fixed) and the denominator of which is the present value of the future benefit payments attributable to the amount deferred, determined as of the date the portion is fixed. For this purpose, if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the present value is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date. In addition, if the employer demonstrates that the amount deferred was determined using reasonable actuarial assumptions as determined by the Commissioner, the present value of the future benefit payments attributable to the amount deferred is determined using those assumptions. In any other case, see paragraph (d)(2)(iii) of this section.

(2) *Income attributable to the amount taken into account*—(i) *Account balance plans*—(A) *In general.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of an account balance plan, the *income attributable to the amount taken into account* means any amount credited on behalf of an employee under the terms of the plan that is income (within the meaning of paragraph (c)(1)(ii)(B) of this section) attributable to an amount previously taken into account (within the meaning of paragraph (d)(1) of this section), but only if the income reflects a rate of return that does not exceed either the rate of return on a predetermined actual investment (as determined in accordance with paragraph (d)(2)(i)(B) of this section) or, if the income does not reflect the rate of return on a predetermined actual investment (as so determined), a reasonable rate of interest (as determined in accordance with paragraph (d)(2)(i)(C) of this section).

(B) *Rules relating to actual investment—(1) In general.* For purposes of this paragraph (d)(2)(i), the rate of return on a predetermined actual investment for any period means the rate of total return (including increases or decreases in fair market value) that would apply if the account balance were, during the applicable period, actually invested in one or more investments that are identified in accordance with the plan before the beginning of the period. For this purpose, an account balance plan can determine income based on the rate of return of a predetermined actual investment regardless of whether assets associated with the plan or the employer are actually invested therein and regardless of whether that investment is generally available to the public. For example, an account balance plan could provide that income on the account balance is determined based on an employee's prospective election among various investment alternatives that are available under the employer's section 401(k) plan, even if one of those investment alternatives is not generally available to the public. In addition, an actual investment includes an investment identified by reference to any stock index with respect to which there are positions traded on a national securities exchange described in section 1256(g)(7)(A).

(*2*) *Certain rates of return not based on predetermined actual investment.* A rate of return will not be treated as the rate of return on a predetermined actual investment within the meaning of this paragraph

(d)(2)(i)(B) if the rate of return (to any extent or under any conditions) is based on the greater of the rate of return of two or more actual investments, is based on the greater of the rate of return on an actual investment and a rate of interest (whether or not the rate of interest would otherwise be reasonable under paragraph (d)(2)(i)(C) of this section), or is based on the rate of return on an actual investment that is not predetermined. For example, if a plan bases the rate of return on the greater of the rate of return on a predetermined actual investment (such as the value of the employer's stock), and a 0 percent interest rate (i.e., without regard to decreases in the value of that investment), the plan is using a rate of return that is not a rate of return on a predetermined actual investment within the meaning of this paragraph (d)(2)(i)(B).

(C) *Rules relating to reasonable interest rates—(1) In general.* If income for a period is credited to an account balance plan on a basis other than the rate of return on a predetermined actual investment (as determined in accordance with paragraph (d)(2)(i)(B) of this section), then, except as otherwise provided in this paragraph (d)(2)(i)(C), the determination of whether the income for the period is based on a reasonable rate of interest will be made at the time the amount deferred is required to be taken into account and annually thereafter.

(*2*) *Fixed rates permitted.* If, with respect to an amount deferred for a period, an account balance plan provides for a fixed rate of interest to be credited, and the rate is to be reset under the plan at a specified future date that is not later than the end of the fifth calendar year that begins after the beginning of the period, the rate is reasonable at the beginning of the period, and the rate is not changed before the reset date, then the rate will be treated as reasonable in all future periods before the reset date.

(ii) *Nonaccount balance plans.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of a nonaccount balance plan, the *income attributable to the amount taken into account* means the increase, due solely to the passage of time, in the present value of the future payments to which the employee has obtained a legally binding right, the present value of which constituted the amount taken into account (determined as of the date such amount was taken into account), but only if the amount taken into account was determined using reasonable actuarial assumptions and methods. Thus, for each year, there will be an increase (determined using the same interest rate used to determine the amount taken into account) resulting from the shortening of the discount period before the future payments are made, plus, if applicable, an increase in the present value resulting from the employee's survivorship during the year. As a result, if the amount deferred for a period is determined using a reasonable interest rate and other reasonable actuarial assumptions and methods, and the amount is taken into account when required under paragraph (e) of this section, then, under the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the future payments attributable to that amount will be subject to FICA tax when paid.

(iii) *Unreasonable rates of return*—(A) *Account balance plans.* This paragraph (d)(2)(iii)(A) applies to an account balance plan under which the income credited is based on neither a predetermined actual investment, within the meaning of paragraph (d)(2)(i)(B) of this section, nor a rate of interest that is reasonable, within the meaning of paragraph (d)(2)(i)(C) of this section, as determined by the

Commissioner. In that event, the employer must calculate the amount that would be credited as income under a reasonable rate of interest, determine the excess (if any) of the amount credited under the plan over the income that would be credited using the reasonable rate of interest, and take that excess into account as an additional amount deferred in the year the income is credited. If the employer fails to calculate the amount that would be credited as income under a reasonable rate of interest and to take the excess into account as an additional amount deferred in the year the income is credited, or the employer otherwise fails to take the full amount deferred into account, then the excess of the income credited under the plan over the income that would be credited using AFR will be treated as an amount deferred in the year the income is credited. For purposes of this section, *AFR* means the mid-term applicable federal rate (as defined pursuant to section 1274(d)) for January 1 of the calendar year, compounded annually. In addition, pursuant to paragraph (d)(1)(ii) of this section, the excess over the income that would result from the application of AFR and any income attributable to that excess are subject to the general timing rule of paragraph (a)(1) of this section.

(B) *Nonaccount balance plans.* If any actuarial assumption or method used to determine the amount taken into account under a nonaccount balance plan is not reasonable, as determined by the Commissioner, then the income attributable to the amount taken into account is limited to the income that would result from the application of the AFR and, if applicable, the applicable mortality table under section 417(e)(3)(A)(ii)(I) (the 417(e) mortality table), both determined as of the January 1 of the calendar year in which the amount was taken into account. In addition, paragraph (d)(1)(ii)(B) of this section applies and, in calculating the fraction described in paragraph (d)(1)(ii)(B) of this section (at the date specified in paragraph (d)(1)(ii)(B) of this section), the numerator is the amount taken into account plus income (as limited under this paragraph (d)(2)(iii)(B)), and the present value in the denominator is determined using the AFR, the 417(e) mortality table, and reasonable assumptions as to cost of living, each determined as of the time the amount deferred was required to be taken into account.

(3) *Examples.* This paragraph (d) is illustrated by the following examples:

Example 1: (i) In 2001, Employer M establishes a nonqualified deferred compensation plan for Employee A under which all benefits are 100 percent vested. In 2002, Employee A has $200,000 of current annual compensation from Employer M that is subject to FICA tax. The amount deferred under the plan on behalf of Employee A for 2002 is $20,000. Thus, Employee A has total wages for FICA tax purposes of $220,000. Because Employee A has other wages that exceed the OASDI wage base for 2002, no additional OASDI tax is due as a result of the $20,000 amount deferred. Because there is no wage base limitation for the HI portion of FICA, additional HI tax liability results from the $20,000 amount deferred. However, Employer M fails to pay the additional HI tax.

(ii) Under paragraph (d)(1)(i) of this section, an amount deferred is considered taken into account as wages for FICA tax purposes as of the date it is included in computing FICA wages, but only if any additional FICA tax liability that results from inclusion of the amount deferred is actually paid. Because the HI tax resulting from the $20,000 amount deferred was not paid, that amount deferred was not taken into account within the meaning of paragraph (d)(1) of this section. Thus, pursuant to paragraph (d)(1)(ii) of this section, benefit payments

attributable to the $20,000 amount deferred will be included as wages in accordance with the general timing rule of paragraph (a)(1) of this section and will be subject to the HI portion of FICA tax when actually or constructively paid (and the OASDI portion of FICA tax to the extent Employee A's wages do not exceed the OASDI wage base limitation).

Example 2: (i) The facts are the same as in *Example 1*, except that Employer M takes all actions necessary to correct its failure to pay the additional tax before the applicable period of limitations expires for 2002 (including payment of any applicable interest and penalties).

(ii) Because the HI tax resulting from the $20,000 amount deferred is paid, that amount deferred is considered taken into account for 2002. Thus, in accordance with paragraph (a)(2)(iii) of this section, neither the amount deferred nor the income attributable to the amount taken into account will be treated as wages for FICA tax purposes at any time thereafter.

Example 3: (i) Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. Under the plan, an employee's account is credited with a contribution equal to 10 percent of salary on December 31 of each year. The employee's account balance also is increased each December 31 by *interest* on the total amounts credited to the employee's account as of the preceding December 31. The interest rate specified in the plan results in income credits that are not based on the rate of return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section, and that are greater than the income that would result from application of a reasonable rate of interest within the meaning of paragraph (d)(2)(i)(C) of this section. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) Pursuant to paragraph (d)(2)(iii)(A) of this section, the income credits in excess of the income that would be credited using the AFR are considered additional amounts deferred in the year credited.

Example 4: (i) The facts are the same as in *Example 3*, except that the annual increase is based on Moody's Average Corporate Bond Yield.

(ii) Because this index reflects a reasonable rate of interest, the income credited under the plan is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 5: (i) The facts are the same as in *Example 3*, except that the annual increase (or decrease) is based on the rate of total return on Employer N's publicly traded common stock.

(ii) Because the income credited under the plan does not exceed the actual rate of return on a predetermined actual investment, the income credited is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 6: (i) The facts are the same as in *Example 3*, except that the annual rate of increase or decrease is equal to the greater of the rate of total return on a specified aggressive growth mutual fund or the rate of return on a specified income-oriented mutual fund. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) Because the rate of increase or decrease is based on the greater of two rates of returns, the increase is not based on the return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section. Thus, if the rate of return credited under the plan (i.e., the greater of the rates of return of the two mutual funds) exceeds the income that would be credited using the AFR, the excess is not considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section and, pursuant to paragraph (d)(2)(iii)(A) of this section, is considered an additional amount deferred.

Example 7: (i) The facts are the same as in *Example 6*, except that the annual increase or decrease with respect to 50 percent of the employee's account is equal to the rate of total return on the specified aggressive growth mutual fund and the annual increase or decrease with respect to the other 50 percent of the employee's account is equal to the increase or decrease in the Standard & Poor's 500 Index.

(ii) Because the increase or decrease attributable to any portion of the employee's account is based on the return on a predetermined actual investment, the entire increase or decrease is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 8: (i) The facts are the same as in *Example 3*, except that, pursuant to the terms of the plan, before the beginning of each year, the board of directors of Employer N designates a specific investment on which the following year's annual increase or decrease will be based. The board is authorized to switch investments more frequently on a prospective basis. Before the beginning of 2004, the board designates Company A stock as the investment for 2004. Before the beginning of 2005, the board designates Company B stock as the investment for 2005. At the end of 2005, the board determines that the return on Company B stock was lower than expected and changes its designation for 2005 to the rate of return on Company C stock, which had a higher return during 2005. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) The annual increase or decrease for 2004 is based on the return of a predetermined actual investment. Although the annual increase or decrease for 2005 is based on an actual investment, the actual investment is not predetermined since it was not designated before the beginning of 2005. Pursuant to paragraph (d)(2)(iii)(A) of this section, the excess of the income credited under the plan over the income determined using AFR is an additional amount deferred for 2005.

Example 9: (i) Employer O establishes a nonqualified deferred compensation plan for Employee B. Under the plan, if Employee B survives until age 65, he has a fully vested right to receive a lump sum payment at that age, equal to the product of 10 percent per year of service and Employee B's highest average annual compensation for any 3-year period, but no benefits are payable in the event Employee B dies prior to age 65. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages as of the last day of the year. As of December 31, 2002, Employee B has 25 years of service and Employee B's high 3-year average compensation is $100,000 (the average for the years 2000 through 2002). As of December 31, 2002, Employee B has a legally binding right to receive a payment at age 65 of $250,000 (10 percent × 25 years × $100,000). As of December 31, 2003, Employee B is age 63, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2003, Employee B has a legally binding right to receive a payment at age 65 of $270,400 (10 percent × 26 years × $104,000). Thus, during 2003, Employee B has earned a legally binding right to an additional payment at age 65 of $20,400 ($270,400−$250,000). The assumptions that Employer O uses to determine the amount deferred for

2003 are a 7 percent interest rate and the GAM 83 (male) mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions. The amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $17,353. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payment due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. As of the payment date at age 65, the present value of the future payment earned during 2003 is $20,400. The entire difference between the $20,400 and the $17,353 amount deferred ($3,047) is the increase in the present value of the future payment due solely to the passage of time, and thus constitutes income attributable to the amount taken into account. Because the amount deferred was taken into account, the entire payment of $20,400 represents either an amount deferred that was previously taken into account ($17,353) or income attributable to that amount ($3,047). Accordingly, pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the payment is included in wages.

Example 10: (i) The facts are the same as in *Example 9*, except that, instead of providing a lump sum equal to 10 percent of average compensation per year of service, the plan provides Employee B with a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and Employee B's highest average annual compensation for any 3-year period. The plan also provides that, if Employee B dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As of December 31, 2002, Employee B has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee B has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee B has earned a legally binding right to additional lifetime payments of $4,080 ($54,080− $50,000) per year beginning at age 65. The amount deferred for 2003 is $32,935, which is the present value, as of December 31, 2003, of these additional payments, determined using the same actuarial assumptions and methods used in *Example 9*, except that there is no discount for the probability of death prior to age 65. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payments due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. Because the amount deferred was taken into account, each annual payment of $4,080 attributable to the amount deferred in 2003 represents either an amount deferred that was previously taken into account or income attributable to that amount. Accordingly, pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the payments are included in wages.

Example 11: (i) The facts are the same as in *Example 10*, except that no amount is taken into account for 2003 because Employer O fails to pay the additional FICA tax.

(ii) Under paragraph (d)(1)(ii)(A) of this section, if an amount deferred for a period is not taken into account, then the benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. In this case, assuming that the amounts deferred in other periods were taken into account, $4,080 of each year's total benefit payments will be included in wages when

actually or constructively paid, in accordance with the general timing rule.

Example 12: (i) Employer P establishes an account balance plan on January 1, 2002, under which all benefits are 100 percent vested. The plan provides that amounts deferred will be credited annually with interest beginning in 2002 at a rate that is greater than a reasonable rate of interest. Employer P treats the excess over the applicable interest rate in section 417(e) as an additional amount deferred for 2002 and in each year thereafter, and takes the additional amount into account by including it in FICA wages and paying the additional FICA tax for the year.

(ii) Under the nonduplication rule in paragraph (a)(2)(iii) of this section, the benefits paid under the plan will be excluded from wages for FICA tax purposes.

Example 13: (i) The facts are the same as in *Example 9*, except that, in determining the amount deferred, Employer O uses a 15 percent interest rate, which, solely for purposes of this example, is assumed not to be a reasonable interest rate. Employer O determines that the amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $15,023. Employer O includes $15,023 in wages and pays any resulting FICA tax. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is unreasonable, the income attributable to the amount taken into account is limited to the income that would result from using a 7 percent interest rate and, in this case, an increase for survivorship using the 417(e) mortality table. Under these assumptions, the income attributable to the $15,023 amount taken into account for 2003 is $1,199 in 2004 and $1,313 in 2005. Under paragraph (d)(1)(ii) of this section, the sum of these amounts ($17,535) is excluded from Employee B's wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, and the balance of the payment ($2,865) is subject to the general timing rule of paragraph (a)(1) of this section and, thus, is included in Employee B's wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction, the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account. In this *Example 13,* the fraction would be $15,023 divided by $17,478, which equals .85954. The $20,400 payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $17,535 ($20,400×.85954) is excluded from wages and the balance ($2,865) is subject to FICA tax when actually or constructively paid.

Example 14: (i) The facts are the same as *Example 10,* except that Employer O calculates the amount deferred for 2003 as $18,252 and takes that amount into account by including that amount in wages and paying any resulting FICA tax. The assumptions that Employer O uses to determine the amount deferred are a 15 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table.

The 15 percent interest rate is assumed, solely for purposes of this example, not to be a reasonable actuarial assumption. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method used is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is not reasonable, the income attributable to the amount taken into account is equal to the income that would result from using a 7 percent interest rate and the amount taken into account is treated as if it represented a portion of the amount deferred for purposes of applying paragraph (d)(1)(ii)(B) of this section. Under these assumptions, the income attributable to the $18,252 amount taken into account for 2003 is $1,278 in 2004 and $1,367 in 2005. Under paragraph (d)(1)(ii)(B) of this section, the portion of each benefit payment attributable to the amount deferred that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section is determined at benefit commencement by multiplying each benefit payment by a fraction, the numerator of which is the amount taken into account (plus income attributable to that amount) and the denominator of which is the present value of future benefit payments attributable to the amount deferred. Because the interest rate assumption is not reasonable, not only is the income limited to the application of the AFR, but the present value in the denominator must be determined using the AFR and (if applicable) the 417(e) mortality table. In this case, the present value is $40,283 and thus the fraction is $20,897 divided by $40,283, or .51875. Thus, $2,116 (.51875 × $4,080) of each year's benefit payment is excluded from wages and the balance of each year's payment ($1,964) is subject to the general timing rule of paragraph (a)(1) of this section and is included in wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account. In this *Example 14*, the fraction would be $18,252 divided by $35,185, which equals .51875. The $4,080 annual payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $2,116 ($4,080 × .51875) is excluded from wages and the balance ($1,964) is subject to FICA tax when actually or constructively paid.

(e) *Time amounts deferred are required to be taken into account*—(1) *In general.* Except as otherwise provided in this paragraph (e), an amount deferred under a nonqualified deferred compensation plan must be taken into account as wages for FICA tax purposes as of the later of the date on which services creating the right to the amount deferred are performed (within the meaning of paragraph (e)(2) of this section) or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section). However, in no event may any amount deferred under a nonqualified deferred compensation plan be taken into account as wages for FICA tax purposes prior to the establishment of the plan providing for the amount deferred (or, if later, the plan amendment providing for the amount deferred). Therefore, if an amount is deferred pursuant to the terms of a legally binding agreement that is not put in writing until after the amount would otherwise be taken into account under this paragraph (e)(1), the amount deferred (including any attributable income) must be taken into account as wages for FICA tax purposes as of the date the material terms of the plan are put in writing.

(2) *Services creating the right to an amount deferred.* For purposes of this section, services creating the right to an amount deferred under a nonqualified deferred compensation plan are considered to be performed as of the date on which, under the terms of the plan and all the facts and circumstances, the employee has performed all of the services necessary to obtain a legally binding right (as described in paragraph (b)(3)(i) of this section) to the amount deferred.

(3) *Substantial risk of forfeiture.* For purposes of this section, the determination of whether a substantial risk of forfeiture exists must be made in accordance with the principles of section 83 and the regulations thereunder.

(4) *Amount deferred that is not reasonably ascertainable under a nonaccount balance plan*—(i) *In general*—(A) *Date required to be taken into account.* Notwithstanding any other provision of this paragraph (e), an amount deferred under a nonaccount balance plan is not required to be taken into account as wages under the special timing rule of paragraph (a)(2) of this section until the first date on which all of the amount deferred is reasonably ascertainable (the resolution date). In this case, the amount required to be taken into account as of the resolution date is determined in accordance with paragraph (c)(2) of this section.

(B) *Definition of reasonably ascertainable.* For purposes of this paragraph (e)(4), an amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial or other assumptions regarding future events or circumstances needed to determine the amount deferred are interest and mortality. For this purpose, the form and commencement date of the benefit payments attributable to the amount deferred are treated as known if the requirements of paragraph (c)(2)(iii)(B) of this section (under which payments are treated as being made in the normal form of benefit commencing at normal commencement date) are satisfied. In addition, an amount deferred does not fail to be reasonably ascertainable on a date merely because the exact amount of the benefit payable cannot readily be calculated on that date or merely because the exact amount of the benefit payable depends on future changes in the cost of living. If the exact amount of the benefit payable depends on future changes in the cost of living, the amount deferred must be determined using a reasonable assumption as to the future changes in the cost of living. For example, the amount of a benefit is treated as known even if the exact amount of the benefit payable cannot be determined until future changes in the cost of living are reflected in the section 415 limitation on benefits payable under a qualified retirement plan.

(ii) *Earlier inclusion permitted*—(A) *In general.* With respect to an amount deferred that is not reasonably ascertainable, an employer may choose to take an amount into account at any date or dates (an early inclusion date or dates) before the resolution date (but not before the date described in paragraph (e)(1) of this section with respect to the amount deferred). Thus, for example, with respect to an amount deferred under a nonaccount balance plan that is not reasonably ascertainable because the plan permits employees to receive their benefits in more than one form or commencing at more than one date (and the requirements of paragraph (c)(2)(iii) of this section are not satisfied), an

employer may choose to take an amount into account on the date otherwise described in paragraph (e)(1) of this section before the form and commencement date are selected (based on assumptions as to the form and commencement date for the benefit payments) or may choose to wait until the form and commencement date of the benefit payments are selected. An employer that chooses to take an amount into account at an early inclusion date under this paragraph (e)(4)(ii) for an employee under a plan is not required until the resolution date to identify the period to which the amount taken into account relates.

(B) *True-up at resolution date.* If, with respect to an amount deferred for a period, an employer chooses to take an amount into account as of an early inclusion date in accordance with this paragraph (e)(4)(ii) and the benefit payments attributable to the amount deferred exceed the benefit payments that are actuarially equivalent to the amount taken into account at the early inclusion date (payable in the same form and using the same commencement date as the benefit payments attributable to the amount deferred), then the present value of the difference in the benefits, determined in accordance with paragraph (c)(2) of this section, must be taken into account as of the resolution date.

(C) *Actuarial assumptions.* For purposes of determining the benefits that are actuarially equivalent to the amount taken into account as of an early inclusion date, the amount taken into account is converted to an actuarially equivalent benefit payable in the same form and commencing on the same date as the actual benefit payments attributable to the amount deferred using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date. Thus, with respect to an amount deferred for a period, the amount required to be taken into account as of the resolution date is the present value (determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that are reasonable as of the resolution date) of the excess, if any, of the future benefit payments attributable to the amount deferred over the future benefits payable in the same form and commencing on the same date that are actuarially equivalent to the portion of the amount deferred that was taken into account as of the early inclusion date (where actuarial equivalence is determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date).

(D) *Allocation rules for amounts deferred over more than one period—*(*1*) *General rule.* The rules of this paragraph (e)(4)(ii)(D) apply for purposes of determining whether an amount has been included under this paragraph (e)(4) before the earliest date permitted under paragraph (e)(1) of this section.

(*2*) *Future compensation increases.* Increases in an employee's compensation after the early inclusion date must be disregarded.

(*3*) *Early retirement subsidies.* An early retirement subsidy that the employee ultimately receives may be taken into account at an early inclusion date if the employee would have a legally binding right to the subsidy at the early inclusion date but for any condition that the employee continue to render services. Accordingly, an employer may take into account at an early inclusion date any early retirement subsidy that the employee ultimately receives to the extent that elimination or reduction of

that subsidy would violate section 411(d)(6)(B)(i) if that section applied to the plan.

(*4*) *Allocation with respect to offsets.* In any case in which a series of amounts are deferred over more than one period, the amounts deferred are not reasonably ascertainable until a single resolution date and the benefit payments attributable to the entire series are determined under a formula that provides a gross benefit that in the aggregate is subject to an objective reduction for future events under the terms of the plan, such as an offset for the aggregate benefits payable under a plan qualified under section 401(a), the attribution of benefit payments to the amount deferred in each period is determined under the rules of this paragraph (e)(4)(ii)(D)(*4*). In a case described in the preceding sentence, the benefit payments made as a result of the series of amounts deferred may be treated as attributable to the amount deferred as of the earliest period in which the employee obtained a legally binding right to a benefit under the plan equal to the excess, if any, of the amount of the gross benefit attributable to that period (determined at the resolution date), over the amount of the reduction determined as of the end of that period. Thus, for example, if an employee obtains a legally binding right in each of several years to benefit payments from a nonqualified deferred compensation plan that provides for a specified gross benefit for the years to be offset by the benefits payable under a qualified plan, the amount deferred in the first year may be treated as equal to the gross benefit for the year, reduced by the offset applicable at the end of the year (even if the offset increases after the end of the year).

(E) *Treatment of benefits paid before the resolution date.* If a benefit payment is attributable to an amount deferred that is not reasonably ascertainable at the time of payment (or is paid before the date selected under paragraph (e)(5) of this section), and the employer has previously taken an amount into account with respect to the amount deferred under the early inclusion rule of this paragraph (e)(4), then, in lieu of the pro rata rule provided in paragraph (d)(1)(ii)(B) of this section, a first-in-first-out rule applies in determining the portion of the benefit payment attributable to the amount taken into account. Under this first-in-first-out rule, the benefit payment is compared to the sum of the amount taken into account at the early inclusion date and the income attributable to that amount. If the benefit payment equals or exceeds the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment, the benefit payment is included as wages under the general timing rule of paragraph (a)(1) of this section to the extent of any excess, and the amount taken into account at the early inclusion date (and income attributable to that amount) is disregarded thereafter with respect to the amount deferred. If the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment exceeds the benefit payment, the benefit payment is not included as wages under the general timing rule of paragraph (a)(1) of this section and, in determining the amount that must be taken into account thereafter with respect to the amount deferred, the amount taken into account at the early inclusion date, plus attributable income as of the date of the benefit payment, is reduced by the amount of the benefit payment, and only the excess plus future income attributable to the excess (credited using assumptions that were reasonable on the early inclusion date) is taken into consideration. If amounts have been taken into account at more than one early inclusion date, this paragraph (e)(4)(ii)(E) applies on a first-in-first-out basis, beginning with the amount taken into account at the earliest early inclusion date (including income attributable thereto).

(5) *Rule of administrative convenience.* For purposes of this section, an employer may treat an amount deferred as required to be taken into account under this paragraph (e) on any date that is later than, but within the same calendar year as, the actual date on which the amount deferred is otherwise required to be taken into account under this paragraph (e). For example, if services creating the right to an amount deferred are considered performed under paragraph (e)(2) of this section periodically throughout a year, the employer may nevertheless treat the services creating the right to that amount deferred as performed on December 31 of that year. If an employer uses the rule of administrative convenience described in this paragraph (e)(5), any determination of whether the income attributable to an amount deferred under an account balance plan is based on a reasonable rate of interest or whether the actuarial assumptions used to determine the present value of an amount deferred in a nonaccount balance plan are reasonable will be made as of the date the employer selects to take the amount into account.

(6) *Portions of an amount deferred required to be taken into account on more than one date.* If different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date (e.g., on account of a graded vesting schedule), then each such portion is considered a separate amount deferred for purposes of this section.

(7) *Examples.* This paragraph (e) is illustrated by the following examples:

Example 1: (i) Employer M establishes a nonqualified deferred compensation plan for Employee A on November 1, 2005. Under the plan, which is an account balance plan, Employee A obtains a legally binding right on the last day of each calendar year (if Employee A is employed on that date) to be credited with a principal amount equal to 5 percent of compensation for the year. In addition, a reasonable rate of interest is credited quarterly. Employee A's account balance is nonforfeitable and is payable upon Employee A's termination of employment. For 2006, the principal amount credited to Employee A under the plan (which, in this case, is also the amount deferred within the meaning of paragraph (c) of this section) is $25,000.

(ii) Under paragraph (e)(2) of this section, the services creating the right to the $25,000 amount deferred are considered performed as of December 31, 2006, the date on which Employee A has performed all of the services necessary to obtain a legally binding right to the amount deferred. Thus, in accordance with paragraph (e)(1) of this section, the $25,000 amount deferred must be taken into account as of December 31, 2006, which is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture.

Example 2: (i) The facts are the same as in *Example 1,* except that the principal amount credited under the plan on the last day of each year (and attributable interest) is forfeited if the employee terminates employment within five years of that date.

(ii) Under paragraph (e)(3) of this section, the determination of whether the right to an amount deferred is subject to a substantial risk of forfeiture is made in accordance with the principles of section 83. Under §1.83–3 (c) of this chapter, a substantial risk of forfeiture generally exists where rights in property that are transferred are conditioned, directly or indirectly, upon the future performance of substantial services. Because Employee A's right to receive the $25,000 principal amount (and attributable interest) is conditioned on the performance

of services for five years, a substantial risk of forfeiture exists with respect to that amount deferred until December 31, 2011.

(iii) December 31, 2011, is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture. Thus, in accordance with paragraph (e)(1) of this section, the amount deferred (which, pursuant to paragraph (c)(1) of this section, is equal to the $25,000 principal amount credited to Employee A's account on December 31, 2006, plus the interest credited with respect to that principal amount through December 31, 2011) must be taken into account as of December 31, 2011.

Example 3: (i) The facts are the same as in *Example 2*, except that the principal amount credited under the plan on the last day of each year (and attributable interest) becomes nonforfeitable according to a graded vesting schedule under which 20 percent is vested as of December 31, 2007; 40 percent is vested as of December 31, 2008; 60 percent is vested as of December 31, 2009; 80 percent is vested as of December 31, 2010; and 100 percent is vested as of December 31, 2011. Because these dates are later than the date on which the services creating the right to the amount deferred are considered performed (December 31, 2006), the amount deferred is required to be taken into account as of these dates that fall in five different years.

(ii) Paragraph (e)(6) of this section provides that, if different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date, then each such portion is considered a separate amount deferred for purposes of this section. Thus, $5,000 of the principal amount, plus interest credited through December 31, 2007, is taken into account as an amount deferred on December 31, 2007; $5,000 of the principal amount, plus interest credited through December 31, 2008, is taken into account as a separate amount deferred on December 31, 2008; etc.

Example 4: (i) On November 21, 2001, Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. The plan provides for Employee B (who is age 45) to receive a lump sum benefit of $500,000 at age 65. This benefit will be forfeited if Employee B dies before age 65.

(ii) Because the amount, form, and commencement date of the benefit are known, and the only assumptions needed to determine the amount deferred are interest and mortality, the amount deferred is reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section on November 21, 2001.

Example 5: (i) The facts are the same as in *Example 4*, except that plan provides that the lump sum will be paid at the later of age 65 or termination of employment and provides that the $500,000 payable to Employee B is increased by 5 percent per year for each year that payment is deferred beyond age 65.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section, unless the plan satisfies the requirements of paragraph (c)(2)(iii)(B) of this section. Because the fixed 5 percent factor may not be reasonable at the time benefit payments commence (i.e., 5 percent might be higher or lower than a reasonable interest rate when payments commence), the plan fails to satisfy paragraph (c)(2)(iii)(B) of this section and accordingly the amount deferred is not reasonably ascertainable until termination of employment.

Example 6: (i) The facts are the same as in *Example 4*, except that the $500,000 is payable to Employee B at the later of age 55 or termination of employment.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable until termination of employment.

Example 7: (i) The facts are the same as in *Example 4*, except that Employee B may elect to take the benefit in the form of a life annuity of $50,000 per year (commencing at age 65).

(ii) Because the plan permits employees to elect to receive benefits in more than one form and the alternative forms may not have the same value when Employee B makes his election, the plan fails to satisfy the requirements of paragraph (c)(2)(iii)(B) of this section until a form of benefit is selected. Thus, the amount deferred is not reasonably ascertainable until then.

Example 8: (i) Employer O establishes a nonqualified deferred compensation plan. The plan is a supplemental executive retirement plan (SERP) that provides Employee C with a fully vested right to receive a pension, in the form of a life annuity payable monthly, beginning at age 65, equal to the excess of 3 percent of Employee C's final 3-year average pay for each year of participation up to 15 years, over the amount payable to Employee C from Employer O's qualified pension plan. The amount payable under the qualified pension plan is a life annuity payable monthly, beginning at age 65, equal to 1.5 percent of final 3-year average pay for each year of employment, excluding pay in excess of the section 401(a)(17) compensation limit. No benefits are payable under the SERP if Employee C dies before age 65. Employee C becomes a participant in the SERP on January 1, 2001, at age 44. The amount deferred under the SERP for any year is not reasonably ascertainable prior to termination of employment because the amount of the benefit is not known and the determination of the amount deferred requires assumptions other than interest and mortality (e.g., an assumption as to Employee C's average pay for the final three years of employment). As permitted by paragraph (e)(4)(i) of this section, Employer O chooses not to take any amount into account for any year before the resolution date. Employee C terminates employment on December 31, 2018 when he is age 62.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning in 2021 when Employee C is age 65. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $26,950, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 9: (i) The facts are the same as in *Example 8*, except that the plan provides that Employee C may choose to receive early retirement benefits on an unreduced basis at any time after age 60 if Employee C has completed 15 years of service by that date.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning on December 31, 2018 when Employee C is age 62. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $37,576, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 10: (i) The facts are the same as in *Example 9*, except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $13,043 (the present value of a life annuity of $4,000 per year, payable at age 62, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $13,043 previously taken into account, the present value of the excess must be taken into account. In this *Example 10*, the $13,043 previously taken into account is actuarially equivalent to a $4,000 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, no additional amount need be taken into account in 2018, regardless of any changes in market rates of interest between 2001 and 2018.

Example 11: (i) The facts are the same as in Example 9, except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $9,569 (the present value of a life annuity of $4,000 per year, payable at age 65, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning in 2018 at age 62 exceeds the life annuity which is actuarially equivalent to the $9,569 previously taken into account, the present value of the excess must be taken into account. In this case, the $9,569 previously taken into account is actuarially equivalent to a $2,935 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, an additional amount needs to be taken into account in 2018 equal to the present value of the excess of the $4,000 annual stream of benefit payments to which Employee C obtained a legally binding right during 2001 over the $2,935 annual stream of benefit payments which is actuarially equivalent to the amount previously taken into account. This present value (i.e., the present value of a life annuity equal to $4,000 minus $2,935, or $1,065 annually) is determined by Employer O to be $10,005 as of the resolution date using a 7 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018).

Example 12: (i) The facts are the same as in *Example 9*, except that the amount that Employer O takes into account on December 31, 2001, is $15,834 (the present value of $4,000, payable at age 60, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $15,834 previously taken into account, the present value of the excess must be taken into account. In this case, the $15,834 previously taken into account is actuarially equivalent to a $4,856 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Because the life annuity of $4,856 per year (which is equivalent to the amount taken into account at the early inclusion date) exceeds the $4,000 annuity attributable to the amount deferred in 2001, no additional amount is required to be taken into account for that amount deferred as of the resolution date. Employer O may claim a refund or credit for the overpayment of FICA tax with respect to amounts taken into account prior to the resolution date to the extent permitted by sections 6402, 6413, and 6511.

Example 13: (i) The facts are the same as in *Example 12*, except that Employee C became a participant in the SERP on January 1, 2000. In addition, Employer O determines in 2018 that during 2000 Employee C earned a legally binding right to a life annuity of $1,500 per year beginning on December 31, 2018.

(ii) Employer O may allocate the $15,834 previously taken into account among any amounts deferred on or before the early inclusion date. At the resolution date, Employer O will have to take into account the present value of an annuity equal to the excess of the life annuity attributable to the amounts deferred for 2000 and 2001 over a life annuity of $4,856 per year.

Example 14: (i) In 2003, Employer P establishes a nonqualified deferred compensation plan for Employee D. The plan provides that, in consideration of Employee D's services to be performed on Project X in 2004, Employee D will have a nonforfeitable right to receive 1 percent per year of Employer P's net profits associated with Project X for each of the immediately succeeding three years. No services beyond 2004 are required. The 1 percent of net profits payable each year will be paid on March 31 of the immediately succeeding year. One percent of net profits associated with Project X is $750,000 in 2005, $400,000 in 2006, and $90,000 in 2007. Employee D receives $750,000 on March 31, 2006, $400,000 on March 31, 2007, and $90,000 on March 31, 2008.

(ii) Because the services creating the right to all of the amount deferred are performed in 2004, the benefit payments based on the 2005, 2006, and 2007 net profits are all attributable to the amount deferred in 2004. However, because the present value of Employee D's future benefit is contingent on future profits, the determination of the amount deferred requires the use of assumptions other than interest, mortality, and cost of living. Thus, all of the amount deferred in 2004 will not be reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section until December 31, 2007 (which is the resolution date). Employer P does not choose to take any amount into account prior to the amount deferred becoming reasonably ascertainable.

(iii) However, paragraph (d)(1)(ii)(A) of this section provides that a benefit payment attributable to an amount deferred under a nonqualified deferred compensation plan must be included as wages when actually or constructively paid if the amount deferred has not been taken into account as wages under the special timing rule of paragraph (a)(2) of this section. Thus, the benefit payments in 2006 and 2007 must be included as wages when paid.

(iv) As of December 31, 2007, all of the amount deferred under the plan becomes reasonably ascertainable because the amount of the benefit payable attributable to the amount deferred is treated as known under paragraph (e)(4)(i)(B) of this section, and the only assumption needed to determine the present value of the future benefits is interest. However, since Employer P was required to treat the payments in 2006 and 2007 as wages when paid under the general timing rule of paragraph (a)(1) of this section, only the present value of the payment to be made in 2008 is required to be taken into account as of the resolution date (December 31, 2007) under the special timing rule of paragraph (a)(2) of this section. Using an interest rate of 10 percent per year (which, solely for purposes of this *Example 14*, is assumed to be reasonable), Employer P determines that on December 31, 2007, the present value of the future benefits is $87,881, and Employer P includes that additional amount in wages for 2007. (Note that Employer P can choose to use the lag method of withholding described in paragraph (f)(3) of this section, which allows the resolution date amount to be taken into account no later than March 31, 2008, provided that the amount deferred is increased by interest using the AFR for January of 2008.)

Example 15: (i) The facts are the same as in *Example 14*, except that Employer P chooses the early inclusion option permitted by paragraph (e)(4)(ii) of this section to take $1,000,000 into account on December 31, 2004, before the amount deferred for 2004 is reasonably ascertainable.

(ii) Pursuant to paragraph (e)(4)(ii)(E) of this section, in applying the nonduplication rule of paragraph (a)(2)(iii) of this section, a first-in-first-out rule applies in determining the benefit payments that are attributable to amounts previously taken into account. Using the 10 percent interest rate, Employer P determines that the $750,000 benefit payment on March 31, 2006, and the March 31, 2007, benefit payment of $400,000 are less than the $1,000,000 taken into account at the early inclusion date, plus attributable income, and, therefore, are not included in wages when paid.

(iii) Under paragraph (e)(4)(ii)(E) of this section, if an employer chooses to take an amount into account before the resolution date, the amount taken into account (plus income attributable to that amount) is disregarded to the extent the amount is attributed to benefit payments made before the resolution date. Thus, Employer P must reduce the $1,000,000 taken into account in 2004 (plus income attributable to that amount) based upon the two benefit payments ($750,000 and $400,000) that were excluded from wages. Using an interest rate of 10 percent, Employer P determines that the amount taken into account in 2004 plus interest to the resolution date and reduced based upon the two benefit payments is $15,228 and the additional amount that is required to be taken into account as of December 31, 2007, is $72,653 ($87,881–$15,228).

Example 16: (i) Employee E obtains a fully vested, legally binding right during 2002, 2003, and 2004 to payments from a nonqualified deferred compensation plan of Employer Q under which the benefits are based on a formula that includes an actuarial offset by the account balance under a qualified defined contribution plan of Employer Q as of December 31, 2004. The payments from the nonqualified deferred compensation plan are to commence on December 31, 2005. At the resolution date for the amounts earned during 2002, 2003, and 2004, which is December 31, 2004, Employee E has a legally binding right to a net annual benefit of $100,000

payable for life to commence on December 31, 2005. On the resolution date, Employer Q determines that on December 31, 2002, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $120,000 annually for life, and the offset being $20,000 annually for life, as of December 31, 2002). On December 31, 2003, Employee E had a legally binding right to receive $95,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $135,000 annually for life, and the offset being $40,000 annually for life, as of December 31, 2003). On December 31, 2004, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $145,000 annually for life, and the offset being $45,000 annually for life, as of December 31, 2004).

(ii) In this case, pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, Employer Q can attribute the entire $100,000 life annuity to the amount deferred for 2002, even though Employee E's benefit under the nonqualified deferred compensation plan is reduced to $95,000 in 2003.

Example 17: (i) In 2010, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of a motion picture. In 2011, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of another motion picture. These proceeds are calculated by subtracting the total advertising expenses for both movies. Payment is to be made in the year following the date on which both pictures have been sold, but not later than 2018. At the end of 2010, the advertising expenses for both pictures totaled $300,000. The first motion picture is sold for $10,000,000 in 2014. The second motion picture is sold for $17,000,000 in 2017. At the end of 2017, the advertising expenses totaled $1,700,000. In 2018, Employee F is paid $2,530,000 (10 percent of the sum of $10,000,000 and $17,000,000 minus $1,700,000).

(ii) Pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, $970,000 (10 percent of the excess of the gross proceeds from the sale of the first motion picture at the resolution date in 2017 over the advertising expenses incurred at the end of 2010) of the payment made in 2018 can be attributed to the amount deferred in 2010 (and with the remaining payment of $1,560,000 to be attributed to the amount deferred in 2011).

(f) *Withholding*—(1) *In general.* Unless an employer applies an alternative method described in paragraph (f)(2) or (3) of this section, an amount deferred under a nonqualified deferred compensation plan for any employee is treated, for purposes of withholding and depositing FICA tax, as wages paid by the employer and received by the employee at the time it is taken into account in accordance with paragraph (e) of this section. However, paragraphs (f)(2) and (3) of this section provide alternative methods which may be used with respect to an amount deferred for an employee. An employer is not required to be consistent in applying the alternatives described in this paragraph (f) with respect to different employees or amounts deferred.

(2) *Estimated method*—(i) *In general.* Under the alternative method provided in this paragraph (f)(2), the employer may make a reasonable estimate of the amount deferred on the date on which the amount is taken into account in accordance with paragraph (e) of this section and take that estimated amount into account as wages paid by the employer and received by the employee on that date (the estimate date), for purposes of withholding and depositing FICA tax.

(ii) *Underestimate of the amount deferred*—(A) *General rule.* If the employer underestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and other actuarial assumptions that are reasonable as of that date), the employer may treat the shortfall as wages paid as of the estimate date or as of any date that is no later than three months after the estimate date. In either case, the shortfall does not include the income credited to the amount deferred after the amount is taken into account in accordance with paragraph (e) of this section.

(B) *Shortfall is treated as wages paid on a date after the estimate date.* If the employer chooses to treat the shortfall as wages paid on a date that is no later than three months after the estimate date, the employer must take that shortfall into account as wages paid by the employer and received by the employee on that date, for purposes of withholding and depositing FICA tax.

(C) *Shortfall is treated as wages paid on the estimate date.* If the employer chooses to treat the shortfall as wages paid as of the estimate date, the shortfall is treated as an error for purposes of withholding and depositing FICA tax. Appropriate adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of §31.6205–1(b), the error need not be treated as ascertained before the date that is three months after the estimate date.

(D) *Reporting.* The employer must report the shortfall as wages on Form 941, Employer's Quarterly Federal Tax Return (and, if applicable, Form 941c, Supporting Statement to Correct Information) and Form W-2, Wage and Tax Statement (or, if applicable, Form W-2c, Corrected Wage and Tax Statement) in accordance with its treatment of the shortfall under paragraph (f)(2)(ii) (B) or (C) of this section.

(iii) *Overestimate of the amount deferred.* If the employer overestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and actuarial assumptions that are reasonable as of that date) and deposits more than the amount required, the employer may claim a refund or credit in accordance with sections 6402, 6413, and 6511. A Form 941c, or an equivalent statement, must accompany each claim for refund. In addition, Form W-2 or, if applicable, Form W-2c must also reflect the actual amount deferred that should have been taken into account.

(3) *Lag method.* Under the alternative method provided in this paragraph (f)(3), an amount deferred, plus interest, may be treated as wages paid by the employer and received by the employee, for purposes of withholding and depositing FICA tax, on any date that is no later than three months after the date the amount is required to be taken into account in accordance with paragraph (e) of this section. For purposes of this paragraph (f)(3), the amount deferred must be increased by interest through the date on which the wages are treated as paid, at a rate that is not less than AFR. If the employer withholds and deposits FICA tax in accordance with this paragraph (f)(3), the employer will

be treated as having taken into account the amount deferred plus income to the date on which the wages are treated as paid.

(4) *Examples.* This paragraph (f) is illustrated by the following examples:

Example 1: (i) Employer M maintains a nonqualified deferred compensation plan that is an account balance plan. The plan provides for annual bonuses based on current year profits to be deferred until termination of employment. Employer M's profits for 2003, and thus the amount deferred, is reasonably ascertainable, but Employer M calculates the amount deferred on March 3, 2004, when the relevant data is available.

(ii) In accordance with the alternative method described in paragraph (f)(2) of this section, Employer M makes a reasonable estimate that the amount deferred that must be taken into account as of December 31, 2003, for Employee A is $20,000, and withholds and deposits FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. In January of 2004, Employer M files and furnishes Form W-2 for Employee A including the $20,000 in FICA wages. On March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $22,000.

(iii) In accordance with the alternative method described in paragraph (f)(2)(ii) of this section, Employer M may treat the additional $2,000 as wages paid to and received by Employee A on December 31, 2003, the estimate date. Employer M may treat the $2,000 shortfall as an error ascertained on March 3, 2004, and withhold and deposit FICA tax on that amount. Form W-2c for Employee A for 2003 must include the $2,000 shortfall in FICA wages. Employer M must also correct the information on Form 941 for the last quarter of 2003, reporting the adjustment on Form 941 for the first quarter of 2004, accompanied by Form 941c for the last quarter of 2003.

(iv) Instead, Employer M may treat the $2,000 shortfall as wages paid on March 31, 2004, and withhold and deposit FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. Form W-2 for Employee A for 2004 and Form 941 for the first quarter of 2004 must include the $2,000 shortfall in FICA wages.

Example 2: (i) The facts are the same as in *Example 1,* except that on March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $19,000.

(ii) Under paragraph (f)(2)(iii) of this section, Employer M may, in accordance with sections 6402, 6413, and 6511, claim a refund or credit for the overpayment of tax resulting from the overestimate. In addition, Employer M must file and furnish a Form W-2c for Employee A and must correct the information on Form 941 for the last quarter of 2003.

Example 3: (i) The facts are the same as in *Example 1,* except that Employer M does not make a reasonable estimate of the amount deferred that must be taken into account as of December 31, 2003. Instead, Employer M withholds and deposits FICA tax on the amount deferred plus interest on that amount using AFR (for January 2004) as if it were wages paid by Employer M and received by Employee A on March 15, 2004.

(ii) Under the alternative method described in paragraph (f)(3) of this section, the amount taken into account on

March 15, 2004 (including the interest), will be treated as FICA wages paid to and received by Employee A on March 15, 2004.

Example 4: (i) The facts are the same as in *Example 1*, except that an amount is also deferred for Employee B which is required to be taken into account on October 15, 2003, and Employer M chooses to use the lag method in paragraph (f)(3) of this section in order to provide time to calculate the amount deferred.

(ii) Employer M may use any date not later than January 15, 2004, to take the amount deferred into account (provided that the amount deferred includes interest, at AFR for January 1, 2003, through December 31, 2003, and at AFR for January 1, 2004, through January 15, 2004).

(g) *Effective date and transition rules*—(1) *General effective date.* Except for paragraphs (g)(2) through (4) of this section, this section is applicable on and after January 1, 2000. Thus, paragraphs (a) through (f) of this section apply to amounts deferred on or after January 1, 2000; to amounts deferred before January 1, 2000, which cease to be subject to a substantial risk of forfeiture on or after January 1, 2000, or for which a resolution date occurs on or after January 1, 2000; and to benefits actually or constructively paid on or after January 1, 2000.

(2) *Reasonable, good faith interpretation for amounts deferred and benefits paid before January 1, 2000*—(i) *In general.* For periods before January 1, 2000 (including amounts deferred before January 1, 2000, and any benefits actually or constructively paid before January 1, 2000, that are attributable to those amounts deferred), an employer may rely on a reasonable, good faith interpretation of section 3121(v)(2), taking into account pre-existing guidance. An employer will be deemed to have determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has complied with paragraphs (a) through (f) of this section. For purposes of paragraphs (g)(2) through (4) of this section, and subject to paragraphs (g)(2)(ii) and (iii) of this section, whether an employer that has not complied with paragraphs (a) through (f) of this section has determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) will be determined based on the relevant facts and circumstances, including consistency of treatment by the employer and the extent to which the employer has resolved unclear issues in its favor.

(ii) *Plan must be established or adopted.* If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section) providing for the deferred compensation (or, if later, the establishment of the plan as amended to provide for the deferred compensation, as provided in paragraph (b)(2)(ii) of this section). If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid before January 1, 2000, then in no event will the employer's treatment of that amount deferred be considered

to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the adoption of the plan providing for the deferred compensation (or, if later, the adoption of the plan amendment providing the deferred compensation). For example, awards, bonuses, raises, incentive payments, and other similar amounts granted under a plan as compensation for past services may not be taken into account under section 3121(v)(2) prior to the establishment (or, if applicable, the adoption) of the plan.

(iii) *Certain changes in position for stock options, stock appreciation rights, and other stock value rights not reasonable, good faith interpretation.* In the case of a stock option, stock appreciation right, or other stock value right (as defined in paragraph (b)(4)(ii) of this section) that is exercised before January 1, 2000, an employer that treats the exercise as not subject to FICA tax as a result of the nonduplication rule of section 3121(v)(2)(B) is not acting in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has not treated that grant and all earlier grants as subject to section 3121(v)(2) by reporting the current value of such options and rights as FICA wages on Form 941 filed for the quarter during which each grant was made (or, if later, for the quarter during which each grant ceased to be subject to a substantial risk of forfeiture).

(3) *Optional adjustments to conform with this section for pre-effective-date open periods*—(i) *General rule.* If an employer determined FICA tax liability with respect to section 3121(v)(2) in any period ending before January 1, 2000, for which the applicable period of limitations has not expired on January 1, 2000 (pre-effective-date open periods), in a manner that was not in accordance with this section, the employer may adjust its FICA tax determination for that period to conform to this section. Thus, if an amount deferred was taken into account in a pre-effective-date open period when it was not required to be taken into account (e.g., an amount taken into account before it became reasonably ascertainable), the employer may claim a refund or credit for any FICA tax paid on that amount to the extent permitted by sections 6402, 6413, and 6511.

(ii) *Consistency required.* In the case of a plan that is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section), if any payment was actually or constructively paid to an employee under the plan in a pre-effective-date open period and that payment was not included in FICA wages by reason of the employer's treatment of the plan as a nonqualified deferred compensation plan, then the employer may claim a refund or credit for FICA tax paid on amounts treated as amounts deferred under the plan (in accordance with the employer's treatment of the plan as a nonqualified deferred compensation plan) for that employee for pre-effective-date open periods only to the extent that the FICA tax paid on all amounts treated as amounts deferred for the employee in all pre-effective-date open periods under the plan exceeds the FICA tax that would have been due on the benefits actually or constructively paid to the employee in those periods under the plan if those benefits were included in FICA wages when paid. If any benefit payments attributable to amounts deferred after December 31, 1993, were actually or constructively paid to an employee under a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) in a pre-effective-date open period, but these payments were treated as subject to FICA tax because the employer treated the plan as not being a nonqualified deferred compensation plan, then the employer may claim a refund or credit for the FICA tax paid on those benefit payments only to the extent that

the FICA tax paid on those benefit payments exceeds the FICA tax that would have been due on the amounts deferred to which those benefit payments are attributable if those amounts deferred had been taken into account when they would have been required to have been taken into account under this section (if this section had been in effect then).

(iii) *Reporting.* Any employer that adjusts its FICA tax determination in accordance with paragraphs (g)(3)(i) and (ii) of this section must make appropriate adjustments on Form 941 and Form 941c for the affected periods, and, in addition, must file and furnish Form W-2, or, if applicable, Form W-2c, for any affected employee so that the Social Security Administration may correctly post the amount deferred to the employee's earnings record. The adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of §31.6205–1(b), the error is not required to be treated as ascertained before March 31, 2000.

(4) *Application of reasonable, good faith standard*—(i) *Plans that are not subject to section 3121(v)(2).* If a plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, but, for a period ending prior to January 1, 2000, and, pursuant to a reasonable, good faith interpretation of section 3121(v)(2), an amount under the plan was taken into account (within the meaning of paragraph (d)(1) of this section) as an amount deferred under a nonqualified deferred compensation plan, then, pursuant to paragraph (g)(2) of this section, the following rules shall apply—

(A) With respect to benefit payments actually or constructively paid before January 1, 2000, that are attributable to amounts previously taken into account under the plan, no additional FICA tax will be due;

(B) On or after January 1, 2000, benefit payments under the plan must be taken into account as wages when actually or constructively paid in accordance with paragraph (a)(1) of this section; and

(C) To the extent permitted by paragraph (g)(3) of this section, the employer may claim a refund or credit for FICA tax actually paid on amounts taken into account prior to January 1, 2000.

(ii) *Plans that are subject to section 3121(v)(2) for which the amount deferred has not been fully taken into account*—(A) *In general.* The rules of paragraphs (g)(4)(ii)(B) through (E) of this section apply if a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and, with respect to an amount deferred under the plan for an employee prior to January 1, 2000, the employer, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), either took into account an amount that is less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect for that period or took no amount into account. Thus, paragraphs (g)(4)(ii)(B) through (E) of this section apply both to an employer that treated the plan as if it were not a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) (by withholding and paying FICA tax due on benefits actually or constructively paid under the plan during that period, if any) and to an employer that treated the plan as a nonqualified deferred compensation plan within the meaning of section 3121(v)(2).

(B) *No additional tax required.* Pursuant to paragraph (g)(2) of this section, no additional FICA tax will be due for any period ending prior to January 1, 2000.

(C) *General timing rule applicable.* In accordance with paragraph (d)(1)(ii) of this section, except as provided in paragraphs (g)(4)(ii) (D) and (E), the general timing rule described in paragraph (a)(1) of this section applies to benefits actually or constructively paid on or after January 1, 2000, attributable to an amount deferred in a period before January 1, 2000, to the extent the amount taken into account was less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect before January 1, 2000.

(D) *Special rule for amounts deferred before 1994.* The difference between the amount that was taken into account in any period ending prior to January 1, 1994, and the amount that would have been required or permitted to be taken into account in that period if paragraphs (a) through (f) of this section had been in effect is treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. For example, in the case of an amount deferred before 1994 that was not reasonably ascertainable (and which was not subject to a substantial risk of forfeiture), the employer is treated as if it had anticipated the actual amount, form, and commencement date for the benefit payments attributable to the amount deferred and had taken the amount deferred into account at an early inclusion date before 1994 using a method permitted under this section. Thus, with respect to such an amount deferred, the employer is not required to take any additional amount into account when the amount deferred becomes reasonably ascertainable, and no additional FICA tax will be due when the benefit payments attributable to the amount deferred are actually or constructively paid.

(E) *Special rule for amounts required to be taken into account in 1994 or 1995.* In the case of an amount deferred that would have been required to be taken into account in 1994 or 1995 if paragraphs (a) through (f) of this section had been in effect, an employer will be treated as taking the amount deferred into account under paragraph (d)(1) of this section to the extent the employer takes the amount into account by treating it as wages paid by the employer and received by the employee as of any date prior to April 1, 2000.

(iii) *Plans that are subject to section 3121(v)(2) for which more than the amount deferred has been taken into account.* If a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and an amount was taken into account under the plan for an employee before January 1, 2000, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), but that amount could not have been taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect then, the following rules apply—

(A) The determination of the amount deferred for any period beginning on or after January 1, 2000, must be made in accordance with paragraph (c) of this section, and the time when amounts deferred under the plan are required to be taken into account must be determined in accordance with paragraph (e) of this section, without regard to any such amount that was taken into account for any period ending before January 1, 2000; and

(B) To the extent permitted by sections 6402, 6413, and 6511, the employer may claim a refund or credit for an overpayment of tax caused by the overinclusion of wages that occurred before January 1, 2000.

(5) *Examples.* This paragraph (g) is illustrated by the following examples:

Example 1: (i) In 1996, Employer M establishes a nonqualified deferred compensation plan that is a nonaccount balance plan for Employee A. All benefits under the plan are 100 percent vested. In order to determine the amount deferred on behalf of Employee A under the plan for 1996 and 1997, Employer M must make assumptions as to the date on which Employee A will retire and the form of benefit Employee A will elect, in addition to interest, mortality, and cost-of-living assumptions. Based on assumptions made with respect to all of these contingencies, Employer M determines that the amount deferred for 1996 is $50,000 and the amount deferred for 1997 is $55,000. In 1996 and 1997, Employee A's total wages (without regard to the amounts deferred) exceed the OASDI wage bases. Employer M withholds and deposits HI tax on the $50,000 and $55,000 amounts. Employee A does not retire before January 1, 2000. Employer M chooses under paragraph (g)(3) of this section to apply this section to 1996 and 1997 before the January 1, 2000, general effective date.

(ii) Under this section, the amounts deferred in 1996 and 1997 are not reasonably ascertainable (within the meaning of paragraph (e)(4)(i) of this section) before January 1, 2000. Thus, as long as the applicable period of limitations has not expired for the periods in 1996 and 1997, Employer M may, to the extent permitted under paragraph (g)(3) of this section, apply for a refund or credit for the HI tax paid on the amounts deferred for 1996 and 1997 and, in accordance with paragraph (e)(4) of this section, take into account the amounts deferred when they become reasonably ascertainable.

Example 2: (i) Employer N adopts a plan on January 1, 1994, that covers Employee B, who has 10 years of service as of that date. The plan provides that, in consideration of Employee B's outstanding services over the past 10 years, Employee B will be paid a $500,000 lump sum distribution upon termination of employment at any time. On January 15, 1996, Employee B terminates employment with Employer N. Employer N determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the plan is a nonqualified deferred compensation plan under that section. Employer N treats the $500,000 as having been taken into account as an amount deferred in 1993 and earlier years.

(ii) Under paragraph (g)(2)(ii) of this section, if all amounts are deferred and all benefits are paid under a plan before January 1, 2000, then in no event will an employer's treatment of amounts deferred under the plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats these amounts as taken into account as wages for FICA tax purposes prior to the adoption of the plan. Accordingly, Employer N's treatment is not in accordance with a reasonable, good faith interpretation of section 3121(v)(2) because Employer N treated amounts as taken into account in years before the adoption of the plan. As a result, the payment made to Employee B in 1996 was subject to both the OASDI and HI portions of FICA tax when paid.

Example 3: (i) Employer O adopts a bonus plan on December 1, 1993, that becomes effective and legally binding on January 1, 1994. Under the plan, which is not set forth in writing, a specified bonus amount (which

is 100 percent vested) is credited to Employee C's account each December 31. A reasonable rate of interest on Employee C's account balance is credited quarterly. Employee C's account balance will begin to be paid in equal annual installments over 10 years beginning on January 1, 2000. Employer O determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the bonus plan is a nonqualified deferred compensation plan under that section and, therefore, treats the amounts credited from January 1, 1994, through December 31, 1999, as amounts deferred and, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), takes those amounts deferred into account as wages for FICA tax purposes as of those dates. The bonus plan is set forth in writing on May 1, 1999, and, thus, is treated as established as of January 1, 1994.

(ii) Under paragraph (g)(2)(ii) of this section, if an amount is deferred before January 1, 2000, and the attributable benefit is paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred under a plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats the amount deferred as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section). Because the bonus plan is treated as established on January 1, 1994 (pursuant to the transition rule for unwritten plans in paragraph (b)(2)(iii) of this section), and because Employer O, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), took amounts deferred into account in 1994 through 1999, the amounts paid to Employee C attributable to those amounts deferred will not be subject to FICA tax when paid.

Example 4: (i) In 1985, Employer P establishes a compensation arrangement for Employee D that provides for a lump sum payment to be made after termination of employment but the arrangement is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section). However, prior to January 1, 2000, and in accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer P treats the arrangement as a nonqualified deferred compensation plan under section 3121(v)(2). Employer P determines that Employee D's total wages (without regard to the amount deferred) for each year from 1985 through 1993 exceed the applicable OASDI and HI wage bases for each of those years and, consequently, there is no FICA tax liability with respect to the amounts deferred for those years. In 1994, Employee D's total wages (without regard to the amount deferred) exceed the OASDI wage base. However, because there is no limit on the HI wage base, the amount deferred for 1994 results in additional HI tax liability of $290, which is timely paid by Employer P.

(ii) Employee D terminates employment with Employer P in 1995 and receives a plan payment of $50,000. In that year, Employee D also receives wages of $60,000 from Employer P. In accordance with its treatment of the plan as a nonqualified deferred compensation plan under section 3121(v)(2), Employer P does not treat the $50,000 payment in 1995 as wages for FICA tax purposes in that year.

(iii) Because amounts under a plan were taken into account (within the meaning of paragraph (d)(1) of this section) as amounts deferred under a nonqualified deferred compensation plan pursuant to a reasonable, good faith interpretation of section 3121(v)(2)(A), but that plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, the transition rules provided in paragraph (g)(4)(i) of this section apply. Thus, no additional FICA tax will be due on the benefits paid in 1995.

(iv) Because $290 of HI tax was paid on the amount deferred in 1994, Employer P is entitled to a refund or credit for that amount to the extent permitted under sections 6402, 6413, and 6511—but only to the extent that

$290 exceeds the FICA tax that would have been due on the $50,000 payment in 1995 if that payment had been subject to FICA tax when paid (i.e., if paragraphs (a) through (f) of this section had been effective for those years). In 1995, Employee D had other wages of $60,000. Thus, only $1,200 (the $61,200 OASDI wage base, less the $60,000 of other wages) of the $50,000 payment would have been subject to OASDI; the full $50,000 would have been subject to HI. This would have resulted in $148.80 of OASDI tax ($1,200 × 12.4 percent) and $1,450 of HI tax ($50,000 × 2.9 percent). Employer P is not entitled to a refund or credit under the consistency rule of paragraph (g)(3)(ii) because the $290 of HI tax paid in 1994 is less than the total $1,598.80 of FICA tax liability that would have resulted if this section had applied for 1995.

(v) However, if the benefit payment is instead actually or constructively paid on or after January 1, 2000, the benefit payment must be taken into account as wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section (and paragraph (g)(4)(i)(B) of this section).

Example 5: (i) In 1985, Employer Q establishes a compensation arrangement for Employee E that is a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section. However, prior to January 1, 2000, Employer Q determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the arrangement is not a nonqualified deferred compensation plan within the meaning of that section. Thus, when Employee E retires at the end of 1996 and benefit payments under the arrangement begin in 1997, Employer Q withholds and deposits FICA tax on the amounts paid to Employee E. Payments under the arrangement continue on or after January 1, 2000. Employer Q does not choose (under paragraph (g)(3) of this section) to adjust its FICA tax determination for a pre-effective-date open period by treating this section as in effect for all amounts deferred and benefits actually or constructively paid for any such period. The periods in 1994 and 1995 are not pre-effective-date open periods for Employer Q.

(ii) Under paragraph (g)(4)(ii) of this section, for purposes of determining whether benefits actually or constructively paid on or after January 1, 2000, were previously taken into account for purposes of applying the nonduplication rule of section 3121(v)(2)(B), any amount that would have been required to have been taken into account before 1994 will be treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. Under the nonduplication rule, benefit payments attributable to an amount that has been so treated as taken into account is not treated as wages for FICA tax purposes at any later time (such as upon payment).

(iii) Because Employer Q does not adjust its FICA tax determination by treating this section as in effect for all amounts deferred for periods ending after December 31, 1993, any benefit payments attributable to amounts deferred in periods ending after December 31, 1993, will be included in wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 6: (i) The facts are the same as in *Example 5*, except that Employer Q chooses (in accordance with paragraph (g)(3) of this section) to adjust its FICA tax determination for all pre-effective-date open periods by treating this section as in effect for all amounts deferred for those periods. In addition, Employer Q chooses (in accordance with paragraph (g)(4)(ii)(E) of this section) to take the amounts deferred for 1994 and 1995 into account by treating these amounts as FICA wages paid and received by Employee E on January 15, 2000.

(ii) In accordance with the nonduplication rule of paragraph (a)(2)(iii) of this section, because all amounts deferred for Employee E under the plan were taken into account (or treated as taken into account), any benefit

payments made to Employee E under the plan will not be included as FICA wages when actually or constructively paid.

Example 7: (i) The facts are the same as in Example 5, except that Employer Q does not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000.

(ii) Because Employer Q did not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000, Employer Q did not determine FICA tax liability and satisfy FICA tax withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2). Thus, the transition rules provided in paragraphs (g)(3) and (4) of this section do not apply. As a result, any amount that would have been required to have been taken into account under this section before 1994 is not treated as if it had been so taken into account under paragraph (g)(4)(ii)(D) of this section, and benefit payments attributable to amounts deferred before January 1, 2000, are treated as FICA wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 8: (i) In 1993, Employer R establishes a nonqualified deferred compensation plan for Employee F under which Employee F will have a fully vested right to receive a lump sum payment in 2000 equal to 50 percent of Employee F's highest rate of salary. On December 31, 1993, Employee F's highest salary is $1 million. In accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer R determines that, for 1993, there is an amount deferred that must be taken into account as wages for FICA tax purposes. Based on Employer R's estimate that Employee F's highest salary will be $3 million in 2000, Employer R determines that the amount deferred is equal to the present value in 1993 of $1.5 million payable in 2000. However, because Employee F has other wages in 1993 that exceed the applicable OASDI and HI wage bases for that year, no additional FICA tax is paid as a result of that amount deferred being taken into account for 1993. In addition, Employer R takes no amounts into account under the plan after 1993 for Employee F. Under paragraphs (e)(1) and (4)(ii)(D)(*2*) of this section, the largest amount that could have been taken into account in 1993 is the present value of a lump sum payment of $500,000, payable in 2000, because that is the maximum amount to which Employee F has a legally binding right as of December 31, 1993. Employee F's highest salary is, in fact, $3 million in 2000 and Employee F receives $1.5 million under the plan on December 31, 2000.

(ii) In accordance with paragraphs (g)(1) and (4)(iii)(A) of this section, the determination of the amount deferred under the plan for any period beginning on or after January 1, 2000, and the time when that amount deferred is required to be taken into account must be determined in accordance with this section. In addition, these determinations must be made without regard to any amount deferred that was taken into account for any period ending before January 1, 2000, that could not be taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect. Because no FICA tax was actually paid on that $1 million in 1993, no overpayment of tax was caused by the overinclusion of wages in 1993 and, thus, Employer R is not entitled to a refund or credit (even assuming that the period of limitations has been kept open for periods in 1993). In addition, because the difference between the present value of the $1.5 million payment and the present value of a $500,000 payment was not taken into account for periods beginning on or after January 1, 1994, $1 million must be included in FICA wages under the general timing rule when paid.

[64 FR 4547, Jan. 29, 1999; 64 FR 15687, Apr. 1, 1999]

§ 31.3121(v)(2)-2 Effective dates and transition rules.

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(a) *General statutory effective date.* Except as otherwise provided in paragraphs (b) through (e) of this section, section 3121(v)(2) and the amendments made to section 3121(a)(2), (a)(3), and (a)(13) by the Social Security Amendments of 1983 (Pub. L. 98–21, 97 Stat. 65), as amended by section 2662(f)(2) of the Deficit Reduction Act of 1984 (Pub. L. 98–369, 98 Stat. 494), apply to amounts deferred and benefits paid after December 31, 1983.

(b) *Definitions.* For purposes of §31.3121(v)(2)–1 and this section, the following definitions apply:

(1) *FICA. FICA* means the Federal Insurance Contributions Act (26 U.S.C. 3101 *et seq.*).

(2) *457(a) plan. A 457(a) plan* means an eligible deferred compensation plan of a State or local government or of a tax-exempt organization to which section 457(a) applies.

(3) *Gap agreement. Gap agreement* means an agreement adopted after March 24, 1983, and on or before December 31, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of §31.3121(v)(2)–1(b). Such an agreement does not fail to be a gap agreement merely because the terms of the plan are changed after December 31, 1983.

(4) *Individual party to a gap agreement. Individual party to a gap agreement* means an individual who was eligible to participate in a gap agreement on December 31, 1983, under the terms of the agreement on that date. An individual will be treated as an individual party to a gap agreement even if the individual has not accrued any benefits under the plan by December 31, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a gap agreement after December 31, 1983, is not an individual party to a gap agreement.

(5) *Individual party to a March 24, 1983 agreement. Individual party to a March 24, 1983 agreement* means an individual who was eligible to participate in a March 24, 1983 agreement under the terms of the agreement on March 24, 1983. An individual will be treated as an individual party to a March 24, 1983 agreement even if the individual has not accrued any benefits under the plan by March 24, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a March 24, 1983 agreement after March 24, 1983, is not an individual party to a March 24, 1983 agreement.

(6) *March 24, 1983 agreement. March 24, 1983 agreement* means an agreement in existence on March 24, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of §31.3121(v)(2)–1(b). Such an agreement does not fail to be a March 24, 1983 agreement merely because the terms of the plan are changed after March 24, 1983. In addition, for purposes of

this paragraph (b)(6) only, any plan (or agreement) that provides for payments that qualify for one of the retirement payment exclusions is treated as a nonqualified deferred compensation plan. For example, §31.3121(v)(2)–1(b)(4)(v) provides that certain benefits established in connection with impending termination do not result from the deferral of compensation and thus are not considered deferred under a nonqualified deferred compensation plan. However, a plan that provides such benefits and that was in existence on March 24, 1983, is treated as a nonqualified deferred compensation plan for purposes of this paragraph (b) to the extent it provides benefits that would have satisfied one of the retirement payment exclusions.

(7) *Retirement payment exclusions. Retirement payment exclusions* are the exclusions from wages (for FICA tax purposes) for retirement payments under section 3121(a)(2)(A), (a)(3), and (a)(13)(A)(iii), as in effect on April 19, 1983 (the day before enactment of the Social Security Amendments of 1983).

(8) *Transition benefits. Transition benefits* are payments made after December 31, 1983, attributable to services rendered before January 1, 1984. For this purpose, transition benefits are determined without regard to any changes made in the terms of the plan after March 24, 1983, in the case of a March 24, 1983 agreement or after December 31, 1983, in the case of a gap agreement.

(c) *Transition rules*—(1) *In general.* Except as provided in paragraph (c)(2) or (3) of this section, the general statutory effective date described in paragraph (a) of this section applies to benefit payments after December 31, 1983. Thus, except as provided in paragraph (c)(2) or (3) of this section, section 3121(v)(2) applies, and the retirement payment exclusions do not apply, to benefit payments made after December 31, 1983, even if the benefit payments are made under a March 24, 1983 agreement or a gap agreement.

(2) *Transition benefits under a March 24, 1983 agreement.* With respect to an individual party to a March 24, 1983 agreement, transition benefits paid under that March 24, 1983 agreement (except for those paid under a 457(a) plan) are not subject to the special timing rule of section 3121(v)(2) and are subject to section 3121(a) as in effect on April 19, 1983. Thus, transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) to an individual party to a March 24, 1983 agreement are excluded from wages (for FICA tax purposes) only if they qualify for any of the retirement payment exclusions (or any other exclusion provided under section 3121(a) as in effect on April 19, 1983).

(3) *Transition benefits under a gap agreement.* With respect to an individual party to a gap agreement, the payor of transition benefits under the gap agreement must choose to either—

(i) Take the transition benefits into account as wages when paid; or

(ii) Take the amount deferred (within the meaning of §31.3121(v)(2)–1(c)) with respect to the transition benefits into account as wages under section 3121(v)(2) (as if section 3121(v)(2) had applied before its general statutory effective date).

(d) *Determining transition benefit portion.* For purposes of determining the portion of total benefits under a nonqualified deferred compensation plan that represents transition benefits, if, under the terms of the plan, benefit payments are not attributed to specific years of service, the employer may use any reasonable method. For example, if a plan provides that the employee will receive benefits equal to 2 percent of high 3-year average compensation multiplied by years of service, and the employee retires after 25 years of service, 9 of which are before 1984, the employer may determine that 9/25 of the total benefit payments to be received beginning in 2000 are transition benefits attributable to services performed before 1984.

(e) *Order of payment.* If an employer determines, in accordance with paragraph (d) of this section, that a portion of the total benefits under a nonqualified deferred compensation plan constitutes transition benefits, then, for purposes of determining the portion of each benefit payment that constitutes transition benefits, the employer must treat each benefit payment as consisting of transition benefits in the same proportion as the transition benefits that have not been paid (as of January 1, 2000) bear to total benefits that have not been paid (as of January 1, 2000), unless such allocation is inconsistent with the terms of the plan. However, for a benefit payment made before January 1, 2000, the employer may use any reasonable allocation method to determine the portion of a payment that consists of transition benefits, provided that the allocation method is consistent with the terms of the plan.

[64 FR 4567, Jan. 29, 1999]

§ 31.3123-1 Deductions by an employer from remuneration of an employee.

top

Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

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Tax on Employees

top

§ 31.3201-1 Measure of employee tax.

top

The employee tax is measured by the amount of compensation received for services rendered as an employee. For provisions relating to compensation, see §31.3231(e)–1. For provisions relating to the circumstances under which certain compensation is to be disregarded for the purpose of determining the employee tax, see paragraphs (b)(1) and (2) of §31.3231(e)–1.

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3201-2 Rates and computation of employee tax.

top

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee tax rate equals the sum of the tax rates in effect under section 3101(a), relating to old-age, survivors, and disability insurance, and section 3101(b), relating to hospital insurance. The Tier 1 employee tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3101(a) rate of 6.2 percent would be applied to *A*'s compensation up to $55,500, the applicable contribution base for 1992. The section 3101(b) rate of 1.45 percent would be applied to the entire $60,000 of *A*'s compensation because the applicable contribution base for 1992 is $130,200.

(2)(i) *Tier 2 tax.* The Tier 2 employee tax rate equals the percentage set forth in section 3201(b) of the Code. This rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3201(b) rate of 4.90 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(b)(1) *Computation.* The employee tax is computed by multiplying the amount of the employee's compensation with respect to which the employee tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect when the compensation is received by the employee. For rules relating to the time of receipt, see §31.3121(a)–2 (a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, employee *A* received compensation of $1,000 as remuneration for services performed for employer *R* in 1989. The employee tax is payable at the rate of 12.55 percent (7.65 percent plus 4.90 percent) in effect for 1990 (the year the compensation was received), and not the 12.41 percent rate (7.51 percent plus 4.90 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3202-1 Collection of, and liability for, employee tax.

top

(a) *Collection; general rule.* The employer shall collect from each of his employees the employee tax imposed with respect to the compensation of the employee by deducting or causing to be deducted the amount of such tax from the compensation subject to the tax as and when such compensation is paid. As to the measure of the employee tax, see §31.3201–1.

(b) *Collection; payments by two or more employers in excess of annual compensation limitation.* For rules relating to payments by two or more employers in excess of the annual compensation limitation see §31.3121(a)(1)–1.

(c) *Undercollections or overcollections.* Any undercollection or overcollection of employee tax resulting from the employer's inability to determine, at the time compensation is paid, the correct amount of compensation with respect to which the deduction should be made shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and abatements.

(d) *When fractional part of cent may be disregarded.* In collecting the employee tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(e) *Employer's liability.* The employer is liable for the employee tax with respect to compensation paid by him, whether or not collected from the employee. If the employer deducts less than the correct amount of employee tax or fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him, the employee is also liable for the employee tax. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. An employer is not liable to any person for the amount of the employee tax deducted by him and paid to the district director.

(f) *Concurrent employment.* If two or more related corporations who are rail employers concurrently

employ the same individual and compensate that individual through a common paymaster, which is one of the related corporations employing the individual, see §31.3121(s)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 553, Jan 20, 1961; T.D. 6727, 29 FR 5866, May 5, 1964; T.D. 8582, 59 FR 66189, Dec. 23, 1994]

Tax on Employee Representatives

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§ 31.3211-1 Measure of employee representative tax.

top

The employee representative tax is measured by the amount of compensation received for services rendered as an employee representative. For provisions relating to compensation, see §31.3231(e)–1.

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211-2 Rates and computation of employee representative tax.

top

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee representative tax rate equals the sum of the tax rates in effect under sections 3101(a) and 3111(a), relating to the employee and the employer tax for old-age, survivors, and disability insurance, and sections 3101(b) and 3111(b), relating to the employee and the employer tax for hospital insurance. The Tier 1 employee representative tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act, and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. B, an employee representative, received compensation of $60,000 in 1992. The sections 3101(a) and 3111(a) rates of 12.4 percent (6.2 percent plus 6.2 percent) would be applied to *B*'s compensation up to $55,500, the applicable contribution base for 1992. The sections 3101(b) and 3111(b) rates of 2.9 percent (1.45 percent plus 1.45 percent) would be applied to the entire $60,000 of *B*'s compensation because the applicable contribution base for 1992 is $130,200.

(2) (i) *Tier 2 tax.* The Tier 2 employee representative tax rate equals the percentage set forth in section

3211(a)(2) of the Code. This rate is applied up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. B received compensation of $60,000 in 1992. The section 3211(a)(2) rate of 14.75 percent would be applied to *B*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative is imposed at the same rate as the excise tax imposed on every employer under section 3221(c). See also §31.3211–3.

(b) (1) *Computation.* The employee representative tax is computed by multiplying the amount of the employee representative's compensation with respect to which the employee representative tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect when the compensation is received by the employee representative. For rules relating to the time of receipt, see §31.3121(a)–2 (a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, employee representative *B* received $1,000 as remuneration for services performed for employer *R* in 1989. The employee representative tax is payable at the rate of 30.05 percent (15.30 percent plus 14.75 percent) in effect for 1990 (the year the compensation was received), and not the 29.77 percent rate (15.02 percent plus 14.75 percent) in effect for 1989 (the year the services were performed).

(c) (1) *Rule where compensation is received both as an employee representative and employee.* The following rule applies to an individual who renders service both as an employee representative and as an employee. The employee representative tax is imposed on compensation received as an employee representative under the rules described in §31.3211–2. The employee tax is imposed on compensation received as an employee under the rules described in §31.3201–2. However, if the total compensation received is greater than the applicable contribution base, the employee representative tax is imposed on the amount equal to the contribution base less the amount received for services rendered as an employee.

(2) *Example.* The rule in paragraph (c)(1) of this section is illustrated by the following example.

Example. C performed services both as an employee and an employee representative in 1992. *C* received compensation of $40,000 as an employee and $20,000 as an employee representative. *C*'s entire compensation of $40,000 is subject to tax under the rules described in §31.3201–2. The amount of employee representative compensation subject to the section 3101(a) and the section 3111(a) rate is $15,500 ($55,500−$40,000). The entire $20,000 is subject to the sections 3101(b) and 3111(b) rates since the combined compensation is less than $130,200, the applicable contribution base for 1992. The amount of the employee representative

compensation subject to the section 3211(a)(2) rate is $1,400 ($41,400−$40,000).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211-3 Employee representative supplemental tax.

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See paragraphs (a), (b), and (c) of §31.3221–3 for rules applicable to the supplemental tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

§ 31.3212-1 Determination of compensation.

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See §31.3231(e)–1 for regulations applicable to compensation.

Tax on Employers

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§ 31.3221-1 Measure of employer tax.

top

(a) *General Rule*—The employer tax is measured by the amount of compensation paid by an employer to its employees. For provisions relating to compensation, see §31.3231(e)-1. For provisions relating to the circumstances under which certain compensation is to be disregarded for purposes of determining the employer tax, see paragraphs (b) (1) and (2) of §31.3231(e)–1.

(b) *Payments by two or more employers in excess of annual compensation limitation.* For rules relating to payments by two or more employers in excess of the annual compensation limitation, see §31.3121(a)(1)–1.

(c) *Underpayments or overpayments.* Any underpayment or overpayment of employer tax resulting from the employer's inability to determine, at the time such tax is paid, the correct amount of compensation with respect to which the tax should be paid shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and

abatements.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 555, Jan. 20, 1961; T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221-2 Rates and computation of employer tax.

top

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employer tax rate equals the sum of the tax rates in effect under section 3111(a), relating to old-age, survivors, and disability insurance, and section 3111(b), relating to hospital insurance. The Tier 1 employer tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. R's employee, *A*, received compensation of $60,000 in 1992. The section 3111(a) rate of 6.2 percent would be applied to *A*'s compensation up to $55,500, the applicable contribution base for 1992. The section 3111(b) rate of 1.45 percent would be applied to the entire $60,000 of *A*'s compensation because the applicable contribution base for 1992 is $130,200.

(2)(i) *Tier 2 tax.* The Tier 2 employer tax rate equals the percentage set forth in section 3221(b) of the Internal Revenue Code. This rate is applied up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. R's employee, *A*, received compensation of $60,000 in 1992. The section 3221(b) rate of 16.10 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid by an employer for services rendered during any calendar quarter by employees is imposed at the tax rate determined each calendar quarter by the Railroad Retirement Board. See also §31.3221–3.

(b)(1) *Computation.* The employer tax is computed by multiplying the amount of the compensation with respect to which the employer tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect at the time the compensation is paid. For rules relating to the time of payment, see §31.3121(a)–2(a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, *R*'s employee *A* received $1,000 as remuneration for services performed for *R* in 1989. The employer tax is payable at the rate of 23.75 percent (7.65 percent plus 16.10 percent) in effect for 1990 (the year the compensation was received) and not the 23.61 percent rate (7.51 percent plus 16.10 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221-3 Supplemental tax.

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(a) *Introduction*—(1) *In general.* Section 3221(c) imposes an excise tax on every employer, as defined in section 3231(a) and §31.3231(a)–1, with respect to individuals employed by the employer. The tax is imposed for each work-hour for which the employer pays compensation, as defined in section 3231 (e) and §31.3231(e)–1, for services rendered to the employer during a calendar quarter. This §31.3221–3 provides rules for determining the number of taxable work-hours.

(2) *Overview.* Paragraph (b) of this section defines *work-hours.* Paragraph (c) of this section demonstrates the calculation of work-hours. Paragraph (d) of this section offers a safe harbor calculation of work-hours for use by any employer in lieu of calculating the number of work-hours for each employee.

(b) *Definition of work-hours*—(1) *In general.* For purposes of section 3221(c) and this section, *work-hours* are hours for which the employee is compensated, whether or not the employee performs services.

(i) *Payments included in work-hours.* Work-hours include regular time worked; overtime; time paid for vacations and holidays; time allowed for meals; away-from-home terminal time; called and not used, runaround, and deadheading time; time for attending court, participating in investigations, and attending claim and safety meetings; and guaranteed time not worked. Work-hours also include conversion hours, that is, compensation converted into work-hours. Conversion hours may be derived from payment by the mile or by the piece. Work-hours also include time for which the employee is paid for periods of absence not due to sickness or accident disability, such as for routine medical and dental examinations or for time lost.

(ii) *Payments excluded from work-hours.* Certain kinds of payments are not subject to conversion into work-hours. These include those payments that are specifically excluded from *compensation* within the meaning of section 3231(e), such as certain sick pay payments (section 3231(e)(1)(i)); tips (section 3231(e)(1)(ii)); and amounts paid specifically (either as an advance, as reimbursement, or allowance)

for traveling expenses (section 3231(e)(1)(iii)). Traveling expenses paid under a nonaccountable plan are excluded from work-hours even though they are includible in compensation. See §31.3231(e)–1(a)(5). Also excluded from work-hours are amounts representing bonuses, amounts received pursuant to the exercise of an employee stock option, and all separation payments or severance allowances.

(2) *Hourly compensation.* Because the tax under section 3221(c) is calculated on the basis of work-hours, the number of hours for which an employee receives compensation is the figure used to determine work-hours. In the case of an hourly-rated employee, each hour for which the employee receives compensation is one work-hour.

(3) *Daily, weekly, monthly compensation.* (i) If an employee is paid by the day, week, month, or other period of time, the tax is imposed on the number of hours comprehended in the rate and, if any, the number of overtime hours for which additional compensation is paid. Thus, in the case of an office worker who receives an annual salary based on an 8-hour, 5-day-a-week work schedule that includes paid holidays, vacations, and sick time, the number of work-hours for one month is 174 (2088 hours/year ÷12 months).

(ii) The rule in paragraph (b)(3)(i) of this section is illustrated by the following examples.

Example 1. *A*, an office worker, receives an annual salary that is paid monthly. The salary is based on an 8-hour, Monday through Friday work schedule. *A* is not paid for overtime hours. *A* is not expected to work on holidays, during *A*'s annual vacation, or during periods that *A* is ill. The number of work-hours for one month is 174 (2088 hours/year ÷12 months). This figure remains constant, even though some months have more workdays than others.

Example 2. *B* is paid a stated amount for each day *B* works, regardless of the number of hours worked. However, if *B* works more than 8 hours during any day, *B* is paid overtime for each additional hour worked that day. *B* is not paid for holidays, vacations, or sick time. During May, *B* worked 6 hours on 4 days, 7 hours on 6 days, 8 hours on 6 days, and 9 hours on 5 days. Because *B* is paid a daily rate for up to 8 hours, 8 hours are comprehended in the daily rate. Therefore, the number of work-hours for May is 173 (21 days×8 hours/day +5 overtime hours), even though *B* actually worked 159 hours.

(4) *Conversion hours*—(i) Compensation not based on time (hour, day, month, etc.), such as compensation paid by the mile or by the piece, must be converted into the number of hours represented by the compensation paid. Thus, if an employee is paid by the mile, 1 work-hour equals the number of miles constituting a workday, divided by 8 hours. However, in the case of a collective bargaining agreement that specifies a number of hours as constituting a workday, the number of hours specified under the agreement may be used instead of 8.

(ii) The rule in paragraph (b)(4)(i) of this section is illustrated by the following example.

Example. C's normal workday consists of 2 150-mile round trips that together take 6 hours. *C* is paid by the mile. The collective bargaining agreement does not specify the number of hours in a workday. Thus, the

number of work-hours for each day *C* works is 8, or 1 work-hour for each 37.5 miles (300 miles/day ÷ 8 hours/day). If the applicable collective bargaining agreement specifies that 6 hours constitute a workday, the number of work-hours for each day *C* works would be 6.

(c) *Calculation of work-hours*—(1) An employer may calculate the work-hours separately for each employee, as described in the examples in this paragraph. If the employer chooses to calculate work-hours separately for each employee, the employer must calculate the number of regular hours, overtime hours, and conversion hours for each employee for each month. In lieu of separate calculations, the employer may calculate the work-hours for all the employer's employees using the safe harbor formula described in paragraph (d) of this section.

(2) The rules in paragraph (c) of this section are illustrated by the following examples.

Example 1. D worked 8 hours a day, Monday through Friday, during the months of February and March 1992. *D* did not work on President's Day, but was paid for the holiday. *D*'s work-hours for February were 160 (19 days × 8 hours a day + 8 holiday hours). *D*'s work-hours for March were 176 (22 days × 8 hours a day).

Example 2. E worked 7-hour shifts every Tuesday through Saturday during the months of February and March 1992. *E* also worked 7 overtime hours during February and 21 overtime hours during March. Also, *E* was paid for 7 hours on President's Day, even though *E* did not work on that day. The number of work-hours for February was 161 (21 days × 7 hours a day + 7 overtime hours + 7 holiday hours). The number of work-hours for March was 168 (21 days × 7 hours a day + 21 overtime hours). Because *E* receives an hourly wage and was paid for the President's Day holiday, the number of hours (7) for which *E* was paid are added to the hours *E* actually worked. If *E* had worked on President's Day and had received extra pay for working on a holiday and holiday pay for 7 hours, the employer would include 14 hours in *E*'s work-hours for that day, the 7 hours *E* actually worked and the 7 holiday hours for which *E* was paid.

Example 3. Employment beginning during month. F began employment on March 16, a Monday, and worked 8 hours a day, Monday through Friday. The employer calculates that *F*'s hours for the month were 96, because *F* worked 12 8-hour days during the month. If March 16 were on a Friday, the employer would calculate 11 days, or 88 hours.

Example 4. Employment ending during month. G's last day of employment was Friday, March 13. *G* worked 8 hours a day, Monday through Friday, except for March 3, when *G* was ill. *G* was paid for 8 hours for March 3. The employer calculates that *G*'s work-hours for March were 80, because *G* worked 9 8-hour days and was paid for an additional 8 hours.

(d) *Safe harbor*—(1) *In general.* In lieu of calculating work-hours separately for each employee, an employer may use the safe harbor for all employees. If the employer elects to use the safe harbor for a calendar year, the employer must use the safe harbor for all employees for the entire calendar year. If an employer uses the safe harbor for a calendar year, the employer need not elect the safe harbor for the following calendar year. An employer that elects the safe harbor for a calendar year may not subsequently elect to separately calculate employee work-hours for that calendar year.

(2) *Method of calculation.* The safe harbor treats each employee of the employer as receiving monthly compensation for a number of hours equal to the safe harbor number. To determine the number of work-hours for a month, the employer multiplies the safe harbor number by the number that equals the total number of employees to whom the employer paid compensation during the month.

(i) *Safe harbor number defined.* The safe harbor number is the number established in guidance of general applicability promulgated by the Commissioner.

(ii) *Employee defined.* Solely for purposes of this paragraph, an employee is any individual who is paid compensation, within the meaning of §31.3231(e)–1, regardless of the amount, during the month. Thus, for example, a part-time, temporary, or seasonal employee is counted as an employee. A terminated employee is counted in the month of termination (provided the terminated employee received compensation in the month of termination), but not in any subsequent month in which the employee does not perform service for the employer as an employee, even if the terminated employee is paid compensation in a subsequent month. Thus, for example, an employee who terminates employment during the month, receives compensation during the month of termination, and receives a final paycheck the following month is counted as an employee of the employer for the month of termination but not for the following month.

(3) *Method of election.* An employer makes the safe harbor election for a calendar year on the employment tax return filed for the previous calendar year.

(4) *Additional rules.* The Commissioner may, in revenue procedures, revenue rulings, notices, or other guidance of general applicability, revise the safe harbor number or provide additional safe harbors that satisfy section 3221(c).

(e) *Effective dates.* This §31.3221–3 is effective for calendar years beginning after December 31, 1992, except that paragraph (d) is effective for calendar years beginning after December 31, 1993. Taxpayers may apply the rules in paragraphs (a), (b), and (c) of this section before January 1, 1993.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

§ 31.3221-4 Exception from supplemental tax.

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(a) *General rule.* Section 3221(d) provides an exception from the excise tax imposed by section 3221(c). Under this exception, the excise tax imposed by section 3221(c) does not apply to an employer with respect to employees who are covered by a supplemental pension plan, as defined in paragraph (b) of this section, that is established pursuant to an agreement reached through collective bargaining between the employer and employees, within the meaning of paragraph (c) of this section.

(b) *Definition of supplemental pension plan*—(1) *In general.* A plan is a supplemental pension plan covered by the section 3221(d) exception described in paragraph (a) of this section only if it meets the requirements of paragraphs (b)(2) through (b)(4) of this section.

(2) *Pension benefit requirement.* A plan is a supplemental pension plan within the meaning of this section only if the plan is a pension plan within the meaning of §1.401–1(b)(1)(i) of this chapter. Thus, a plan is a supplemental pension plan only if the plan provides for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. A plan need not be funded through a qualified trust that meets the requirements of section 401(a) or an annuity contract that meets the requirements of section 403(a) in order to meet the requirements of this paragraph (b)(2). A plan that is a profit-sharing plan within the meaning of §1.401–1(b)(1)(ii) of this chapter or a stock bonus plan within the meaning of §1.401–1(b)(1)(iii) of this chapter is not a supplemental pension plan within the meaning of this paragraph (b).

(3) *Railroad Retirement Board determination with respect to the plan.* A plan is a supplemental pension plan within the meaning of this paragraph (b) with respect to an employee only during any period for which the Railroad Retirement Board has made a determination under 20 CFR 216.42(d) that the plan is a private pension, the payments from which will result in a reduction in the employee's supplemental annuity payable under 45 U.S.C. 231a(b). A plan is not a supplemental pension plan for any time period before the Railroad Retirement Board has made such a determination, or after that determination is no longer in force.

(4) *Other requirements.* [Reserved]

(c) *Collective bargaining agreement.* A plan is established pursuant to a collective bargaining agreement with respect to an employee only if, in accordance with the rules of §1.410(b)–6(d)(2) of this chapter, the employee is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, provided that there is evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers.

(d) *Substitute section 3221(d) excise tax.* Section 3221(d) imposes an excise tax on any employer who has been excepted from the excise tax imposed under section 3221(c) by the application of section 3221(d) and paragraph (a) of this section with respect to an employee. The excise tax is equal to the amount of the supplemental annuity paid to that employee under 45 U.S.C. 231a(b), plus a percentage thereof determined by the Railroad Retirement Board to be sufficient to cover the administrative costs attributable to such payments under 45 U.S.C. 231a(b).

(e) *Effective date*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, this section applies beginning on October 1, 1998.

(2) *Delayed effective date for collective bargaining agreement provisions.* Paragraph (c) of this section

applies beginning on January 1, 2000.

[T.D. 8832, 64 FR 42833, Aug. 6, 1999]

General Provisions

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§ 31.3231(a)-1 Who are employers.

top

(a) Each of the following persons is an employer within the meaning of the act:

(1) Any carrier, that is, any express carrier, sleeping car carrier, or rail carrier providing transportation subject to subchapter I of chapter 105 of title 49;

(2) Any company—

(i) Which is directly or indirectly owned or controlled by one or more employers as defined in paragraph (a)(1) of this section, or under common control therewith, and

(ii) Which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with—

(*a*) The transportation of passengers or property by railroad, or

(*b*) The receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad;

(3) Any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any employer as defined in paragraph (a)(1) or (2) of this section;

(4) Any railroad association, traffic association, tariff bureau, demurrage bureau, weighing and inspection bureau, collection agency, and any other association, bureau, agency, or organization controlled and maintained wholly or principally by two or more employers as defined in paragraph (a)(1), (2) or (3) of this section and engaged in the performance of services in connection with or incidental to railroad transportation;

(5) Any railway labor organization, national in scope, which has been or may be organized in

accordance with the provisions of the Railway Labor Act; and

(6) Any subordinate unit of a national railway-labor-organization employer, that is, any State or National legislative committee, general committee, insurance department, or local lodge or division, of an employer as defined in paragraph (a)(5) of this section, established pursuant to the constitution and bylaws of such employer.

(b) As used in paragraph (a)(2) of this section, the term "controlled" includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interest of one or more carriers. It is the reality of the control, however, which is decisive, not its form nor the mode of its exercise.

(c) As used in paragraph (a)(2) of this section, the term *casual* applies when the service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

(d) The term "employer" does not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation which is operated by any other motive power.

(e) The term "employer" does not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple and the operation of equipment or facilities for such mining or supplying of coal, or in any of such activities.

(f) Any company that is described in paragraph (a)(2) of this section is an employer under section 3231. In certain cases, based on all the facts and circumstances, it may be appropriate to segregate those businesses engaged in rail services and therefore subject to the Railroad Retirement Tax Act from those businesses engaged exclusively in nonrail services and therefore not subject to the Railroad Retirement Tax Act. The factors considered are set forth in guidance published by the Internal Revenue Service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960; T.D. 8582, 59 FR 66191, Dec. 23, 1994]

§ 31.3231(b)-1 Who are employees.

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(a) *In general.* (1) An individual who is in the service of one or more employers for compensation is an employee within the meaning of the act. (For definitions of the terms "employer", "service", and "compensation", see subsections (a), (d), and (e), respectively, of section 3231.) An individual is in the service of an employer, with respect to services rendered for compensation, if—

(i) He is subject to the continuing authority of the employer to supervise and direct the manner in which he renders such services; or

(ii) He is rendering professional or technical services and is integrated into the staff of the employer; or

(iii) He is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations.

(2) In order that an individual may be in the service of an employer within the meaning of paragraph (a)(1)(i) of this section, it is not necessary that the employer actually direct or control the manner in which the services are rendered; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services. Other factors indicating that an individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services are the furnishing of tools and the furnishing of a place to work by the employer to the individual who renders the services.

(3) In general, if an individual is subject to the control or direction of an employer merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. On individual performing services as an independent contractor is not, as to such services, in the service of an employer within the meaning of paragraph (a)(1)(i) of this section. However, an individual performing services as an independent contractor may be, as to such services, in the service of an employer within the meaning of paragraph (a)(1) (ii) or (iii) of this section.

(4) Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

(5) If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis.

(6) No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other supervisory personnel are employees within the meaning of the act. An officer of an employer is an employee, but a director as such is not.

(7) In determining whether an individual is an employee with respect to services rendered within the

United States, the citizenship or residence of the individual, or the place where the contract of service was entered into is immaterial.

(8) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which does not conduct the principal part of its business within the United States, such individual shall be deemed to be in the service of such employer only to the extent that he performs services for it in the United States. Thus, with respect to services rendered for such employer outside the United States, such individual is not in the service of an employer.

(9) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which conducts the principal part of its business within the United States, he is in the service of such employer whether his services are rendered within or without the United States. In the case of an individual, not a citizen or resident of the United States, rendering services in a place outside the United States to an employer which is required under the laws applicable in such place to employ, in whole or in part, citizens or residents thereof, such individual shall not be deemed to be in the service of an employer with respect to services so rendered.

(10) The term "employee" does not include any individual while he is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(b) *Employees of local lodges or divisions of railway-labor-organization employers.* (1) An individual is in the service of a local lodge or division of a railway-labor-organization employer (see paragraph (a)(6) of §31.3231(a)–1) only if—

(i) All, or substantially all, the individuals constituting the membership of such local lodge or division are employees of an employer conducting the principal part of its business in the United States; or

(ii) The headquarters of such local lodge or division is located in the United States.

(2) (i) An individual in the service of a local lodge or division is not an employee within the meaning of the act unless he was, on or after August 29, 1935, in the service of a carrier (see §31.3231(g) for definition of carrier) or he was, on August 29, 1935, in the "employment relation" to a carrier.

(ii) An individual shall be deemed to have been in the employment relation to a carrier on August 29, 1935, if (*a*) he was on that date on leave of absence from his employment expressly granted to him by the carrier by whom he was employed, or by a duly authorized representative or such carrier, and the grant of such leave of absence was established to the satisfaction of the Railroad Retirement Board before July 1947; or (*b*) he was in the service of a carrier after August 29, 1935, and before January 1946 in each of six calendar months whether or not consecutive; or (*c*) before August 29, 1935, he did

not retire and was not retired or discharged from the service of the last carrier by whom he was employed or its corporate or operating successor, but (*1*) solely by reason of his physical or mental disability he ceased before August 29, 1935, to be in the service of such carrier and thereafter remained continuously disabled until he attained age sixty-five or until August 1945, or (*2*) solely for such last stated reason a carrier by whom he was employed before August 29, 1935, or a carrier who is its successor did not on or after August 29, 1935, and before August 1945 call him to return to service, or (*3*) if he was so called he was solely for such reason unable to render service in six calendar months as provided in (*b*) of this subdivision; or (*d*) he was on August 29, 1935, absent from the service of a carrier by reason of a discharge which, within one year after the effective date thereof, was protested, to an appropriate labor representative or to the carrier, as wrongful, and which was followed within 10 years of the effective date thereof by his reinstatement in good faith to his former service with all his seniority rights. However, an individual shall not be deemed to have been in the employment relation to a carrier on August 29, 1935, if before that date he was granted a pension or gratuity on the basis of which a pension was awarded to him pursuant to section 6 of the Railroad Retirement Act of 1937 (45 U.S.C. 228f), or if during the last payroll period before August 29, 1935, in which he rendered service to a carrier he was not, with respect to any service in such payroll period, in the service of an employer (see paragraph (a) of this section).

(c) *Employees of general committees of railway-labor-organization employers.* An individual is in the service of a general committee of a railway-labor-organization employer (see paragraph (a)(6) of §31.3231(a)–1) only if—

(1) He is representing a local lodge or division described in paragraph (b)(1) of this section; or

(2) All, or substantially all, the individuals represented by such general committee are employees of an employer conducting the principal part of its business in the United States; or

(3) He acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer. In such case, if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only a part of his remuneration for such service shall be regarded as compensation. The part of his remuneration regarded as compensation shall be in the same proportion to his total remuneration as the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case such other formula as the Railroad Retirement Board may have prescribed pursuant to section 1(c) of the Railroad Retirement Act of 1937 (45 U.S.C. 228a) shall be applicable. However, no part of his remuneration for such service shall be regarded as compensation if the application of such mileage formula, or such other formula as the Railroad Retirement Board may have prescribed, would result in his compensation for the service being less than 10 percent of his remuneration for such service.

§ 31.3231(c)-1 Who are employee representatives.

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(a) An employee representative within the meaning of the act is—

(1) Any officer or official representative of a railway labor organization which is not included as an employer under section 3231(a) who—

(i) Was in the service of an employer either before or after June 29, 1937, and

(ii) Is duly authorized and designated to represent employees in accordance with the Railway Labor Act.

For railway labor organizations which are employers under section 3231(a), see paragraph (a) (5) and (6) of §31.3231(a)–1.

(2) Any individual who is regularly assigned to or regularly employed by an employee representative, as defined in paragraph (a)(1) of this section, in connection with the duties of such employee representative's office.

(b) In determining whether an individual is an employee representative, his citizenship or residence is material only insofar as those factors may affect the determination of whether he was "in the service of an employer" (see paragraph (a) of §31.3231(b)–1).

§ 31.3231(d)-1 Service.

top

See §31.3231(b)–1 for regulations relating to the term "in the service of an employer."

§ 31.3231(e)-1 Compensation.

top

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121 (a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see §31.3123–1.

(3) The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see §31.3121(a)–3. For rules regarding the inclusion of fringe benefits in compensation, see §31.3121(a)–1T.

(6) *Split-dollar life insurance arrangements. See* §§1.61–22 and 1.7872–15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(b) *Special Rules.* (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of §31.3231(b)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994, as amended by T.D. 9092, 68 FR 54361, Sept. 17, 2003]

§ 31.3231(e)-2 Contribution base.

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The term *compensation* does not include any remuneration paid during any calendar year by an employer to an employee for services rendered in excess of the applicable contribution base. For rules applying this provision, see §31.3121(a)(1)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994]

Subpart D—Federal Unemployment Tax Act (Chapter 23, Internal Revenue Code of 1954)

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§ 31.3301-1 Persons liable for tax.

top

Every person who is an employer as defined in section 3306(a) (see §31.3306(a)–1) is liable for the tax. Even if an employer is not subject to any State unemployment compensation law, he is nevertheless liable for the tax. However, if he is subject to such a State law, he may be entitled to certain credits against the tax (see §§31.3302(a)1 to 31.3302(c)–1, inclusive). For provisions relating to payment of the tax, see Subpart G of the regulations in this part.

§ 31.3301-2 Measure of tax.

top

The tax for any calendar year is measured by the amount of wages paid by the employer during such year with respect to employment after December 31, 1938. (See §31.3306(b)–1, relating to wages, and §§31.3306(c)–1 to 31.3306(c)–3, inclusive, relating to employment.)

[T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3301-3 Rate and computation of tax.

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(a) The rates of tax with respect to wages paid in calendar years after 1954 are as follows:

	Percent
In the calendar years 1955 to 1960, both inclusive.....	3
In the calendar year 1961.....	3.1
In the calendar year 1962.....	3.5
In the calendar year 1963.....	3.35
In the calendar year 1964 and subsequent calendar years.....	3.1

(b) The tax is computed by applying to the wages paid in a calendar year, with respect to employment after December 31, 1938, the rate in effect at the time the wages are paid.

[T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3301-4 When wages are paid.

top

Wages are paid when actually or constructively paid. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. See §31.6011(a)–3, relating to the return on which wages are to be reported.

§ 31.3302(a)-1 Credit against tax for contributions paid.

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(a) *In general.* Subject to the provision of paragraphs (b) and (c) of this section and to the provisions of §31.3302(c)–1, the taxpayer may credit against the tax for any taxable year the total amount of contributions paid by him into an unemployment fund maintained during such year under a State law which has been found by the Secretary of Labor to contain the provisions specified in section 3304(a); *Provided, however,* That no credit may be taken for contributions under a State law if such State has not been duly certified for the calendar year to the Secretary of the Treasury by the Secretary of Labor.

The contributions may be credited against the tax whether or not they are paid with respect to employment as defined in section 3306(c). For provisions relating to additional credit against the tax, see §31.3302(b)–1.

(b) *Limitation on the taxable year with respect to which contributions are allowable.* In order to be allowable as credit against the tax for any taxable year, the contributions must have been paid with respect to such year.

Example 1. Under the unemployment compensation law of State X, employer M is required to report in his contribution return for the quarter ending December 31, 1955, all remuneration payable for services rendered in such quarter. A portion of such remuneration is not paid to his employees until February 1, 1956. On January 20, 1956, M pays to the State the total amount of contributions due with respect to all remuneration so required to be reported. Such contributions, including those with respect to the remuneration paid on February 1, 1956, may be included in computing the credit against the tax for the calendar year 1955. This is true even though the remuneration paid on February 1, 1956 (if it constitutes "wages") is required to be reported in the Federal return for 1956 and not in the Federal return for 1955.

Example 2. Under the unemployment compensation law of State Y, employer N is required to include in his contribution return for the quarter ending December 31, 1955, certain remuneration paid on December 30, to 1955, to an employee for services to be rendered after December 31. On January 20, 1956, N pays to the State the total amount of contributions due with respect to all remuneration required to be reported on the contribution return. Such contributions, including those with respect to the remuneration paid on December 30, 1955, may be included in computing the credit against the tax for the calendar year 1955.

(c) *Limitation on amount of credit allowable based on time when contributions are paid*—(1) *In general.* The amount of credit allowable for contributions paid into a State unemployment fund depends in part on the time of payment of such contributions. Although contributions paid at any time may be credited against the tax (subject to the limitations referred to in paragraphs (c)(2) and (3) of this section), no refund or credit of the tax based on credit for contributions paid will be allowed unless the contributions are paid prior to the expiration of the period of limitations applicable to refund or credit of the tax. For general provisions relating to the limitation period and to refunds, credits and abatements of the tax, see respectively §§301.6511(a)–1, 301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

(2) *Amount of credit allowable when contributions are paid on or before last day for filing return.* Contributions paid into a State unemployment fund on or before the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount equal to such contributions, but not, however, to exceed the total credits, determined pursuant to §31.3302(c)–1. For provisions relating to the time for filing the return, see §31.6071(a)–1 in Subpart G of this part.

(3) *Amount of credit allowable when contributions are paid after last day for filing return.* Contributions paid into a State unemployment fund after the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount not to exceed 90

percent of the amount which would have been allowable as credit on account of such contributions had they been paid into a State unemployment fund on or before such last day. However, see paragraph (c)(4) of this section relating to the payment of contributions to the wrong State. For general provisions relating to refunds, credits, and abatements of the tax, see §§301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

Example 1. The Federal return of the M Company for the calendar year 1961 discloses total wages of $400,000. The Federal tax, imposed at the rate of 3.1 percent, is $12,400. The company is liable for total State contributions of $8,000 for 1961. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The contributions are not paid until February 1, 1962. If the contributions had been paid on or before January 31, 1962, the entire amount of $8,000 could have been credited against the tax. (Credits could not exceed 2.7 percent of the wages, or $10,800. See §31.3302(c)–1.) Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of the amount which would have been allowable as credit had the contributions been paid on time (90 percent of $8,000, or $7,200), the net liability for Federal tax being $5,200 ($12,400 minus $7,200).

Example 2. The facts are the same as in example 1, except that the M Company is liable for and pays total State contributions of $12,000, instead of $8,000. If the contributions had been paid on or before January 31, 1962, the amount allowable as credit would have been $10,800 (2.7 percent of wages of $400,000). Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of $10,800, or $9,720, the net liability for Federal tax being $2,680 ($12,400 minus $9,720).

Example 3. The Federal return of the R Company for the calendar year 1961 discloses a total tax of $3,100. The company is liable for total State contributions of $2,700 for such year. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The R Company pays $1,700 of the total State contributions on or before such date, and the remaining $1,000 on February 1, 1962. If the $1,000 had been paid on or before January 31, 1962, that amount could have been credited against the tax (such amount plus the $1,700 paid on or before January 31, 1962, not exceeding the aggregate credit allowable). Since the $1,000 was paid after January 31, 1962, the R Company is entitled to a credit of 90 percent of this amount or $900, plus the credit of $1,700 allowable for the contributions paid on or before January 31, 1962. The net liability for Federal tax is thus $500 ($3,100 minus $2,600).

(4) *Amount of credit allowable when contributions are paid to wrong State.* Contributions for the taxable year paid into a State unemployment fund which are required under the unemployment compensation law of that State, but which are paid with respect to remuneration on the basis of which the taxpayer had, prior to such payment, erroneously paid an amount as contributions under another unemployment compensation law, shall be deemed for purposes of the credit to have been paid at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions for such taxable year with respect to services subject to such other law, the payment into the proper fund shall be deemed for purposes of credit to have been made on the date the Federal return for such year was actually filed by the taxpayer under §31.6011(a)–3.

Example. Employee N, whose Federal return for the calendar year 1961 discloses a total tax of $3,100, employs individuals in State X and State Y during the calendar year 1961. N assumes in good faith that the

services of his employees are covered by the unemployment compensation law of State Y, and pays as contributions to State Y the amount of $2,700 based upon the remuneration of the employees. All of the services were in fact covered by the unemployment compensation law of State X, and none by the law of State Y. The payment to State Y was made on January 31, 1962. When the error was discovered thereafter, N paid to State X contributions in the amount of $2,700 based upon such remuneration. Since the contributions were paid to State Y on January 31, 1962, the contributions to State X are, for purposes of the credit, deemed to have been paid on such date. N is entitled to a credit of $2,700 against the Federal tax of $3,100, the net liability for Federal tax being $400 ($3,100 minus $2,700).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3302(a)-2 Refund of State contributions.

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If, subsequent to the filing of the return, a refund is made by a State to the taxpayer of any part of his contribution credited against the tax, the taxpayer is required to advise the district director of the date and amount of such refund and the reason therefor, and to pay the tax, if any, due as a result of such refund, together with interest from the date when the tax was due.

§ 31.3302(a)-3 Proof of credit under section 3302(a).

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Credit against the tax for any calendar year for contributions paid into State unemployment funds shall not be allowed unless there is submitted to the district director:

(a) A certificate of the proper officer of each State (the laws of which required the contributions to be paid) showing, for the taxpayer:

(1) The total amount of contributions required to be paid under the State law with respect to such calendar year (exclusive of penalties and interest) which was actually paid on or before the date the Federal return is required to be filed; and

(2) The amounts and dates of such required payments (exclusive of penalties and interest) actually paid after the date the Federal return is required to be filed.

(b) A statement by the taxpayer that no part of any payment made by him into a State unemployment fund for such calendar year, which is claimed as a credit against the tax, was deducted or is to be deducted from the remuneration of individuals in his employ. Such statement shall contain or be verified by a written declaration that it is made under the penalties of perjury.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(a).

§ 31.3302(b)-1 Additional credit against tax.

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(a) *In general.* In addition to the credit against the tax allowable for contributions actually paid to State unemployment funds (see §31.3302(a)–1), the taxpayer may be entitled to a credit under section 3302 (b). This additional credit is allowable to the taxpayer with respect to the amount of contributions which he is relieved from paying to an unemployment fund under the provisions of a State law which have been certified for the taxable year as provided in section 3303. Generally, an additional credit is available to an employer, if under the provisions of a State law which have been so certified he is permitted to pay contributions to such State for the taxable year, or portion thereof, at a rate which is both lower than the highest rate applied under such law in such year and lower than 2.7 percent. No additional credit is allowable except with respect to a State law certified by the Secretary of Labor for the taxable year as provided in section 3303 (or with respect to any provisions thereof so certified).

(b) *Method of computing amount of additional credit allowable with respect to a State law*—(1) *Certification of a State law as a whole.* In ascertaining the additional credit for any taxable year with respect to a particular State law which the Secretary of Labor certifies as a whole to the Secretary of the Treasury in accordance with the provisions of section 3303, the taxpayer must first compute the following amounts:

(i) The amount of contributions (whether or not with respect to employment as defined in section 3306 (c)) which the taxpayer would have been required to pay under the State law for such year if throughout the year he had been subject to the highest rate applied under such law in such year, or to a rate of 2.7 percent, whichever rate is lower.

(ii) The amount of contributions (whether or not with respect to employment as defined in section 3306 (c)) he was required to pay under the State law with respect to such year, whether or not paid.

The amount computed under paragraph (b)(1)(ii) of this section should then be subtracted from the amount computed under paragraph (b)(1)(i) of this section and the result will be the additional credit for the taxable year with respect to the law of that State.

Example. A employs individuals only in State X during the calendar year 1955. The unemployment compensation law of State X has been certified in its entirety to the Secretary of the Treasury by the Secretary of Labor for such year. The highest rate applied in such year under such State law to any taxpayer is 3 percent. However, A has obtained a rate of 1 percent under the law of such State and is required to pay his entire year's contribution at that rate. The amount of remuneration of A's employees subject to contributions under such State law is $25,000. A's additional credit under section 3302(b) is $425, computed as follows:

Remuneration subject to contributions	$25,000
Contributions at 2.7 percent rate	675
Less:	
Contributions required to be paid at 1 percent rate	250
Additional credit to A	425

Since the 2.7 percent rate is less than the highest rate applied (3 percent), the 2.7 percent rate is used in computing the amount ($675) from which the amount of contributions required to be paid at the 1 percent rate ($250) is deducted in order to ascertain the additional credit ($425).

(2) *Certification with respect to particular provisions of a State law.* If the Secretary of Labor makes a certification to the Secretary of the Treasury with respect to particular provisions of a State law for any taxable year pursuant to section 3303, the additional credit of the taxpayer for such year with respect to such law shall be computed in such manner as the Commissioner shall determine.

(c) *Amount of additional credit allowable to taxpayer with respect to more than one State law.* If the taxpayer is entitled to additional credit with respect to more than one State law in any taxable year, the additional credit allowable with respect to each State law shall be computed separately (in accordance with paragraph (b) of this section) and the total additional credit allowable against the tax for such year shall be the aggregate of the additional credits allowable with respect to such State laws. For limitation on total credits, see §31.3302(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3302(b)-2 Proof of additional credit under section 3302(b).

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Additional credit under section 3302(b) shall not be allowed against the tax for any calendar year unless there is submitted—

(a) To the Commissioner a certificate of the proper officer of each State (with respect to the law of

which the additional credit is claimed) showing the highest rate of contributions applied under the State law in such calendar year to any person having individuals in his employ; and

(b) To the district director a certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing for the taxpayer—

(1) The total remuneration with respect to which contributions were required to be paid by the taxpayer under the State law with respect to such calendar year; and

(2) The rate of contributions applied to the taxpayer under the State law with respect to such calendar year.

If under the law of such State different rates of contributions were applied to the taxpayer during particular periods of such calendar year, the certificate shall set forth the information called for in paragraphs (b)(1) and (2) of this section with respect to each such period.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the additional credit provided for under section 3302(b).

§ 31.3302(c)-1 Limit on total credits.

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(a) *In general.* Paragraph (b) of this section relates to the limitation on the aggregate of the credits allowable under section 3302 (a) and (b). Paragraph (c) of this section relates to reductions, under certain circumstances, of the total credits allowable after applying section 3302 (a), (b), and (c)(1). In paragraphs (c)(1), (2), and (3) of this section, relate, respectively, to reductions of credits in respect of advances under title XII of the Social Security Act before September 13, 1960, advances under title XII of the Social Security Act after September 12, 1960, and payments under the Temporary Unemployment Compensation Act of 1958. A reduction of credit under paragraph (c)(1), (2), or (3) of this section applies separately from, and in addition to, a reduction under any other such subparagraph. See section 3302(d) and §31.3302(d)–1 for definitions and special rules relating to section 3302(c), and for a provision that, in applying section 3302(c), the Federal tax shall be computed at the rate of 3 percent.

(b) *Limitation on aggregate credit.* The aggregate of the credit under section 3302(a) and the additional credit under section 3302(b) shall not exceed 90 percent of the tax against which credit is taken, computed as if the tax were imposed at the rate of 3 percent. Thus, the aggregate of the credit which is allowable to an employer for any taxable year shall not exceed 2.7 percent of the wages paid by the employer during the year.

(c) *Reductions of amount of credit otherwise allowable*—(1) *Advances before September 13, 1960,*

under title XII of Social Security Act—(i) *Credit reductions for 1961 and 1962.* Pursuant to section 3302(c)(2), as applicable to credit allowable for any year ended before 1963, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State of—

(*a*) Alaska shall be reduced for the taxable year 1961 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1961 which are attributable to Alaska, and shall be reduced for the taxable year 1962 by an amount equal to 0.3 percent of the wages paid by the taxpayer during 1962 which are attributable to Alaska; or

(*b*) Michigan shall be reduced for the taxable year 1962 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1962 which are attributable to Michigan.

(ii) *Credit reductions for 1963 and subsequent years.* If any balance of an advance or advances under title XII of the Social Security Act, made before September 13, 1960, to the unemployment account of a State, remains unpaid on January 1, 1963, or on January 1 of any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year unless—

(*a*) No balance of such advance or advances exists as of the beginning of November 10 of the taxable year, or

(*b*) The State pays into the Federal unemployment account, before November 10 of the taxable year, the amount certified by the Secretary of Labor pursuant to section 3302(c)(2), and designates such payment as being made for purposes of the last sentence of section 3302(c)(2).

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that taxable year which are attributable to the State. The percentage for the taxable year 1963, or for any succeeding taxable year beginning before January 1, 1968, is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). The percentage for any taxable year beginning on or after January 1, 1968, is the percentage reduction for the immediately preceding taxable year plus 0.15 percent. Thus, for 1968 the percentage is 0.3 percent, for 1969 the percentage is 0.45 percent, and for 1970 the percentage is 0.6 percent.

(2) *Advances after September 12, 1960, under title XII of Social Security Act*—(i) *In general.* If any balance of an advance or advances under title XII of the Social Security Act, made after September 12, 1960, to the unemployment account of a State, remains unpaid on January 1 of two consecutive taxable years, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year beginning with the second consecutive January 1, unless prior to November 10 of that taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction made pursuant to this subdivision in the total credits otherwise allowable for the taxable year

beginning with the second consecutive January 1 shall be 0.3 percent of the wages paid by the taxpayer during the taxable year which are attributable to the State (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). In the case of any succeeding taxable year beginning with a consecutive January 1 on which there exists such a balance of an unreturned advance or advances made after September 12, 1960, the total credits otherwise allowable shall be further reduced unless prior to November 10 of that succeeding taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction for each such succeeding taxable year beginning with a consecutive January 1 on which such a balance exists shall be a percentage of the wages paid by the taxpayer during that succeeding taxable year which are attributable to the State. The percentage reduction for any such succeeding taxable year shall be the aggregate of (*a*) the percentage reduction (without regard to paragraph (c)(2)(ii) or (iii) of this section) for the immediately preceding taxable year, (*b*) 0.3 percent of the wages paid by the taxpayer during the taxable year which are attributable to the State, and (*c*) the percentage, if any, described in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Additional reduction if a balance of advances exists after third or fourth consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the third or fourth consecutive taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for such State for the calendar year preceding such taxable year is at least 2.7 percent. The percentage of reduction, if any, under this subdivision shall be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(iii) *Additional reduction if a balance of advances exists after fifth or any succeeding consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the fifth or any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for the State for the calendar year preceding such taxable year equals or exceeds the 5-year benefit cost rate (see section 3302(d)(5)) applicable to the State for the taxable year or 2.7 percent, whichever is higher. The percentage of reduction, if any, under this subdivision for a taxable year shall be the percentage referred to in section 3302(c)(3)(C) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(3) *Payments under the Temporary Unemployment Compensation Act of 1958.* If any amount of temporary unemployment compensation was paid in a State under the Temporary Unemployment Compensation Act of 1958, the total credits otherwise allowable under section 3302 to a taxpayer with respect to wages attributable to the State for the taxable year beginning January 1, 1963, and for each taxable year thereafter, shall be reduced unless prior to November 10 of the taxable year—

(i) There have been restored to the Treasury the amounts of temporary unemployment compensation paid in the State (except amounts paid to individuals who exhausted their unemployment

compensation under title XV of the Social Security Act and title IV of the Veterans' Readjustment Assistance Act of 1952 prior to their making their first claims under the Temporary Unemployment Compensation Act of 1958), the amount of costs incurred in the administration of the Temporary Unemployment Compensation Act of 1958); with respect to the State, and the amount estimated by the Secretary of Labor as the State's proportionate share of other costs incurred in the administration of such Act, or

(ii) The State restores to the general fund of the Treasury the amount certified by the Secretary of Labor pursuant to section 104 of the Temporary Unemployment Compensation Act of 1958, and designates such restoration as being made for purposes of the last sentence of such section.

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that year which are attributable to the State. The percentage for the taxable year 1963 is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent). The percentage for any succeeding year is 0.3 percent (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent).

(4) *Example.* The cumulative effect of the credit reductions described in this paragraph may be illustrated by the following example:

Example. Advances to the unemployment account of State X were made in 1957 and in 1961 under title XII of the Social Security Act. Payments under the Temporary Unemployment Compensation Act of 1958 were made in State X in 1958. No portion of the advances or payments is returned before November 10, 1964. As a consequence:

(a) The credit reduction applicable under subparagraph (1) of this paragraph is made for 1964 at the rate of 0.15 percent;

(b) The credit reduction described in subparagraph (2) of this paragraph has been made for 1963 (the second successive year after 1961) at the rate of 0.3 percent. The rate of credit reduction under subparagraph (2) for 1964 is 1 percent (the aggregate of 0.6 percent under section 3302(c)(3)(A) and 0.4 percent (assumed for purposes of this example to be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor), and

(c) The credit reduction described in subparagraph (3) of this paragraph has been made for 1963 at the rate of 0.15 percent. The rate of credit reduction for 1964 is 0.3 percent.

The cumulative rate of credit reduction applicable for 1964 to wages attributable to State X is 1.45 percent, representing the aggregate of the percentage reductions applicable under subparagraphs (1), (2), and (3) of this paragraph (0.15 percent, 1 percent, and 0.3 percent, respectively). In 1964 Employer A paid wages of $100,000, all of which are subject to the unemployment compensation law of State X. The credit which would be allowable (under section 3302 (a), (b), and (c)(1)) if there were no credit reduction is $2,700. Employer A's tax is computed as follows for 1964:

Total taxable wages (attributable to State X)...	$100,000
Gross Federal tax (3.1 percent of wages).....	3,100
Less credit:	
Gross credit.....	$2,700
Credit reduction (1.45 percent of wages).....	1,450
Net credit.....	1,250
Amount of Federal tax due.....	1,850

[T.D. 6658, 28 FR 6633, June 27, 1963, as amended by T.D. 6708, 29 FR 3198, Mar. 10, 1964]

§ 31.3302(d)-1 Definitions and special rules relating to limit on total credits.

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(a) *Rate of tax deemed to be 3 percent.* In applying the provisions of section 3302(c) relating to the limitation on total credits, and to reductions of credits otherwise allowable, the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of any other rate prescribed in section 3301 (see §31.3301–3).

(b) *Wages attributable to a particular State.* For purposes of section 3302(c) (2) or (3), wages are attributable to a particular State if they are subject to the unemployment compensation law of the State. If wages are not subject to the unemployment compensation law of any State, the determination as to whether such wages, or any portion thereof, are attributable to the particular State with respect to which the reduction in total credits is imposed shall be made in accordance with rules prescribed by the Commissioner.

(c) *Employment Security Act of 1960.* The Employment Security Act of 1960, referred to in section 3302(c)(2), means title V of the Social Security Amendments of 1960.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3302(e)-1 Successor employer.

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(a) *In general.* In addition to the credits against the tax allowable under section 3302(a) and (b) for any taxable year after 1960, the taxpayer may be entitled to an amount of credit under section 3302(e). Credit under section 3302(e) is provided in the case of a taxpayer who (1) acquires substantially all of the property used in a trade or business, or in a separate unit of a trade or business, of another person (referred to in this section as a predecessor) who is not an employer (see §31.3306(a)–1) for the calendar year in which the acquisition takes place, and (2) immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of the predecessor.

(b) *Method of computing credit under section 3302(e).* (1) Except as provided in paragraph (b)(2) of this section, the amount of credit to which the taxpayer may be entitled under section 3302(e) is the amount of credit to which the predecessor would be entitled under section 3302 (a), (b), and (e), without regard to the limits in section 3302(c), if the predecessor were an employer.

(2) If, during the calendar year in which the acquisition takes place, the predecessor pays remuneration, subject to contributions under the unemployment compensation law of a State, to any employee other than the individuals referred to in paragraph (a) of this section, the taxpayer will be entitled only to a portion of the amount of credit described in paragraph (b)(1) of this section. The portion is determined by multiplying such amount by a fraction. The numerator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to the individuals referred to in paragraph (a) of this section. The denominator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to all employees for services performed by them in the trade or business, or unit thereof, acquired by the taxpayer.

Example. In April 1961 the X Partnership terminated after selling all of its property to the Y Corporation. During 1961, the X Partnership paid its employees and former employees a total of $1,000,000 as remuneration subject to contributions under the employment compensation law of a State. (Note that the X Partnership did not qualify as an employer for 1961 for purposes of the Federal unemployment tax, because it had employees during less than 20 weeks in 1961.) When the Y Corporation acquired the property it concurrently employed all individuals who were then in the employ of the X Partnership. Assume that the X Partnership, if it had qualified as an employer for 1961, would have been entitled to a total credit against the Federal tax of $30,000 under section 3302 (a) and (b), without regard to the limits in section 3302(c). Of the $1,000,000 remuneration paid by the X Partnership in 1961, one-fifth (or $200,000) was paid to individuals who were employed by the Y Corporation at the time it acquired the property of the X Partnership. Under section 3302(e), therefore, the Y Corporation is entitled to credit of $6,000, which is one-fifth of the credit ($30,000) which would have been available to the X Partnership.

(3) The aggregate amount of credit allowable to the taxpayer under section 3302 (a), (b), and (e) is

subject to the limits in section 3302(c).

(c) *Proof of credit under section 3302(e).* Credit under section 3302(e) shall not be allowed against the tax for any taxable year unless there is submitted to the district director (1) such information or proof as may be called for in the return on which the credit is reported, or in the instructions relating to the return, and (2) such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(e).

(d) *Cross-references.* See paragraph (b) of §31.3306(b)(1)–1 for examples of the acquisition of property used in a trade or business, or in a separate unit thereof.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3306(a)-1 Who are employers.

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(a) *Definition*—(1) *For calendar years 1956 through 1969, inclusive.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during any calendar year after 1955 and before 1970, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(1a) *For 1970 and subsequent calendar years.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during a calendar year after 1969, or during the calendar year immediately preceding such a calendar year, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(2) *For calendar year 1955.* Every person who employs 8 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during the calendar year 1955, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(3) *General agents of the Secretary of Commerce.* For provisions relating to the circumstances under which an employee who performs services as an officer or member of the crew of an American vessel (i) which is owned by or bareboat chartered to the United States and (ii) whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than for the United States, see §31.3306 (N)–1.

(b) The several weeks in each of which occurs a day on which the prescribed number of employees are employed need not be consecutive weeks. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the

prescribed number of employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is 4 or more (8 or more for the calendar year 1955).

(c) In determining whether a person employs a sufficient number of employees to be an employer subject to the tax, each employee is counted with respect to services which constitute employment as defined in section 3306(c) (see §31.3306(c)–2). No employee is counted with respect to services which do not constitute employment as so defined. See, however, paragraph (d) of this section.

(d) The provisions of paragraph (c) of this section are subject to the provisions of section 3306(d), relating to services which do not constitute employment but which are deemed to be employment, and relating to services which constitute employment but which are deemed not to be employment (see §31.3306(d)–1). For example, if the services of an employee during a pay period are deemed to be employment under section 3306(d), even though a portion thereof does not constitute employment under section 3306(c), the employee is counted with respect to all services during the pay period. On the other hand, if the services of an employee during a pay period are deemed not to be employment, even though a portion thereof constitutes employment, the employee is not counted with respect to any services during the pay period.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7037, 35 FR 6709, Apr. 28, 1970]

§ 31.3306(b)-1 Wages.

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(a) *Applicable law and regulations*—(1) *Remuneration paid after 1954.* Whether remuneration paid after 1954 for employment performed after 1938 constitutes wages is determined under section 3306 (b). Accordingly, only remuneration paid after 1954 for employment performed after 1938 is covered by this section of the regulations and by the sections relating to the statutory exclusions from wages (§§31.3306(b)(1)–1 to 31.3306(b)(10)–1).

(2) *Remuneration paid after 1939 and before 1955.* Whether remuneration paid after 1939 and before 1955 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 403 (Regulations 107).

(3) *Remuneration paid in 1939.* Whether remuneration paid in 1939 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 400 (Regulations 90).

(b) The term “wages” means all remuneration for employment unless specifically excepted under section 3306(b) (see §§31.3306(b)(1)–1 to 31.3306(b)(10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions are wages if paid as compensation for employment.

(d) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

(e) Except in the case of remuneration paid for services not in the course of the employer's trade or business (see §31.3306(b)(7)–1), the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payments.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called "vacation allowances" paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see §31.3306(b)–2.

(i) Remuneration paid by an employer to an individual for employment, unless such remuneration is specifically excepted under section 3306(b), constitutes wages even though at the time paid the individual is no longer an employee.

Example. A is employed by B, an employer, during the month of June 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B during the month. A leaves the employ of B at the close of business on June 30, 1955. On July 15, 1955 (when A is no longer an employee of B), B pays A the remuneration of $100 which was earned for the services performed in June. The $100 is wages, and the tax is payable with respect thereto.

(j) In addition to the exclusions specified in §§31.3306(b)(1)–1 to 31.3306(b)(10)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3306(c).

(2) Remuneration for services which are deemed not to be employment under section 3306(d) (§31.3306(d)–1).

(3) Tips or gratuities paid directly to an employee by a customer of an employer, and not accounted for by the employee to the employer.

(k) For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see §31.3307–1.

(l) *Split-dollar life insurance arrangements.* Except as otherwise provided under section 3306(r), *see* §§1.61–22 and 1.7872–15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7375, 40 FR 42350, Sept. 12, 1975; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990; T.D. 9092, 68 FR 54361, Sept. 17, 2003]

§ 31.3306(b)-1T Question and answer relating to the definition of wages in section 3306(b) (Temporary).

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The following question and answer relates to the definition of wages in section 3306(b) of the Internal Revenue Code of 1954, as amended by section 531(d)(3) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of wages under section 3306(b)?

A–1: Yes, unless specifically excluded from the definition of "wages" pursuant to section 3306(b) (1) through (16). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of "wages" if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 755, Jan. 7, 1985]

§ 31.3306(b)-2 Reimbursement and other expense allowance amounts.

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(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and §1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfied the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an

employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§ 31.3306(b)(1)-1 $3,000 limitation.

top

(a) *In general.* (1) the term "wages" does not include that part of the remuneration paid within any calendar year by an employer to an employee which exceeds the first $3,000 of remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3306(b)–1 or §§31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), paid within such calendar year by such employer to such employee for employment performed for him at any time after 1938.

(2) The $3,000 limitation applies only if the remuneration paid during any one calendar year by an employer to the same employee for employment performed after 1938 exceeds $3,000. The limitation in such case relates to the amount of remuneration paid during any one calendar year for employment after 1938 and not to the amount of remuneration for employment performed in any one calendar year.

Example. Employer B, in 1955, pays employee A $2,500 on account of $3,000 due him for employment performed in 1955. In 1956 employer B pays employee A the balance of $500 due him for employment performed in the prior year (1955), and thereafter in 1956 also pays A $3,000 for employment performed in 1956. The $2,500 paid in 1955 is subject to tax in 1955. The balance of $500 paid in 1956 for employment during 1955 is subject to tax in 1956, as is also the first $2,500 paid of the $3,000 for employment during 1956 (this $500 for 1955 employment added to the first $2,500 paid for 1956 employment constitutes the maximum wages subject to the tax which could be paid in 1956 by B to A). The final $500 paid by B to A in 1956 is not included as wages and is not subject to the tax.

(3) If during a calendar year an employee is paid remuneration by more than one employer, the limitation of wages to the first $3,000 of remuneration paid applies, not to the aggregate remuneration paid by all employers with respect to employment performed after 1938, but instead to the remuneration paid during such calendar year by each employer with respect to employment performed after 1938. In such case the first $3,000 paid during the calendar year by each employer constitutes wages and is subject to the tax. In connection with the application of the $3,000 limitation, see also paragraph (b) of this section relating to the circumstances under which wages paid by a predecessor employer are deemed to be paid by his successor. In connection with the annual wage limitation in the case of remuneration after December 31, 1978 from two or more related corporations that compensate an employee through a common paymaster, see §31.3306(p)–1.

Example 1. During 1955 employer D pays to employee C a salary of $600 a month for employment performed for D during the first seven months of 1955, or total remuneration of $4,200. At the end of the fifth month C has been paid $3,000 by employer D, and only that part of his total remuneration from D constitutes

wages subject to the tax. The $600 paid to employee C by employer D in the sixth month, and the like amount paid in the seventh month, are not included as wages and are not subject to the tax. At the end of the seventh month C leaves the employ of D and enters the employ of E. Employer E pays to C remuneration of $600 a month in each of the remaining five months of 1955, or total remuneration of $3,000. The entire $3,000 paid by E to employee C constitutes wages and is subject to the tax. Thus, the first $3,000 paid by employer D and the entire $3,000 paid by employer E constitute wages.

Example 2. During the calendar year 1955 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation, each such corporation being an employer for such year. During such year F is paid a salary of $3,000 by each Corporation. Each $3,000 paid to F by each of the corporations, X, Y, and Z (whether or not such corporations are related), constitutes wages and is subject to the tax.

(b) *Wages paid by predecessor attributed to successor.* (1) If an employer (hereinafter referred to as a successor) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and if immediately after the acquisition the successor employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for purposes of the application of the $3,000 limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3306(b)–1 or §§31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), with respect to employment paid (or considered under this provision as having been paid to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor. Wages paid by a predecessor shall not be considered as having been paid by the successor unless both the predecessor and the successor are employers as defined in section 3306(a) for the calendar year in which the acquisition occurs (see §31.3306(a)–1, relating to who are employers).

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the $3,000 limitation, be treated as having been paid to such employee by a successor, if:

(i) The successor during a calendar year acquired substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of the predecessor;

(ii) Such employee was employed in the trade or business of the predecessor immediately prior to the acquisition and is employed by the successor in his trade or business immediately after the acquisition; and

(iii) Such wages were paid during the calendar year in which the acquisition occurred and prior to such acquisition.

(3) The method of acquisition by an employer of the property of another employer is immaterial. The acquisition may occur as a consequence of the incorporation of a business by a sole proprietor of a partnership, the continuance without interruption of the business of a previously existing partnership

by a new partnership or by a sole proprietor, or a purchase or any other transaction whereby substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of one employer is acquired by another employer.

(4) Substantially all the property used in a separate unit of a trade or business may consist of substantially all the property used in the performance of an essential operation of the trade or business, or it may consist of substantially all the property used in a relatively self-sustaining entity which forms a part of the trade or business.

Example 1. The M Corporation which is engaged in the manufacture of automobiles, including the manufacture of automobile engines, discontinues the manufacture of the engines and transfers all the property used in such manufacturing operations to the N Company. The N Company is considered to have acquired a separate unit of the trade or business of the M Corporation, namely, its engine manufacturing unit.

Example 2. The R Corporation which is engaged in the operation of a chain of grocery stores transfers one of such stores to the S Company. The S Company is considered to have acquired a separate unit of the trade or business of the R Corporation.

(5) A successor may receive credit for wages paid to an employee by a predecessor only if immediately prior to the acquisition the employee was employed by the predecessor in his trade or business which was acquired by the successor and if immediately after the acquisition such employee is employed by the successor in his trade or business (whether or not in the same trade or business in which the acquired property is used). If the acquisition involves only a separate unit of a trade or business of the predecessor, the employee need not have been employed by the predecessor in that unit provided he was employed in the trade or business of which the acquired unit was a part.

Example. The Y Corporation in 1955 acquires all the property of the X Manufacturing Company and immediately after the acquisition employs in its trade or business employee A, who, immediately prior to the acquisition, was employed by the X Company. Both the Y Corporation and the X Company are employers, as defined in the Act, for the calendar year 1955. The X Company has in 1955 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $2,000 of wages to A. The Y Corporation in 1955 pays to A remuneration with respect to employment of $2,000. Only $1,000 of such remuneration is considered to be wages. For purposes of the $3,000 limitation, the Y Corporation is credited with the $2,000 paid to A by the X Company. If, in the same calendar year, the property is acquired from the Y Corporation by the Z Company, an employer for such year, and A immediately after the acquisition is employed by the Z Company in its trade or business, no part of the remuneration paid to A by the Z Company in the year of the acquisition will be considered to be wages. The Z Company will be credited with the remuneration paid to A by the Y Corporation and also with the wages paid to A by the X Company (considered for purposes of the application of the $3,000 limitation as having also been paid by the Y Corporation).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3306(b)(2)-1 Payments under employers' plans on account of retirement, sickness or accident

disability, medical or hospitalization expenses, or death.

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(a) The term “wages” does not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of:

(1) An employee's retirement,

(2) Sickness or accident disability of an employee or any of his dependents,

(3) Medical or hospitalization expenses in connection with sickness or accident disability of an employee or any of his dependents, or

(4) Death of an employee or any of his dependents.

(b) The plan or system established by an employer need not provide for payments on account of all of the specified items, but such plan or system may provide for any one or more of such items. Payments for any one or more of such items under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

§ 31.3306(b)(3)-1 Retirement payments.

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The term “wages” does not include any payment made by an employer to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of the employee's retirement. Thus payments made to an employee on account of his retirement are excluded from wages under this exception even though not made under a plan or system.

§ 31.3306(b)(4)-1 Payments on account of sickness or accident disability, or medical or hospitalization expenses.

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The term "wages" does not include any payment made by an employer to, or on behalf of, an employee on account of the employee's sickness or accident disability or the medical or hospitalization expenses in connection with the employee's sickness or accident disability, if such payment is made after the expiration of 6 calendar months following the last calendar month in which such employee worked for such employer. Such payments are excluded from wages under this exception even though not made under a plan or system. If the employee does not actually perform services for the employer during the requisite period, the existence of the employer-employee relationship during that period is immaterial.

§ 31.3306(b)(5)-1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans.

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(a) *Payments from or to certain tax-exempt trusts.* The term "wages" does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of an employee or his beneficiary from a trust,

if at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages.

(b) *Payments under or to certain annuity plans.* (1) The term "wages" does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term "wages" does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan meets the requirements of section 401(a) (3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term "wages" does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

[T.D. 6658, 28 FR 6636, June 27, 1963]

§ 31.3306(b)(6)-1 Payment by an employer of employee tax under section 3101 or employee contributions under a State law.

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The term "wages" does not include any payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of either (a) the employee tax imposed by section 3101 or the corresponding section of prior law, or (b) any payment required from an employee under a State unemployment compensation law.

§ 31.3306(b)(7)-1 Payments other than in cash for service not in the course of employer's trade or business.

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The term "wages" does not include remuneration paid in any medium other than cash for service not in the course of the employer's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for service not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exclusion from wages. For provisions relating to the circumstances under which service not in the course of the employer's trade or business does not constitute employment, see §31.3306(c)(3)–1.

§ 31.3306(b)(8)-1 Payments to employees for non-work periods.

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The term "wages" does not include any payment (other than vacation or sick pay) made by an employer to an employee after the calendar month in which the employee attains age 65, if—

(a) Such employee does no work (other than being subject to call for the performance of work) for such employer in the period for which such payment is made; and

(b) The employer-employee relationship exists between the employer and employee throughout the period for which such payment is made.

Vacation or sick pay is not within this exclusion from wages. If the employee does any work for the employer in the period for which the payment is made, no remuneration paid by such employer to such employee with respect to such period is within this exclusion from wages. For example, if employee A, who attained the age of 65 in January 1955, is employed by the X Company on a stand-by basis and is paid $200 by the X Company for being subject to call during the month of February 1955 and an additional $25 for work performed for the X Company on one day in February 1955, then none of the $225 is excluded from wages under this exception.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6708, 29 FR 3199, Mar. 10, 1964]

§ 31.3306(b)(9)-1 Moving expenses.

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(a) The term "wages" does not include remuneration paid on or after November 1, 1964, to or on behalf of an employee, either as an advance or a reimbursement, specifically for moving expenses incurred or expected to be incurred, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term "moving expenses" has the same meaning as when used in section 217 and the regulations thereunder.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3306(b), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3306(b).

[T.D. 7375, 40 FR 42351, Sept. 12, 1975]

§ 31.3306(b)(10)-1 Payments under certain employers' plans after retirement, disability, or death.

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(a) *In general.* The term "wages" does not include the amount of any payment or series of payments made after January 2, 1968, by an employer to, or on behalf of, an employee or any of his dependents under a plan established by the employer which makes provisions for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), which is paid or commences to be paid upon or within a reasonable time after the termination of an employee's employment relationship because of the employee's—

(1) Death,

(2) Retirement for disability, or

(3) Retirement after attaining an age specified in the plan established by the employer or in a pension plan of the employer as the age at which a person in the employee's circumstances is eligible for retirement.

A payment or series of payments made under the circumstances described in the preceding sentence is excluded from "wages" even if made pursuant to an incentive compensation plan which also provides for the making of other types of payments. However, any payment or series of payments which would have been paid if the employee's relationship had not been terminated is not excluded from "wages" under this section and section 3306(b)(10). For example, lump-sum payments for unused vacation time or a final paycheck received after retirement are payments which the employee would have received whether or not he retired and therefore are not excluded from "wages." Further, if any payment is made upon or after termination of employment for any reason other than those set out in paragraphs (a)(1), (2), and (3) of this section such payment is not excludable from "wages" by this section. For example, if a pension plan provides for retirement upon disability, completion of 30 years of service, or attainment of age 65, and if an employee who is not disabled retires at age 61 after 30 years of service, none of the retirement payments made to the employee under the pension plan (including any made after he is 65) is excludable from "wages" under this section. However, if the pension plan had conditioned retirement after 30 years of service upon attainment of age 60, all of the retirement payments would have been excludable.

(b) *Plan.* The plan or system established by an employer need not provide for payments because of termination of employment for all the reasons set out in paragraphs (a)(1), (2), and (3) of this section, but such plan or system may provide for payments because of termination for any one or more of such reasons. Payments because of termination of employment for any one or more of such reasons under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) *Dependents.* Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Benefit payments.* It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is paid on account of services rendered or taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required expressly or impliedly, by the contract of service.

(e) *Example.* The application of this section may be illustrated by the following example:

Example. A, an employee, receives a salary of $1,500 a month, payable on the 5th day of the month following the month for which the salary is earned. A's employer has established an incentive compensation plan for a class of his employees, including A, providing for the payment of deferred compensation on termination of employment, including termination upon an employee's death, retirement at age 65 (the retirement age specified in the plan), or retirement for disability. On March 1, 1973, A attains the age of 65 and retires. On March 5, 1973, A receives $5,500 from his employer of which $1,500 represents A's salary for services he performed in February 1973, and $4,000 represents incentive compensation paid under the employer's plan. The amount of $4,000 is excluded from "wages" under this section. The amount of $1,500 is not excluded from "wages" under this section.

[T.D. 7374, 40 FR 30951, July 24, 1975]

§ 31.3306(b)(13)-1 Payments or benefits under a qualified educational assistance program.

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The term "wages" does not include any payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, if at the time of such payment or furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3306(c)-1 Employment; services performed before 1955.

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(a) Services performed after 1938 and before 1955 constitute employment under section 3306(c) if such services were employment under the law applicable to the period in which they were performed.

(b) The tax applies with respect to remuneration paid by an employer after 1954 for services

performed after 1938 and before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§31.3306(b)–1 to 31.3306(b)(8)–1, inclusive, relating to wages.

(c) Determination of whether services performed after 1938 and before 1955 constitute employment shall be made in accordance with the provisions of law applicable to the period in which they were performed and of the regulations thereunder. The regulations applicable in determining whether services performed after 1938 and before 1955 constitute employment are as follows:

(1) Services performed in 1939—26 CFR (1939) Part 400 (Regulations 90).

(2) Services performed after 1939 and before 1955—26 CFR (1939) Part 403 (Regulations 107).

§ 31.3306(c)-2 Employment; services performed after 1954.

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(a) *In general.* Whether services performed after 1954 constitute employment is determined under subsections (c) and (n) of section 3306.

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see §31.3306(j)–1) by an employee for the person employing him, unless specifically excepted under section 3306(c), constitute employment. With respect to services performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the person employing him also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the person employing him may be citizens and residents of a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment.

(c) *Services performed outside the United States*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, services performed outside the United States (see §31.3306(j)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) This subparagraph relates to services performed after 1954 "on or in connection with" an American vessel, and to services performed after 1961 "on or in connection with" an American aircraft to the extent that the remuneration for the latter services is paid after 1961. Such services performed outside the United States by an employee for the person employing him constitute employment if:

(*a*) The employee is also employed "on and in connection with" such vessel or aircraft when outside the United States; and

(*b*) The services are performed under a contract of service, between the employee and the person employing him, which is entered into within the United States, or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft it touches at a port within the United States; and

(*c*) The services are not excepted under section 3306(c). (See particularly §31.3306(c)(17)–1, relating to fishing.)

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since the services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(iii) If services are performed by an employee "on and in connection with" an American vessel or American aircraft when outside the United States and the conditions in (*b*) and (*c*) of paragraph (c)(2)(i) of this section are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment. The expression "on or in connection with" refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(iv) Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment, notwithstanding that service performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.

(v) A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term "port" means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo. For definitions of "American vessel" and "American aircraft", see §31.3306(m)–1.

(vi) With respect to services performed outside the United States on or in connection with an

American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.

[T.D. 6658, 28 FR 6636, June 27, 1963]

§ 31.3306(c)-3 Employment; excepted services in general.

top

(a) Services performed by an employee for the person employing him do not constitute employment for purposes of the tax if they are specifically excepted from employment under any of the numbered paragraphs of section 3306(c). Services so excepted do not constitute employment for purposes of the tax even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3306(c), such regulations apply with respect to services performed after 1954.

(b) The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services rendered by the employee in an excepted class.

Example. A is an individual who is employed part time by B to perform services which constitutes "agricultural labor" (see §31.3306 (k)–1). A is also employed by C part time to perform services as a grocery clerk in a store owned by him. While A's services which constitute "agricultural labor" are expected, the exception does not embrace the services performed by A as a grocery clerk in the employ of C and the latter services are not excepted from employment.

(c) For provisions relating to the circumstances under which services which are excepted are nevertheless deemed to be employment, and relating to the circumstances under which services which are not excepted are nevertheless deemed not to be employment, see §31.3306(d)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6637, June 27, 1963]

§ 31.3306(c)(1)-1 Agricultural labor.

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Services performed by an employee for the person employing him which constitute "agricultural labor" as defined in section 3306(k) are excepted from employment. For provisions relating to the definition of the term "agricultural labor", see §31.3306(k)–1.

§ 31.3306(c)(2)-1 Domestic service.

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(a) *In a private home.* (1) Services of a household nature performed by an employee in or about a private home of the person by whom he is employed are excepted from employment. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not excepted.

(2) In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobile for family use.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed are excepted from employment. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the services performed therein are not within the exception.

(2) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) *Services not excepted.* Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, are not within the exception. Services of a household nature are not within the exception if performed in or about rooming or lodging houses, boarding houses, clubs (except local college clubs), hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

§ 31.3306(c)(3)-1 Services not in the course of employer's trade or business.

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(a) Services not in the course of the employer's trade or business performed by an employe for an employer in a calendar quarter are excepted from employment unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, the services are excepted from employment.

(b) The term “services not in the course of the employer's trade or business” includes services that do not promote or advance the trade or business of the employer. Services performed for a corporation do not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthermore, in determining whether $50 or more has been paid for services not in the course of the employer's trade or business, only cash remuneration for such services shall be taken into account. The term “cash remuneration” includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs services not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of services not in the course of the employer's trade or business during the preceding calender quarter (including the last calendar quarter of 1954).

(e) In determining whether an employee has performed services not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such services; and

(2) Any day or portion thereof on which the employee does not perform services of the prescribed

character but with respect to which cash remuneration is paid or payable to the employee for such services, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform services not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such services on that day. For purposes of this exception, a day is a period of 24 hours commencing at midnight and ending at midnight.

(f) For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see §31.3306(b) (7)–1.

§ 31.3306(c)(4)-1 Services on or in connection with a non-American vessel or aircraft.

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(a) Services performed within the United States by an employee for an employer “on or in connection with” a vessel not an American vessel, or “on or in connection with” an aircraft not an American aircraft, are excepted from employment if the employee is employed by the employer “on and in connection with” the vessel or aircraft when outside the United States.

(b) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft when outside the United States which are also in connection with the vessel or aircraft. Services performed on the vessel outside the United States by employees as officers or members of the crew, or by employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft outside the United States by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(c) The expression “on or in connection with” refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(d) The citizenship or residence of the employee and the place where the contract of service is entered into are immaterial for purposes of this exception, and the citizenship or residence of the person employing him is material only in case it has a bearing in determining whether the vessel is an American vessel. For definitions of the terms “vessel” and “aircraft”, see paragraph (c)(2)(v) of §31.3306(c)–2. For definitions of the terms “American vessel” and “American aircraft”, see §31.3306

(m)–1.

(e) Since the only services performed outside the United States which constitute employment are those described in section 3306(c) and paragraph (c) of §31.3306(c)–2 (relating to services performed outside the United States on or in connection with an American vessel or American aircraft), services performed outside the United States on or in connection with a vessel not an American vessel, or an aircraft not an American aircraft, do not constitute employment in any event.

(f) The provisions of section 3306(c) (4) and of this section, insofar as they relate to services performed on or in connection with an aircraft not an American aircraft, apply only to services performed after 1961 for which remuneration is paid after 1961.

[T.D. 6658, 28 FR 6637, June 27, 1963]

§ 31.3306(c)(5)-1 Family employment.

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(a) Certain services are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. The exceptions are as follows:

(1) Services performed by an individual in the employ of his or her spouse;

(2) Services performed by a father or mother in the employ of his or her son or daughter; and

(3) Services performed by a son or daughter under the age of 21 in the employ of his or her father or mother.

(b) Under paragraph (a) (1) and (2) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. Under paragraph (a)(3) of this section, in addition to the family relationship, there is a further requirement that the son or daughter shall be under the age of 21, and the exception continues only during the time that such son or daughter is under the age of 21.

(c) Services performed in the employ of a corporation are not within the exception. Services performed in the employ of a partnership are not within the exception unless the requisite family relationship exists between the employee and each of the partners comprising the partnership.

§ 31.3306(c)(6)-1 Services in employ of United States or instrumentality thereof.

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(a) *Services in employ of United States or wholly-owned instrumentality thereof.* Services performed in the employ of the United States Government, except as provided in section 3306(n) (see §31.3306 (n)–1), are excepted from employment. Services performed in the employ of an instrumentality of the United States which is wholly owned by the United States also are excepted from employment.

(b) *Services in employ of instrumentality not wholly owned by United States*—(1) *Services performed after 1961.* Services performed after 1961 in the employ of an instrumentality of the United States which is partially owned by the United States are excepted from employment, if the remuneration for such service is paid after 1961. Services performed after 1961 in the employ of an instrumentality of the United States which is neither wholly owned nor partially owned by the United States are excepted from employment if (i) the instrumentality is exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to section 3301 or the corresponding section of prior law in granting exemption from such tax, and (ii) the remuneration for such service is paid after 1961. For provisions which make general exemptions from Federal taxation ineffectual as to the tax imposed by section 3301, see §31.3308–1.

(2) *Services performed before 1962.* Services performed in the employ of an instrumentality of the United States which is not wholly owned by the United States are excepted from employment if the instrumentality is exempt from the tax imposed by section 3301 by virtue of any other provision of law, and (i) the services are performed before 1962 or (ii) remuneration for the services is paid before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(7)-1 Services in employ of States or their political subdivisions or instrumentalities.

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(a) Services performed in the employ of any State, or of any political subdivision thereof, are excepted from employment. Services performed in the employ of an instrumentality of one or more States or political subdivisions thereof are excepted if the instrumentality is wholly owned by one or more of the foregoing. Services performed in the employ of an instrumentality of one or more of the several States or political subdivisions thereof which is not wholly owned by one or more of the foregoing are excepted only to the extent that the instrumentality is with respect to such services immune under the Constitution of the United States from the tax imposed by section 3301.

(b) For provisions relating to the term "State" see §31.3306(j)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(8)-1 Services in employ of religious, charitable, educational, or certain other organizations

exempt from income tax.

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(a) *Services performed after 1961.* Services performed by an employee after 1961 in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a) are excepted from employment, if the remuneration for such service is paid after 1961. For provisions relating to exemption from income tax of an organization described in section 501(c) (3), see Part 1 of this chapter (Income Tax Regulations).

(b) *Services performed before 1962.* (1) Services performed by an employee in the employ of an organization described in section 3306(c)(8) as in effect before 1962, that is, a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, are excepted from employment if (i) the services are performed before 1962, or (ii) remuneration for the services is paid before 1962.

(2) Any organization which is an organization of a type described in section 501(c)(3) and which—

(i) Is exempt from income tax under section 501(a), or

(ii) Has been denied exemption from income tax under section 501(a) by reason of the provisions of section 503 or 504, relating to prohibited transactions and to accumulations out of income, respectively,

is an organization of a type described in section 3306(c)(8) as in effect before 1962. An organization which would be an organization of a type described in section 501(c)(3) except for those provisions of section 501(c)(3) which are not contained in section 3306(c)(8) as in effect before 1962 (provisions relating to participation or intervention in a political campaign on behalf of a candidate for public office) is also an organization of a type described in section 3306(c)(8) as in effect before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(9)-1 Railroad industry; services performed by an employee or an employee representative under the Railroad Unemployment Insurance Act.

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(a) Services performed by an individual as an “employee” or as an “employee representative”, as those

terms are defined in section 1 of the Railroad Unemployment Insurance Act, as amended, are excepted from employment.

(b) Section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351), as amended, provides, in part, as follows:

For the purposes of this Act, except when used in amending the provisions of other Acts—

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(c) The term "company" includes corporations, associations, and joint-stock companies.

(d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. The term "employee" shall include an employee of a local lodge or division defined as an employer in section 1 (a) only if he was in the service of a carrier on or after August 29, 1935. The term "employee" includes an officer of an employer.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail

with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(e) An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation: *Provided, however,* That an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if (1) all, or substantially all, the individuals constituting its membership are employees of an employer conducting the principal part of its business in the United States; or (2) the headquarters of such local lodge or division is located in the United States; and an individual shall be deemed to be in the service of such a general committee only if (1) he is representing a local lodge or division described in clauses (1) or (2) immediately above; or (2) all, or substantially all, the individuals represented by it are employees of an employer conducting the principal part of its business in the United States; or (3) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case the Board may prescribe such other formula as it finds to be equitable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 per centum of his remuneration for such service no part of such remuneration shall be regarded as compensation: *Provided further,* That an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.

(f) The term “employee representative” means any officer or official representative of a railway labor organization other than a labor organization included in the term employer as defined in section 1(a) who before or after August 29, 1935, was in the service of an employer as defined in section 1(a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

* * * * *

(i) The term “compensation” means any form of money remuneration, including pay for time lost but excluding tips, paid for services rendered as an employee to one or more employers, or as an employee representative: *Provided, however,* That in computing the compensation paid to any employee, no part of any month's compensation in excess of $300 for any month before July 1, 1954, or in excess of $350 for any month after June 30, 1954, and before the calendar month next following the month [May] in which this Act was amended in 1959, or in excess of $400 for any month after the month [May] in which this Act was so

amended, shall be recognized. A payment made by an employer to an individual through the employer's pay roll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid, "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or, if the employee establishes, subject to the provisions of section 8, the period during which such compensation will have been earned.

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(r) The term "Board" means the Railroad Retirement Board.

(s) The term "United States", when used in a geographical sense, means the States, Alaska, Hawaii, and the District of Columbia.

* * * * *

(Sec. 1, Railroad Unemployment Insurance Act, as amended by secs. 1 and 2, Act of June 20, 1939, 53 Stat. 845; secs. 1 and 3, Act of Aug. 13, 1940, 54 Stat. 785, 786; sec. 15, Act of Apr. 8, 1942, 56 Stat. 210; secs. 1 and 2, Act of July 31, 1946, 60 Stat. 722; sec. 302, Act of Aug. 31, 1954, 68 Stat. 1040; sec. 301, Act of May 19, 1959, Pub. L. 86–28, 73 Stat. 30)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(10)-1 Services in the employ of certain organizations exempt from income tax.

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(a) *In general.* (1) This section deals with the exception from employment of certain services performed in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521. (See the provisions of §§1.401–1, 1.501(a)–1, and 1.521–1 of this chapter (Income Tax Regulations).) If the services meet the tests set forth in paragraphs (b), (c), (d), or (e) of this section, the services are excepted.

(2) See also §31.3306(c)(8)–1 for provisions relating to the exception of services performed in the employ of religious, charitable, educational, or certain other organizations exempt from income tax; §31.3306(c)(10)–2 for provisions relating to the exception of services performed by certain students in the employ of a school, college, or university; and §31.3306(c)(10)–3 for provisions relating to the exception of services performed before 1962 in the employ of certain employees' beneficiary associations.

(b) *Remuneration less than $50 for calendar quarter.* Services performed by an employee in a calendar quarter in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 are excepted from employment, if the remuneration for the service is less than $50. The test relating to remuneration of $50 is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. The exception applies separately with respect to each organization for which the employee renders services in a calendar quarter. The type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed and the amount of the remuneration for services performed by the employee in the calendar quarter.

Example 1. X is a local lodge of a fraternal organization and is exempt from income tax under section 501(a) as an organization of the character described in section 501 (c)(8). X has a number of paid employees, among them being A who serves exclusively as recording secretary for the lodge, and B who performs services for the lodge as janitor of its clubhouse. For services performed during the first calendar quarter of 1955 (that is, January 1, 1955, through March 31, 1955, both dates inclusive) A earns a total of $30. For services performed during the same calendar quarter B earns $180. Since the remuneration for the services performed by A during such quarter is less than $50, all of such services are excepted. Thus, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer (see §31.3306(a)–1). Even though it is subsequently determined that X is an employer, A's remuneration of $30 for services performed during the first calendar quarter of such year is not subject to tax. B's services, however, are not excepted during such quarter since the remuneration therefor is not less than $50. Thus, B is counted as an employee in employment during all of such quarter for purposes of determining whether the X organization is an employer. If it is determined that the X organization is an employer, B's remuneration of $180 for services performed during the first calendar quarter is included in computing the tax.

Example 2. The facts are the same as in example 1, above, except that on April 1, 1955, A's salary is increased and, for services performed during the calendar quarter beginning on that date (that is, April 1, 1955, through June 30, 1955, both dates inclusive), A earns $60. Although all of the services performed by A during the first quarter were excepted, none of A's services performed during the second quarter are excepted since the remuneration for such services is not less than $50. A, therefore, is counted as an employee in employment during all of the second quarter for the purpose of determining whether the X organization is an employer. If it is determined that the X organization is an employer, A's remuneration of $60 for services performed during the second calendar quarter is included in computing the tax.

Example 3. The facts are the same as in example 1, above, except that A earns $120 for services performed during the year 1955, and such amount is paid to him in a lump sum at the end of the year. The services

performed by A in any calendar quarter during the year are excepted if the portion of the $120 attributable to services performed in that quarter is less than $50. In such case, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer. If, however, the portion of the $120 attributable to services performed in any calendar quarter during the year is not less than $50, the services during that quarter are not excepted. In the latter case, A is counted as an employee in employment during all of such quarter and, if it is determined that the X organization is an employer, that portion of the $120 attributable to services performed in such quarter is included in computing the tax.

(c) *Collection of dues or premiums for fraternal beneficiary societies, and ritualistic services in connection with such societies, before 1962.* The following services performed by an employee in the employ of a fraternal beneficiary society, order, or association exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962:

(1) Services performed away from the home office of such a society, order, or association in connection with the collection of dues or premiums for such society, order, or association; and

(2) Ritualistic services (wherever performed) in connection with such a society, order, or association.

For purposes of the paragraph the amount of the remuneration for services performed by the employee in the calendar quarter is immaterial; the tests are the character of the organization in whose employ the services are performed, the type of services, and, in the case of collection of dues or premiums, the place where the services are performed.

(d) *Students employed before 1962.* (1) Services performed in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 by a student who is enrolled and is regularly attending classes at a school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962. For purposes of this paragraph, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services, and the place where the services are performed are immaterial; the tests are the character of the organization in whose employ the services are performed and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.

(2) The term “school, college, or university” as used in this paragraph is to be taken in its commonly or generally accepted sense. For provisions relating to services performed before 1962 by a student enrolled and regularly attending classes at a school, college, or university not exempt from income tax in the employ of such school, college, or university, see paragraph (b) of §31.3306(c)(10)–2. For provisions relating to services performed after 1961 by a student enrolled and regularly attending classes at a school, college, or university in the employ of such school, college, or university, see paragraph (a) or §31.3306(c)(10)–2.

(e) *Services performed before 1962 in employ of agricultural or horticultural organization exempt from income tax.* (1) Services performed by an employee in the employ of an agricultural or horticultural organization which is described in section 501(c)(5) and the regulations thereunder and which is exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(2) For purposes of this paragraph, the type of services performed by the employee, the amount of remuneration for the services, and the place where the services are performed are immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6639, June 27, 1963]

§ 31.3306(c)(10)-2 Services of student in employ of school, college, or university.

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(a) *Services performed after 1961.* Services performed after 1961 in the employ of a school, college, or university, by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment (whether or not the school, college, or university is exempt from income tax), if remuneration for the services is paid after 1961.

(b) *Services performed before 1962.* Services performed in the employ of a school, college, or university not exempt from income tax under section 501(a), by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(c) *General rule.* (1) For purposes of this section, the tests are the character of the organization in the employ of which the services are performed and the status of the employee as a student enrolled and regularly attending classes at the school, college, or university described in paragraph (c)(2) of this section, in the employ of which the employee performs the services. If an employee has the status of a student within the meaning of paragraph (d) of this section, the type of services performed by the employee, the place where the services are performed, and the amount of remuneration for services performed by the employee are not material.

(2) *School, college, or university.* An organization is a *school, college, or university* within the meaning of section 3306(c)(10)(B) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) *Student Status—general rule.* Whether an employee has the status of a student within the meaning of section 3306(c)(10)(B) performing the services shall be determined based on the relationship of the

employee with the organization for which the services are performed. In order to have the status of a student within the meaning of section 3306(c)(10)(B), the employee must perform services in the employ of a school, college, or university described in paragraph (c)(2) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study at such school, college, or university within the meaning of paragraph (d)(3) of this section.

(1) *Enrolled and regularly attending classes.* An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c)(2) of this section at which the employee is employed to have the status of a student within the meaning of section 3306(c)(10)(B). An employee is enrolled within the meaning of section 3306(c)(10)(B) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the school, college, or university within the meaning of paragraph (c)(2) of this section for identified students following an established curriculum. The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) *Course of study.* An employee must be pursuing a course of study in order to have the status of a student within the meaning of section 3306(c)(10)(B). A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university within the meaning of paragraph (c)(2) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c)(2) of this section. In addition, a course of study is one or more courses at a school, college or university within the meaning of paragraph (c)(2) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) *Incident to and for the purpose of pursuing a course of study.* (i) *General rule.* An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an

educational, instructional, or training aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

(ii) *Student status determined with respect to each academic term.* Whether an employee's services are incident to and for the purpose of pursuing a course of study is determined separately with respect to each academic term. If the relevant facts and circumstances with respect to an employee's relationship with the employer change significantly during an academic term, whether the employee's services are incident to and for the purpose of pursuing a course of study is reevaluated with respect to services performed during the remainder of the academic term.

(iii) *Full-time employee.* The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of the employee's normal work schedule is not affected by the fact that the services performed by the individual may have an educational, instructional, or training aspect.

(iv) *Evaluating educational aspect.* The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c)(2) of this section at which the employee is enrolled and regularly attending classes.

(v) *Evaluating service aspect.* The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) *Normal work schedule and hours worked.* If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of the employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the individual may have an educational, instructional, or training aspect.

(B) *Professional employee.* (*1*) If an employee has the status of a professional employee, then that suggests that the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(*i*) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(*ii*) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(*iii*) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(*2*) *Licensed, professional employee.* If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) *Employment Benefits.* Whether an employee is eligible to receive employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan described in section 401(a); or eligibility to receive employment benefits such as reduced tuition, or benefits under section 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular benefit may vary depending on the type of employment benefit. For example, eligibility to participate in a retirement plan is generally more

significant than eligibility to receive a dependent care employment benefit. Additional weight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students.

(e) *Effective date.* Paragraphs (c) and (d) of this section apply to services performed on or after April 1, 2005.

[T.D. 6658, 28 FR 6640, June 27, 1963, as amended by T.D. 9167, 69 FR 76410, Dec. 21, 2004]

§ 31.3306(c)(10)-3 Services before 1962 in employ of certain employees' beneficiary associations.

top

(a) *Voluntary employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents are excepted from employment if —

(1) No part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual,

(2) 85 percent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(b) *Federal employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries are excepted from employment if—

(1) Admission to membership in the association is limited to individuals who are officers or employees of the United States Government,

(2) No part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(c) *Application of tests.* For purposes of this section, the type of services performed by the employee, the amount of remuneration for the services, and the place where the services are performed are

immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6640, June 27, 1963]

§ 31.3306(c)(11)-1 Services in employ of foreign government.

top

(a) Services performed by an employee in the employ of a foreign government are excepted from employment. The exception includes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, or as a nondiplomatic representative thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

§ 31.3306(c)(12)-1 Services in employ of wholly owned instrumentality of foreign government.

top

(a) Services performed by an employee in the employ of certain instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if—

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial.

§ 31.3306(c)(13)-1 Services of student nurse or hospital intern.

top

(a) Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.

(b) Services performed as an intern (as distinguished from a resident doctor) in the employ of a hospital are excepted from employment, if the intern has completed a 4 years' course in a medical school chartered or approved pursuant to State law.

§ 31.3306(c)(14)-1 Services of insurance agent or solicitor.

 top

(a) Services performed for a person by an employee as an insurance agent or insurance solicitor are excepted from employment, if all such services performed for such person by such individual are performed for remuneration solely by way of commission.

(b) If all or any part of the remuneration of an employee for services performed as an insurance agent or insurance solicitor for a person is a salary, none of his services performed as an insurance agent or insurance solicitor for such person are excepted from employment, and his total remuneration (for example, salary, or salary and commissions) for such services is included for purposes of computing the tax.

§ 31.3306(c)(15)-1 Services in delivery or distribution of newspapers, shopping news, or magazines.

 top

(a) *Services of individuals under age 18.* Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, are excepted from employment. Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted. The services are excepted irrespective of the form or method of compensation. Incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, are considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, are excepted from employment. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for such services, or is entitled to be

credited with the unsold newspapers or magazines turned back. Moreover, the services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not within the exception. Thus, the services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer are not within the exception. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, are considered to be within the exception.

§ 31.3306(c)(16)-1 Services in employ of international organization.

top

(a) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 228), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 701(a)(18) provides as follows:

Sec. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(2) Section 1 of the International Organizations Immunities Act provides as follows:

Sec. 1. [*International Organizations Immunities Act.*] For the purposes of this title [International Organizations Immunities Act], the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization

for the purposes of this title.

§ 31.3306(c)(17)-1 Fishing services.

top

(a) *In general.* Subject to the limitations prescribed in paragraphs (b) and (c) of this section, services described in this paragraph are excepted from employment. Services performed by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell-fish (for example, oysters, clams, and mussels), crustacea (for example, lobsters, crabs, and shrimps), sponges, seaweeds, or other aquatic forms of animal and vegetable life are excepted. The exception extends to services performed as an officer or member of the crew of a vessel while the vessel is engaged in any such activity whether or not the officer or member of the crew is himself so engaged. In the case of an individual who is engaged in any such activity in the employ of any person, the services performed, by such individual in the employ of such person, as an ordinary incident to any such activity are also excepted. Similarly, for example, the shore services of an officer or member of the crew of a vessel engaged in any such activity are excepted if such services are an ordinary incident to any such activity. Services performed as an ordinary incident to any such activity may include, for example, services performed in such cleaning, icing, and packing of fish as are necessary for the immediate preservation of the catch.

(b) *Salmon and halibut fishing.* Services performed in connection with the catching or taking of salmon or halibut, for commercial purposes, are not within the exception. Thus, neither the services of an officer or member of the crew of a vessel (irrespective of its tonnage) which is engaged in the catching or taking of salmon or halibut, for commercial purposes, nor the services of any other individual in connection with such activity, are within the exception.

(c) *Vessels of more than 10 net tons.* Services described in paragraph (a) of this section performed on or in connection with a vessel of more than 10 net tons are not within the exception. For purposes of the exception, the tonnage of the vessel shall be determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States.

§ 31.3306(c)(18)-1 Services of certain nonresident aliens.

top

(a) (1) Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a) (15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, are excepted from employment if the services are performed to carry out a purpose for which the individual was admitted. For purposes of this section an alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (F) or (J) is deemed to be a nonresident alien individual. The preceding

sentence does not apply to the extent it is inconsistent with section 7701(b) and the regulations under that section. A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (J) includes an alien individual admitted to the United States as an "exchange visitor" under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) If services are performed by a nonresident alien individual's alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, the services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry out such purpose.

(b) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides, in part, as follows:

Sec. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter— * * *

(15) The term *immigrant* means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving

training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

* * * * *

(Sec. 101, Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534)

[T.D. 6658, 28 FR 6640, June 27, 1963, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3306(d)-1 Included and excluded service.

top

(a) If a portion of the services performed by an employee for the person employing him during a pay period constitutes employment, and the remainder does not constitute employment, all the services of the employee during the period shall for purposes of the tax be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3306(c) constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period shall be deemed to be employment.

(c) If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following examples:

Example 1. Employer B, who operates a farm and a store, employs A to perform services in connection with both operations. A's services on the farm are such that they are excepted as agricultural labor and do not constitute employment, and his services in the store constitute employment. He is paid at the end of each month. During a particular month A works 120 hours on the farm and 80 hours in the store. None of A's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment. During another month A works 75 hours on the farm and 120 hours in the store. All of A's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

Example 2. Employee C is employed as a maid by D, a medical doctor, whose home and office are located in the same building. C's services in the home are excepted as domestic service and do not constitute employment, and her services in the office constitute employment. She is paid each week. During a particular week C works 20 hours in the home and 20 hours in the office. All of C's services during that week are deemed to be employment, since one-half or more of her services during the week constitutes employment. During another week C works 22 hours in the home and 15 hours in the office. None of C's services during that week are deemed to be employment, since less than one-half of her services during the week constitutes employment.

(e) For purposes of this section, a "pay period" is the period (of not more than 31 consecutive calendar days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. Thus, if the periods for which payments of remuneration are made to the employee by such person are of uniform duration, each such period constitutes a "pay period". If, however, the periods occasionally vary in duration, the "pay period" is the period for which a payment of remuneration is ordinarily made to the employee by such person, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if a person ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the "pay period" is still the calendar week; or if, instead, that employee is sent on a trip by such person and receives at the end of the third week a single remuneration payment for 3 weeks' services, the "pay period" is still the calendar week.

(f) If there is only one period (and such period does not exceed 31 consecutive calendar days) for which a payment of remuneration is made to the employee by the person employing him, such period is deemed to be a "pay period" for purposes of this section.

(g) The rules set forth in this section do not apply (1) with respect to any services performed by the employee for the person employing him if the periods for which such person makes payments of remuneration to the employee vary to the extent that there is no period "for which a payment of remuneration is ordinarily made to the employee," or (2) with respect to any services performed by the employee for the person employing him if the period for which a payment of remuneration is ordinarily made to the employee by such person exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the person employing him during a pay period if any of such service is excepted by section 3306(c) (9) (see §31.3306(c) (9)–1).

(h) If during any period for which a person makes a payment of remuneration to an employee only a portion of the employee's services constitutes employment, but the rules prescribed in this section are not applicable, the tax attaches with respect to such services as constitute employment as defined in section 3306(c) (provided such person is an employer as defined in section 3306(a) and §31.3306(a)–1).

§ 31.3306(i)-1 Who are employees.

top

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of §31.3306(a)–1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(f) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see §31.3306(c)–2).

§ 31.3306(j)-1 State, United States, and citizen.

top

(a) When used in the regulations in this subpart, the term "State" includes the District of Columbia, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to remuneration paid after 1960 for services performed after 1960) the Commonwealth of Puerto Rico.

(b) When used in the regulations in this subpart, the term "United States", when used in a geographical sense, means the several States (including the Territories of Alaska and Hawaii before their admission as States), and the District of Columbia. When used in the regulations in this subpart with respect to remuneration paid after 1960 for services performed after 1960, the term "United States" also includes the Commonwealth of Puerto Rico when the term is used in a geographical sense, and the term "citizen of the United States" includes a citizen of the Commonwealth of Puerto Rico.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§ 31.3306(k)-1 Agricultural labor.

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(a) *In general.* (1) Services performed by an employee for the person employing him which constitute "agricultural labor" as defined in section 3306(k) are excepted from employment by reason of section 3306(c)(1). See §31.3306(c)(1)–1. The term "agricultural labor" as defined in section 3306(k) includes services of the character described in paragraphs (b), (c), (d), and (e) of this section. In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(2) The term "farm" as used in this subpart includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets) do not constitute "farms".

(b) *Services described in section 3306(k)(1).* Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(1) The cultivation of the soil;

(2) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(3) The raising or harvesting of any other agricultural or horticultural commodity.

(c) *Services described in section 3306(k)(2).* (1) The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms constitute agricultural labor, if the major part of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

(2) The services described in paragraph (c)(1)(i) of this section may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

(3) Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties, do not constitute agricultural labor.

(d) *Services described in section 3306(k)(3).* Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The hatching of poultry;

(3) The raising or harvesting of mushrooms;

(4) The operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying or storing water for farming purposes;

(5) The production or harvesting of maple sap or the processing of maple sap into maple sirup or maple sugar (but not the subsequent blending or other processing of such sirup or sugar with other products); or

(6) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin provided such processing is carried on by the

original producer of such crude gum.

(e) *Services described in section 3306(k)(4).* (1)(i) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see paragraph (e)(2) of this section), produced by such farmer or farmer-members of such organization or group of farmers constitute agricultural labor, if such services are performed as an incident to ordinary farming operations.

(ii) Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations".

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, constitute agricultural labor, if such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may constitute agricultural labor, whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in paragraphs (e)(1) and (2) of this section do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

§ 31.3306(m)-1 American vessel and aircraft.

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(a) The term “American vessel” means any vessel which is documented (that is, registered, enrolled, or licensed) or numbered in conformity with the laws of the United States. It also includes any vessel which is neither documented nor numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. (For provisions relating to the terms “State” and “citizen”, see §31.3306(j)–1.)

(b) The term “American aircraft” means any aircraft registered under the laws of the United States.

(c) For provisions relating to services performed outside the United States on or in connection with an American vessel or American aircraft, see paragraph (c) of §31.3306(c)–2.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§ 31.3306(n)-1 Services on American vessel whose business is conducted by general agent of Secretary of Commerce.

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(a) Section 3306(n) and this section of the regulations apply with respect only to services performed by an officer or member of the crew of an American vessel (1) which is owned by or bareboat chartered to the United States, and (2) whose business is conducted by a general agent of the Secretary of Commerce. Whether services performed by such an officer or member of a crew under the above conditions constitute employment is determined under section 3306(c) and (n), but without regard to section 3306(c)(6). See §31.3306(c)(6)–1, relating to services performed in the employ of the United States and instrumentalities thereof. If, without regard to section 3306(c)(6), such services constitute employment, they are not excepted from employment by reason of the fact that they are performed on or in connection with an American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce, that is, such services are not excepted from employment by section 3306(c)(6). For provisions relating to services performed within the United States and services performed outside the United States which constitute employment, see §31.3306(c)–2.

(b) The expression “officer or member of the crew” includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. Thus, the expression includes, for example, the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, and deck hands.

(c) An employee of the United States who performs services as an officer or member of the crew of an

American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce shall be deemed, under section 3306(n), to be performing services for such general agent rather than for the United States. Any such general agent of the Secretary of Commerce is considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account. Each such general agent who in his capacity as such qualifies as an employer under section 3306(a) is with respect to each calendar year for which he so qualifies subject to the tax imposed by section 3301, and to all the requirements imposed upon an employer as defined in section 3306(a) by the regulations in this part, with respect to services which constitute employment by reason of section 3306(n) and this section of the regulations.

§ 31.3306(p)-1 Employees of related corporations.

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(a) *In general.* For purposes of sections 3301, 3302, and 3306(b)(1), when two or more related corporations concurrently employ the same individual and compensate that individual through a common paymaster which is one of the related corporations for which the individual performs services, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual (unless the disbursing corporation fails to remit the taxes due). Paragraphs (b) and (c) of §31.3121(s)–1 contain rules defining related corporations, common paymasters, and concurrent employment, and rules for determining the liability of the other related corporations for employment taxes if the common paymaster fails to remit the taxes pursuant to sections 3102 and 3111, and for allocating these taxes among the related corporations. Those rules also apply to the tax under section 3301. For purposes of applying those rules to this section, references in those rules to section 3111 are considered references to sections 3301 and 3302, and references to section 3121 are considered references to section 3306.

(b) *Allocation of credit for contributions to State unemployment funds.* A special rule for applying the rules of §31.3121(s)–1 to this section applies if it is necessary to determine the ultimate liability of each related corporation for which services are performed in the event the common paymaster fails to remit the tax to the Internal Revenue Service. In determining the ultimate liability of a corporation, the credit for contributions to State unemployment funds that the corporation may claim under section 3302 is calculated as if each corporation were a separate employer.

(c) *Effective date.* This section is effective with respect to wages paid after December 31, 1978.

[T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3306(r)(2)-1 Treatment of amounts deferred under certain nonqualified deferred compensation plans.

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(a) *In general.* Section 3306(r)(2) provides a special timing rule for the tax imposed by section 3301 with respect to any amount deferred under a nonqualified deferred compensation plan. Section 31.3121 (v)(2)–1 contains rules relating to when amounts deferred under certain nonqualified deferred compensation plans are wages for purposes of sections 3121(v)(2), 3101, and 3111. The rules in §31.3121(v)(2)–1 also apply to the special timing rule of section 3306(r)(2). For purposes of applying the rules in §31.3121(v)(2)–1 to section 3306(r)(2) and this paragraph (a), references to the Federal Insurance Contributions Act are considered references to the Federal Unemployment Tax Act (26 U.S. C. 3301 et seq.), references to FICA are considered references to FUTA, references to section 3101 or 3111 are considered references to section 3301, references to section 3121(v)(2) are considered references to section 3306(r)(2), references to section 3121(a), (a)(5), and (a)(13) are considered references to section 3306(b), (b)(5), and (b)(10), respectively, and references to §31.3121(a)–2(a) are considered references to §31.3301–4.

(b) *Effective dates and transition rules.* Except as otherwise provided, section 3306(r)(2) applies to remuneration paid after December 31, 1984. Section 31.3121(v)(2)–2 contains effective date rules for certain remuneration paid after December 31, 1983, for purposes of section 3121(v)(2). The rules in §31.3121(v)(2)–2 also apply to section 3306(r)(2). For purposes of applying the rules in §31.3121(v) (2)–2 to section 3306(r)(2) and this paragraph (b), references to section 3121(v)(2) are considered references to section 3306(r)(2), and references to section 3121(a)(2), (a)(3), or (a)(13) are considered references to section 3306(b)(2), (b)(3), or (b)(10), respectively. In addition, references to §31.3121(v) (2)–1 are considered references to paragraph (a) of this section. For purposes of applying the rules of §31.3121(v)(2)–2 to this paragraph (b)—

(1) References to “December 31, 1983” are considered references to “December 31, 1984”;

(2) References to “before 1984” are considered references to “before 1985”;

(3) References to “Federal Insurance Contributions Act” are considered references to “Federal Unemployment Tax Act”; and

(4) References to “FICA” are considered references to “FUTA”.

[64 FR 4541, Jan. 29, 1999]

§ 31.3307-1 Deductions by an employer from remuneration of an employee.

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Any amount deducted by an employer from the remuneration of an employee is considered to be a

part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.

§ 31.3308-1 Instrumentalities of the United States specifically exempted from tax imposed by section 3301.

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Section 3308 makes ineffectual as to the tax imposed by section 3301 (with respect to remuneration paid after 1961 for services performed after 1961) those provisions of law which grant to an instrumentality of the United States an exemption from taxation, unless such provisions grant a specific exemption from the tax imposed by section 3301 by an express reference to such section or the corresponding section of prior law. Thus, the general exceptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3301 or the corresponding section of prior law are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3301. For provisions relating to the exception from employment of services performed in the employ of an instrumentality of the United States specifically exempted from the tax imposed by section 3301, see §31.3306(c)(6)–1.

[T.D. 6658, 28 FR 6641, June 27, 1963]

Subpart E—Collection of Income Tax at Source

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§ 31.3401(a)-1 Wages.

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(a) *In general.* (1) The term “wages” means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of

profits; and may be paid hourly, daily, weekly, monthly, or annually.

(4) Generally the medium in which remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, stocks, bonds, or other forms of property. (See, however, §31.3401(a)(11)–1, relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, and §31.3401 (a)(16)–1, relating to the exclusion from wages of tips paid in any medium other than cash.) If services are paid for in a medium other than cash, the fair market value of the thing taken in payment is the amount to be included as wages. If the services were rendered at a stipulated price, in the absence of evidence to the contrary, such price will be presumed to be the fair value of the remuneration received. If a corporation transfers to its employees its own stock as remuneration for services rendered by the employee, the amount of such remuneration is the fair market value of the stock at the time of the transfer.

(5) Remuneration for services, unless such remuneration is specifically excepted by the statute, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by R during the month of January 1955 and is entitled to receive remuneration of $100 for the services performed for R, the employer, during the month. A leaves the employ of R at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of R), R pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages within the meaning of the statute.

(b) *Certain specific items*—(1) *Pensions and retirement pay.* (i) In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403. So-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and do not constitute wages. Those payments of pensions or other benefits by the Federal Government under Title 38 of the United States Code which are excluded from gross income are not wages subject to withholding.

(ii) Amounts received as retirement pay for service in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service or as a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22) U.S.C. 1081; 60 Stat. 1021), are subject to withholding unless such pay or disability annuity is excluded from gross income under section 104(a)(4), or is taxable as an annuity under the provisions of section 72. Where such retirement pay or disability annuity (not excluded from gross income under section 104(a)(4) and not taxable as an annuity under the provisions of section 72) is paid to a nonresident alien individual, withholding is required only in the case of such amounts paid to a nonresident alien individual who is a resident of Puerto Rico.

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see §31.3401 (a)–4.

(3) *Vacation allowances.* Amounts of so-called "vacation allowances" paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(4) *Dismissal payments.* Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.

(5) *Deductions by employer from remuneration of an employee.* Any amount deducted by an employer from the remuneration of an employee is considered to be a part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress, or the law of any State or of Puerto Rico, requires or permits such deductions and the payment of the amounts thereof to the United States, a State, a Territory, Puerto Rico, or the District of Columbia, or any political subdivision of any one or more of the foregoing.

(6) *Payment by an employer of employee's tax, or employee's contributions under a State law.* The term "wages" includes the amount paid by an employer on behalf of an employee (without deduction from the remuneration of, or other reimbursement from, the employee) on account of any payment required from an employee under a State unemployment compensation law, or on account of any tax imposed upon the employee by any taxing authority, including the taxes imposed by sections 3101 and 3201.

(7) *Remuneration for services as employee of nonresident alien individual or foreign entity.* The term "wages" includes remuneration for services performed by a citizen or resident (including, in regard to wages paid after February 28, 1979, an individual treated as a resident under section 6013 (g) or (h)) of the United States as an employee of a nonresident alien individual, foreign partnership, or foreign corporation whether or not such alien individual or foreign entity is engaged in trade or business within the United States. Any person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States (including Puerto Rico as if a part of the United States), is subject to all the provisions of law and regulations applicable with respect to an employer. See §31.3401(d)–1, relating to the term "employer", and §31.3401(a)(8)(C)–1, relating to remuneration paid for services performed by a citizen of the United States in Puerto Rico.

(8) *Amounts paid under accident or health plans*—(i) *Amounts paid in taxable years beginning on or after January 1, 1977*—(*a*) *In general.* Withholding is required on all payments of amounts includible in gross income under section 105(a) and §1.105–1 (relating to amounts attributable to employer contributions), made in taxable years beginning on or after January 1, 1977, to an employee under an accident or health plan for a period of absence from work on account of personal injuries or sickness. Payments on which withholding is required by this subdivision are wages as defined in section 3401 (a), and the employer shall deduct and withhold in accordance with the requirements of chapter 24 of subtitle C of the Code. Third party payments of sick pay, as defined in section 3402(o) and the regulations thereunder, are not wages for purposes of this section.

(*b*) *Payments made by an agent of the employer. (1*) Payments are considered made by the employer if a third party makes the payments as an agent of the employer. The determining factor as to whether a third party is an agent of the employer is whether the third party bears any insurance risk. If the third party bears no insurance risk and is reimbursed on a cost plus fee basis, the third party is an agent of the employer even if the third party is responsible for making determinations of the eligibility of individual employees of the employer for sick pay payments. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not an agent of the employer, but the third party is a payor of third party sick pay for purposes of voluntary withholding from sick pay under sections 3402(o) and 6051(f) and the regulations thereunder. If a third party and an employer enter into an agency agreement as provided in paragraph (c) of §31.6051–3 (relating to statements required in case of sick pay paid by third parties), that agency agreement does not make the third party an agent of the employer for purposes of this paragraph.

(*2*) Payments made by agents subject to this paragraph are supplemental wages as defined in §31.3402 (g)–1, and are therefore subject to the rules regarding withholding tax on supplemental wages provided in §31.3402(g)–1. For purposes of those rules, unless the agent is also an agent for purposes of withholding tax from the employee's regular wages, the agent may deem tax to have been withheld from regular wages paid to the employee during the calendar year.

(*3*) This paragraph is only applicable to amounts paid on or after May 25, 1983 unless the agent actually withheld taxes before that date.

(*c*) *Exceptions to withholding.* (*1*) Withholding is not required on payments that are specifically excepted under the numbered paragraphs of section 3401(a) (relating to the definition of wages), under section 3402(e) (relating to included and excluded wages), or under section 3402(n) (relating to employees incurring no income tax liability).

(*2*) Withholding is not required on disability payments to the extent that the payments are excludable from gross income under section 105(d). In determining the excludable portion of the disability payments, the employer may assume that payments that the employer makes to the employee are the employee's sole source of income. This exception applies only if the employee furnishes the employer with adequate verification of disability. A certificate from a qualified physician attesting that the

employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. This exception does not affect the requirement that a statement (which includes any amount paid under section 105(d)) be furnished under either section 6041 (relating to information at source) or section 6051 (relating to receipts for employees) and the regulations thereunder.

(ii) *Amounts paid after December 31, 1955 and before January 1, 1977—(a) In general.* The term "wage continuation payment", as used in this subdivision, means any payment to an employee which is made after December 31, 1955, and before January 1, 1977 under a wage continuation plan (as defined in paragraph (a)(2)(i) of §1.105–4 and §1.105–5 of Part 1 of this chapter (Income Tax Regulations)) for a period of absence from work on account of personal injuries or sickness, to the extent such payment is attributable to contributions made by the employer which were not includable in the employee's gross income or is paid by the employer. Any such payment, whether or not excluded from the gross income of the employee under section 105(d), constitutes "wages" (unless specifically excepted under any of the numbered paragraphs of section 3401(a) or under section 3402 (e) and withholding thereon is required except as provided in paragraphs (b)(8)(ii) (*b*), (*c*), and (*d*) of this section.

(*b*) *Amounts paid before January 1, 1977, by employer for whom services are performed for period of absence beginning after December 31, 1963.* (*1*) Withholding is not required upon the amount of any wage continuation payment for a period of absence beginning after December 31, 1963, paid before January 1, 1977, to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(*i*) Separately show the amount of each such payment and the excludable portion thereof, and

(*ii*) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or to sickness and whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of any written statement submitted by an employee in accordance with this subdivision (*b)(1)(ii).*

For purposes of this subdivision (*b)(1),* wage continuation payments reasonably expected by the employer to be made on behalf of the employer by another person shall be taken into account in determining whether the 75 percent test contained in section 105(d) is met and in computing the amount of any wage continuation payment made directly by the employer for whom services are performed by the employee which is within the $75 or $100 weekly rate of exclusion from the gross income of the employee provided in section 105(d). In making this latter computation, the amount

excludable under section 105(d) shall be applied first against payments reasonably expected to be made on behalf of the employer by the other person and then, to the extent any part of the exclusion remains, against the payments made directly by the employer. In a case in which wage continuation payments are not paid at a constant rate for the first 30 calendar days of the period of absence, the determination of whether the 75 percent test contained in section 105(d) is met shall be based upon the length of the employee's absence as of the end of the period for which the payment by the employer is made, without regard to the effect which any further extension of such absence may have upon the excludability of the payment.

(*2*) The computation of the amount of any wage continuation payment with repect to which the employer may refrain from withholding may be illustrated by the following examples:

Example 1. A, an employee of B, normally works Monday through Friday and has a regular weekly rate of wages of $100. On Monday, November 5, 1974, A becomes ill, and as a result is absent from work for two weeks, returing to work on Monday, November 19, 1974. A is not hospitalized. Under B's noncontributory wage continuation plan, A receives no benefits for the first three working days of absence and is paid benefits directly by B at the rate of $85 a week thereafter ($34 for the last two days of the first week of absence and $85 for the second week of absence). No wage continuation payment is made by any other person. Since the benefits are entirely attributable to contributions to the plan by B, such benefits are wage continuation payments in their entirety. The wage continuation payments for the first seven calender days of absence are not excludable from A's gross income because A was not hospitalized for at least one day during his period of absence, and therefore B must withhold with respect to such payments. Under section 105(a), the wage continuation payments attributable to absence after the first seven calendar days of absence are excludable to the extent that they do not exceed a rate of $75 a week. Under the principles stated in paragraph (e)(6)(iv) of §1.105–4 of this chapter (Income Tax Regulations), the wage continuation payments in this case are at a rate not in excess of 75 percent (119/200 or 59.5 percent) of A's regular weekly rate of wages. Accordingly, B may refrain from withholding with respect to $75 of the wage continuation payment attributable to the second week of absence.

Example 2. Assume the facts in example 1 except that A is unable to return to work until Monday, February 11, 1975, and that, of the $85 a week of wage continuation payments $35 is paid directly by B and $50 is reasonably expected by B to be paid by C, an insurance company, on behalf of B. In such a case, both the $50 and the $35 payments constitute wage continuation payments and the amount of such payments which is attributable to the first 30 calendar days of absence is at a rate not in excess of 75 percent (323/440 or 73.4 percent) of A's regular weekly rate of wages. Therefore, under section 105(d), the portion of such payments which is attributable to absence after the first seven calendar days of absence is excludable to the extent that it does not exceed a rate of $75 a week for the eighth through the thirtieth calendar day of absence and does not exceed a rate of $100 a week thereafter. B may refrain from withholding with repect to $25 a week (the amount by which the $75 maximum excludable amount exceeds the $50 reasonably expected by B to be paid by C) of his direct payments for the eighth through the thirtieth calendar day of absence. Thereafter, B may refrain from withholding with respect to the entire $35 paid directly by him since the maximum excludable amount ($100 a week) exceeds the total of payments made by B and payments which B reasonably expects will be made by C.

(*c*) *Amounts paid by employer for whom services are performed for period of absence beginning before January 1, 1964.* Withholding is not required upon the amount of any wage continuation

payment for a period of absence beginning before January 1, 1964, made to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(*1*) Separately show the amount of each such payment and the excludable portion thereof, and

(*2*) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or whether such absence was due to sickness, and, if the latter, whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of the information contained in any written statement submitted by an employee in accordance with this paragraph (b)(8)(ii)(*c*)(*2*). For purposes of this paragraph (b)(8)(ii)(*c*), the computation of the amount excludable form the gross income of the employee under section 105(d) may be made either on the basis of the wage continuation payments which are made directly by the employer for whom the employee performs services, or on the basis of such payments in conjunction with any wage continuation payments made on behalf of the employer by a person who is regarded as an employer under section 3401(d)(1).

(*d*) *Amounts paid before January 1, 1977 by person other than the employer for whom services are performed.* No tax shall be withheld upon any wage continuation payment made to an employee by or on behalf of a person who is not the employer for whom the employee performs services but who is regarded as an employer under section 3401(d)(1). For example, no tax shall be withheld with respect to wage continuation payments made on behalf of an employer by an insurance company under an accident or health policy, by a separate trust under an accident or health plan, or by a State agency from a sickness and disability fund maintained under State law.

(*e*) *Cross references.* See sections 6001 and 6051 and the regulations thereunder for rules with respect to the records which must be maintained in connection with wage continuation payments and for rules with respect to the statements which must be furnished an employee in connection with wage continuation payments, respectively. See also section 105 and §1.105–4 of this chapter (Income Tax Regulations).

(9) *Value of meals and lodging.* The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See §1.119–1 of this chapter (Income Tax Regulations).

(10) *Facilities or privileges.* Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called “courtesy” discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges

are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.

(11) *Tips or gratuities.* Tips or gratuities paid, prior to January 1, 1966, directly to an employee by a customer of an employer, and not accounted for by the employee to the employer are not subject to withholding. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§31.3401(f)–1 and 31.3402(k)–1.

(12) *Remuneration for services performed by permanent resident of Virgin Islands*—(i) *Exemption from withholding.* No tax shall be withheld for the United States under chapter 24 from a payment of wages by an employer, including the United States or any agency thereof, to an employee if at the time of payment it is reasonable to believe that the employee will be required to satisfy his income tax obligations with respect to such wages under section 28(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 508). That section provides that all persons whose permanent residence is in the Virgin Islands "shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands".

(ii) *Claiming exemption.* If the employee furnishes to the employer a statement in duplicate that he expects to satisfy his income tax obligations under section 28(a) of the Revised Organic Act of the Virgin Islands with respect to all wages subsequently to be paid to him by the employer during the taxable year to which the statement relates, the employer may, in the absence of information to the contrary, rely on such statement as establishing reasonable belief that the employee will so satisfy his income tax obligations. The employee's statement shall identify the taxable year to which it relates, and both the original and the duplicate copy thereof shall be signed and dated by the employee.

(iii) *Disposition of statement.* The original of the statement shall be retained by the employer. The duplicate copy of the statement shall be sent by the employer to the Director of International Operations, Washington, D.C. 20225, on or before the last day of the calendar year in which the employer receives the statement from the employee.

(iv) *Applicability of subparagraph.* This subparagraph has no application with respect to any payment of remuneration which is not subject to withholding by reason of any other provision of the regulations in this subpart.

(13) *Federal employees resident in Puerto Rico.* Except as provided in paragraph (d) of §31.3401(a)(6)–1, the term "wages" includes remuneration for services performed by a nonresident alien individual who is a resident of Puerto Rico if such services are performed as an employee of the United States or any agency thereof. The place where the services are performed is immaterial for purposes of this subparagraph.

(14) *Supplemental unemployment compensation benefits.* (i) Supplemental unemployment

compensation benefits paid to an individual after December 31, 1970, shall be treated (for purposes of the provisions of Subparts E, F, and G of this part which relate to withholding of income tax) as if they were wages, to the extent such benefits are includible in the gross income of such individual.

(ii) For purposes of this subparagraph, the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from the employment of the employer, whether or not such separation is temporary, but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.

(iii) For the meanings of the terms "involuntary separation from the employment of the employer" and "other similar conditions", see subparagraphs (3) and (4) of §1.501(c)(17)–1(b) of this chapter (Income Tax Regulations).

(iv) As used in this subparagraph, the term "employee" means an employee within the meaning of paragraph (a) of §31.3401(c)–1, the term "employer" means an employer within the meaning of paragraph (a) of §31.3401(d)–1, and the term "employment" means employment as defined under the usual common law rules.

(v) References in this chapter to wages as defined in section 3401(a) shall be deemed to refer also to supplemental unemployment compensation benefits which are treated under this subparagraph as if they were wages.

(15) *Split-dollar life insurance arrangements. See* §1.61–22 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(c) *Geographical definitions.* For definition of the term "United States" and for other geographical definitions relating to the Continental Shelf see section 638 and §1.638–1 of this chapter.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6908, 31 FR 16775, Dec. 31, 1966; T.D. 7001, 34 FR 1000, Jan. 23, 1969; T.D. 7068, 35 FR 17328, Nov. 11, 1970; T.D. 7277, 38 FR 12742, May 15, 1973; T.D. 7493, 42 FR 33728, July 1, 1977; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7888, 48 FR 17587, Apr. 25, 1983; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990; T.D. 9092, 68 FR 54361, Sept. 17, 2003; T.D. 9276, 71 FR 42054, July 25, 2006]

§ 31.3401(a)-1T Question and answer relating to the definition of wages in section 3401(a) (Temporary).

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The following question and answer relates to the definition of wages in section 3401(a) of the Internal Revenue Code of 1954, as amended by section 531(d)(4) of the Tax Reform Act of 1984 (98 Stat.

886):

Q–1: Are fringe benefits included in the definition of "wages" under section 3401(a)?

A–1: Yes, unless specifically excluded from the definition of "wages" pursuant to section 3401(a) (1) through (20). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of "wages" if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 756, Jan. 7, 1985]

§ 31.3401(a)-2 Exclusions from wages.

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(a) *In general.* (1) The term "wages" does not include any remuneration for services performed by an employee for his employer which is specifically excepted from wages under section 3401(a).

(2) The exception attaches to the remuneration for services performed by an employee and not to the employee as an individual; that is, the exception applies only to the remuneration in an excepted category.

Example. A is an individual who is employed part time by B to perform domestic service in his home (see §31.3401(a)(3)–1). A is also employed by C part time to perform services as a clerk in a department store owned by him. While no withholding is required with respect to A's remuneration for services performed in the employ of B (the remuneration being excluded from wages), the exception does not embrace the remuneration for services performed by A in the employ of C and withholding is required with respect to the wages for such services.

(3) For provisions relating to the circumstances under which remuneration which is excepted is nevertheless deemed to be wages, and relating to the circumstances under which remuneration which is not excepted is nevertheless deemed not to be wages, see §31.3402(e)–1.

(4) For provisions relating to payments with respect to which a voluntary withholding agreement is in effect, which are not defined as wages in section 3401(a) but which are nevertheless deemed to be wages, see §§31.3401(a)–3 and 31.3402(p)–1.

(b) *Fees paid a public official.* (1) Authorized fees paid to public officials such as notaries public, clerks of courts, sheriffs, etc., for services rendered in the performance of their official duties are excepted from wages and hence are not subject to withholding. However, salaries paid such officials by the Government, or by a Government agency or instrumentality, are subject to withholding.

(2) Amounts paid to precinct workers for services performed at election booths in State, county, and municipal elections and fees paid to jurors and witnesses are in the nature of fees paid to public officials and therefore are not subject to withholding.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)-3 Amounts deemed wages under voluntary withholding agreements.

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(a) *In general.* Notwithstanding the exceptions to the definition of wages specified in section 3401(a) and the regulations thereunder, the term "wages" includes the amounts described in paragraph (b)(1) of this section with respect to which there is a voluntary withholding agreement in effect under section 3402(p). References in this chapter to the definition of wages contained in section 3401(a) shall be deemed to refer also to this section (§31.3401(a)–3).

(b) *Remuneration for services.* (1) Except as provided in subparagraph (2) of this paragraph, the amounts referred to in paragraph (a) of this section include any remuneration for services performed by an employee for an employer which, without regard to this section, does not constitute wages under section 3401(a). For example, remuneration for services performed by an agricultural worker or a domestic worker in a private home (amounts which are specifically excluded from the definition of wages by section 3401(a) (2) and (3), respectively) are amounts with respect to which a voluntary withholding agreement may be entered into under section 3402(p). See §§31.3401(c)–1 and 31.3401 (d)–1 for the definitions of "employee" and "employer".

(2) For purposes of this paragraph, remuneration for services shall not include amounts not subject to withholding under §31.3401(a)–1(b)(12) (relating to remuneration for services performed by a permanent resident of the Virgin Islands), §31.3401(a)–2(b) (relating to fees paid to a public official), section 3401(a)(5) (relating to remuneration for services for foreign government or international organization), section 3401(a)(8)(B) (relating to remuneration for services performed in a possession of the United States (other than Puerto Rico) by citizens of the United States), section 3401(a)(8)(C) (relating to remuneration for services performed in Puerto Rico by citizens of the United States), section 3401(a)(11) (relating to remuneration other than in cash for service not in the course of employer's trade or business), section 3401(a)(12) (relating to payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans), section 3401(a)(14) (relating to group-term life insurance), section 3401(a)(15) (relating to moving expenses), or section 3401(a)(16) (A) (relating to tips paid in any medium other than cash).

[T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)-4 Reimbursements and other expense allowance amounts.

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(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and §1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Withholding rate.* Payments made under reimbursement or other expense allowance arrangements that are subject to income tax withholding are supplemental wages as defined in §31.3402(g)–1. Accordingly, withholding on such supplemental wages is calculated under the rules provided with

respect to supplemental wages in §31.3402(g)–1.

(d) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51698, Dec. 17, 1990, as amended by T.D. 9276, 71 FR 42054, July 25, 2006]

§ 31.3401(a)(1)-1 Remuneration of members of the Armed Forces of the United States for active service in combat zone or while hospitalized as a result of such service.

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Remuneration paid for active service as a member of the Armed Forces of the United States performed in a month during any part of which such member served in a combat zone (as determined under section 112) or is hospitalized at any place as a result of wounds, disease, or injury incurred while serving in such a combat zone is excepted from wages and is, therefore, not subject to withholding. The exception with respect to hospitalization is applicable, however, only if during all of such month there are combatant activities in some combat zone (as determined under section 112). See §1.112–1 of this chapter (Income Tax Regulations).

§ 31.3401(a)(2)-1 Agricultural labor.

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The term "wages" does not include remuneration for services which constitute agricultural labor as defined in section 3121(g). For regulations relating to the definition of the term "agricultural labor", see §31.3121(g)–1.

§ 31.3401(a)(3)-1 Remuneration for domestic service.

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(a) *In a private home.* (1) Remuneration paid for services of a household nature performed by an employee in or about a private home of the person by whom he is employed is excepted from wages and hence is not subject to withholding. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a

boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home, and the remuneration paid for services performed therein is not within the exception.

(2) In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Remuneration paid for services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed is excepted from wages and hence is not subject to withholding. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the remuneration paid for services performed therein is not within the exception.

(2) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) *Remuneration not excepted.* Remuneration paid for services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, is not within the exception. Remuneration paid for services of a household nature is not within the exception if performed in or about rooming, or lodging houses, boarding houses, clubs (except local college clubs), hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

§ 31.3401(a)(4)-1 Cash remuneration for service not in the course of employer's trade or business.

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(a) Cash remuneration paid for services not in the course of the employer's trade or business performed by an employee for an employer in a calendar quarter is excepted from wages and hence is not subject to withholding unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such

services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, cash remuneration for service not in the course of the employer's trade or business is excluded from wages. (For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see §31.3401(a)(11)–1.)

(b) The term "services not in the course of the employer's trade or business" includes services that do not promote or advance the trade or business of the employer. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home, local college club, or local chapter of a college fraternity or sorority. Accordingly, this exception does not apply with respect to remuneration which is excepted from wages under section 3401(a)(2) or section 3401(a)(3) (see §§31.3401(a)(2)–1 and 31.3401(a)(3)–1, respectively). Remuneration paid for service performed for a corporation does not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthemore, in determining whether $50 or more has been paid for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. The term "cash remuneration" includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs service not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of service not in the course of the employer's trade or business during the preceding calendar quarter.

(e) In determining whether an employee has performed service not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such service; and

(2) Any day or portion thereof on which the employee does not perform service of the prescribed

character but with respect to which cash remuneration is paid or payable to the employee for such service, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform service not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such service on that day. For purposes of this exception, a day is a continuous period of 24 hours commencing at midnight and ending at midnight.

§ 31.3401(a)(5)-1 Remuneration for services for foreign government or international organization.

top

(a) *Services for foreign government.* (1) Remuneration paid for services performed as an employee of a foreign government is excepted from wages and hence is not subject to withholding. The exception includes not only remuneration paid for services performed by ambassadors, ministers, and other diplomatic officers and employees but also remuneration paid for services performed as a consular or other officer or employee of a foreign government or as a nondiplomatic representative of such a government. However, the exception does not include remuneration for services performed for a corporation created or organized in the United States or under the laws of the United States or any State (including the District of Columbia or the Territory of Alaska or Hawaii) or of Puerto Rico even though such corporation is wholly owned by such a government.

(2) The citizenship or residence of the employee and the place where the services are performed are immaterial for purposes of the exception.

(b) *Services for international organization.* (1) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288), remuneration paid for services performed within or without the United States by an employee for an international organization as defined in section 7701(a)(18) is excepted from wages and hence is not subject to withholding. The term “employee” as used in the preceding sentence includes not only an employee who is a citizen or resident of the United States but also an employee who is a nonresident alien individual. The term “employee” also includes an officer. An organization designated by the President through appropriate Executive order as entitled to enjoy the privileges, exemptions, and immunities provided in the International Organizations Immunities Act may enjoy the benefits of the exclusion from wages with respect to remuneration paid for services performed for such organization prior to the date of the issuance of such Executive order, if (i) the Executive order does not provide otherwise and (ii) the organization is a public international organization in which the United States participates, pursuant to a treaty or under the authority of an act of Congress authorizing such participation or making an appropriation for such participation, at the time such services are performed.

(2) Section 7701(a)(18) provides as follows:

Sec. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(3) Section 1 of the International Organizations Immunities Act provides as follows:

Section 1. [*International Organizations Immunities Act.*] For the purposes of this title [International Organizations Immunities Act], the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemption, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3401(a)(6)-1 Remuneration for services of nonresident alien individuals.

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(a) *In general.* All remuneration paid after December 31, 1966, for services performed by a nonresident alien individual, if such remuneration otherwise constitutes wages within the meaning of §31.3401(a)–1 and if such remuneration is effectively connected with the conduct of a trade or business within the United States, is subject to withholding under section 3402 unless excepted from wages under this section. In regard to wages paid under this section after February 28, 1979, the term "nonresident alien individual" does not include a nonresident alien individual treated as a resident under section 6013 (g) or (h).

(b) *Remuneration for services performed outside the United States.* Remuneration paid to a nonresident alien individual (other than a resident of Puerto Rico) for services performed outside the United States is excepted from wages and hence is not subject to withholding.

(c) *Remuneration for services of residents of Canada or Mexico who enter and leave the United States at frequent intervals*—(1) *Transportation service.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in transportation service between points in the United States and points in such foreign country, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, truck, ferry, steamboat, aircraft, or other transportation services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(2) *Service on international projects.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in connection with the construction, maintenance, or operation of a waterway, viaduct, dam, or bridge traversed by, or traversing, the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(3) *Limitation.* The exceptions provided by this paragraph do not apply to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico, in the pursuit of his employment within the United States.

(4) *Certificate required.* In order for an exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (i) that he is not a citizen or resident of the United States, (ii) that he is a resident of Canada or Mexico, as the case may be, and (iii) that he expects to meet the requirements of paragraph (c)(1) or (2) of this section with respect to remuneration to be paid during the taxable year in respect of which the statement is filed. The statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of §1.1461–2 with respect to such remuneration for such calendar year.

(d) *Remuneration for services performed by residents of Puerto Rico.* (1) Remuneration paid for

services performed in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding.

(2) Remuneration paid for services performed outside the United States but not in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. The statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(3) Remuneration paid for services performed outside the United States by a nonresident alien individual who is a resident of Puerto Rico as an employee of the United States or any agency thereof is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. This statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Exemption from income tax for remuneration paid for services performed before January 1, 2001.* Remuneration paid for services performed within the United States by a nonresident alien individual before January 1, 2001, is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from income tax imposed by chapter 1 of the Internal Revenue Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. In order for the exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (1) that he is not a citizen or resident of the United States, (2) that the remuneration to be paid to him during the taxable year is, or will be, exempt from the tax imposed by chapter 1 of the Code, and (3) the reason why such remuneration is so exempt from tax. If the remuneration is claimed to be exempt from tax by reason of a provision of an income tax convention to which the United States is a party, the statement shall also indicate the provision and tax convention under which the exemption is claimed, the country of which the employee is a resident, and sufficient facts to justify the claim to exemption. The statement shall be dated, shall identify the taxable year for which it is to apply and the

remuneration to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of §1.1461–2 with respect to such remuneration for such calendar year.

(f) *Exemption from income tax for remuneration paid for services performed after December 31, 2000.* Remuneration paid for services performed within the United States by a nonresident alien individual after December 31, 2000, is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from the income tax imposed by chapter 1 of the Internal Revenue Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. An employer may rely on a claim that the employee is entitled to an exemption from tax if it complies with the requirements of §1.1441–1(e)(1)(ii) of this chapter (for a claim based on a provision of the Internal Revenue Code) or §1.1441–4(b)(2) of this chapter (for a claim based on an income tax convention).

[T.D. 6908, 31 FR 16775, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7977, 49 FR 36836, Sept. 20, 1984; T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73412, Dec. 30, 1999]

§ 31.3401(a)(6)-1A Remuneration for services of certain nonresident alien individuals paid before January 1, 1967.

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(a) Except in the case of certain nonresident alien individuals who are residents of Canada, Mexico, or Puerto Rico or individuals who are temporarily present in the United States as nonimmigrants under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, remuneration for services performed by nonresident alien individuals does not constitute wages subject to withholding under section 3402. For withholding of income tax on remuneration paid for services performed within the United States in the case of nonresident alien individuals generally, see §1.1441–1 and following of this chapter (Income Tax Regulations).

(b) Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who enter and leave the United States at frequent intervals is not excepted from wages under section 3401(a)(6). See, however, §31.3401(a)(7)–1, relating to remuneration paid to such nonresident alien individuals when engaged in transportation service.

(c) Remuneration paid to a nonresident alien individual for services performed in Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding, even though such alien individual is a resident of Puerto Rico at the time when such services are performed. Wages paid for services performed by a nonresident alien individual who

is a resident of Puerto Rico are subject to withholding if such services are performed as an employee of the United States or any agency thereof. The place of performance of such services is immaterial, provided such alien individual is a resident of Puerto Rico at the time of performance of the services. Wages representing retirement pay for services in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service, or a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021), are subject to withholding, under the limitations specified in paragraph (b)(1)(ii) of §31.3401(a)–1, in the case of an alien resident of Puerto Rico.

(d) (1) Remuneration paid after 1961 to a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, is not excepted from wages under section 3401(a)(6) if the remuneration is exempt from withholding under section 1441(a) by reason of section 1441(c)(4)(B) and is not exempt from taxation under section 872(b)(3). See §§1.872–2 and 1.1441–4 of this chapter (Income Tax Regulations). A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (J) includes an alien individual admitted to the United States as an "exchange visitor" under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides in part, as follows:

Sec. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter— * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

(e) This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see §31.3401(a)(6)–1.

(Sec. 101. Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6727, 29 FR 5869, May 5, 1964; T.D. 6908, 31 FR 16775, Dec. 31, 1966]

§ 31.3401(a)(7)-1 Remuneration paid before January 1, 1967, for services performed by nonresident alien individuals who are residents of a contiguous country and who enter and leave the United States at frequent intervals.

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(a) *Transportation service.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in transportation service between points in the United States and points in a contiguous country, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, ferry, steamboat, and aircraft services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(b) *Service on international projects.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in connection with the construction, maintenance or operation of a waterway, viaduct, dam, or bridge traversed by or traversing the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(c) *Limitation on application of section.* The exception provided by this section has no application to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico in the pursuit of his employment within the United States.

(d) *Certificate required.* In order for the exception to apply, the nonresident alien employee must furnish his employer a statement setting forth the employee's name and address and certifying (1) that he is not a citizen of the United States, (2) that he is a resident of Canada or Mexico, as the case may be, and (3) the approximate period of time during which he has had such status. Such statement shall be dated, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Effective date.* This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see §31.3401(a)(6)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6908, 31 FR 16776, Dec. 31, 1966]

§ 31.3401(a)(8)(A)-1 Remuneration for services performed outside the United States by citizens of the United States.

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(a) *Remuneration excluded from gross income under section 911.* (1) (i) Remuneration paid for services performed outside the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if at the time of payment it is reasonable to believe that such remuneration will be excluded from gross income under the provisions of section 911. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that the remuneration is excludable from gross income under the provisions of section 911. The reasonable belief shall be based upon the application of section 911 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(ii) Remuneration paid by an employer to an employee constitutes wages, and hence is subject to withholding only to the extent that the remuneration is expected to exceed the aggregate amount which is excludable from the employee's gross income under section 911(a). For amounts paid after December 31, 1984, the determination of the amount subject to withholding shall be made by applying the excludable amount, on a pro rata basis, to each payment of remuneration to the employee. For this purpose, an employer is not required to ascertain information with respect to amounts received by his

employee from any other source; but, if the employer has such information, he shall take it into account in determining whether the earned income of the employee is in excess of the applicable limitation. For purposes of section 911(d)(5) and §1.911–2(c), relating to an employee who states to the authorities of a foreign country that he is not a resident of that country, the employer is not required to ascertain whether such a statement has been made; but if an employer knows that such a statement has been made, he shall presume that the employee is not a bona fide resident of that country, unless the employer also knows that the authorities of the foreign country have determined, notwithstanding the statement that the employee is a resident of that country. For purposes of section 911(d)(1) or §1.911–2(a) relating to the definition of a qualified individual, the reasonable belief contemplated by the statute may be based on a presumption as set forth in subparagraph (2) or (3) of this paragraph. For purposes of sections 911(a)(2) and 911(c)(2) and §1.911–4(b) and (d)(1), relating to the housing cost amount exclusion and the definition of housing expenses, the reasonable belief contemplated by the statute may be based on the presumption set forth in subparagraph (4) of this paragraph.

(2)(i) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be a bona fide resident of a foreign country or countries, within the meaning of section 911(d)(1), for an uninterrupted period which includes each taxable year of the employee, or applicable portion thereof, in respect of which the employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirement of §1.911–2(a) relating to maintaining a tax home and a bona fide residence in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(ii) If the employer was entitled to presume for the two consecutive taxable years immediately preceding an employee's current taxable year that such employee was a bona fide resident of a foreign country or countries for an uninterrupted period which includes such preceding taxable years, he may, if such employee is residing in a foreign country on the first day of such current taxable year, presume, in the absence of cause for a reasonable belief to the contrary, and without obtaining from the employee the statement prescribed in subdivision (i) of this subparagraph, that the employee will be a bona fide resident of a foreign country or countries in such current taxable year.

(3) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be present in a foreign country or countries during at least 330 full days during any period of twelve consecutive months, within the meaning of section 911(d)(1), and that such period includes each taxable year of the employee, or applicable portion thereof, in respect of which the employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirements of §1.911–2(a) relating to maintaining a tax home and being physically present in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury.

Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(4) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee's housing cost amount will be the amount shown on a statement properly executed and delivered to the employer. This statement must set forth the employee's estimation of the following items: housing expenses (as defined in §1.911–4(b)), the housing cost amount exclusion (as defined in §1.911–4(d)(1)), and the qualifying period (as defined in §1.911–2(a)). The statement must contain a declaration by the employee that it is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (IO–673). The employer may not rely on a statement from an employee if the employer, based on his or her knowledge of housing costs in the vicinity of the employee's tax home (as defined in §1.911–2(b)), believes the employee's housing expenses are lavish or extravagant under the circumstances.

(b) *Remuneration subject to withholding of income tax under law of a foreign country or a possession of the United States.* (1) Remuneration paid for services performed in a foreign country or in a possession of the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if at the time of the payment of such remuneration the employer is required by the law of any foreign country or of any possession of the United States to withhold income tax upon such remuneration. This paragraph, insofar as it relates to remuneration paid for services performed in a possession of the United States, applies only with respect to remuneration paid on or after August 9, 1955.

(2) Remuneration is not exempt from withholding under this paragraph if the employer is not required by the law of a foreign country or of a possession of the United States to withhold income tax upon such remuneration. Mere agreements between the employer and the employee whereby the estimated income tax of a foreign country or of a possession of the United States is withheld from the remuneration in anticipation of actual liability under the law of such country or possession will not suffice.

(3) The exemption from withholding provided by this paragraph does not apply by reason of withholding of income tax pursuant to the law of a territory of the United States, of a political subdivision of a possession of the United States, or of a political subdivision of a foreign state.

(4) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of §31.3401(a)–1.

(c) *Limitation on application of section.* This section has no application to the remuneration paid to a citizen of the United States for services performed outside the United States as an employee of the United States or any agency thereof.

(Approved by the Office of Management and Budget under control number 1545–0067)

(Sec. 911, 95 Stat. 194; 26 U.S.C. 911), sec. 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6697, 28 FR 13745, Dec. 17, 1963; T. D. 8006, 50 FR 2977, Jan. 23, 1985]

§ 31.3401(a)(8)(B)-1 Remuneration for services performed in possession of the United States (other than Puerto Rico) by citizen of the United States.

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(a) Remuneration paid for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico) does not constitute wages and hence is not subject to withholding, if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services. The reasonable belief contemplated by section 3401 (a)(8)(B) may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that at least 80 percent of the remuneration paid by the employer to the employee during the calendar year was for services performed within such a possession of the United States.

(b) This section has no application to remuneration paid to a citizen of the United States for services performed in any possession of the United States as an employee of the United States or any agency thereof.

(c) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of §31.3401(a)–1.

§ 31.3401(a)(8)(C)-1 Remuneration for services performed in Puerto Rico by citizen of the United States.

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(a) Remuneration paid for services performed within Puerto Rico for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico. The reasonable belief contemplated by section 3401(a)(8)(C) may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that the employee was a bona fide resident of Puerto Rico for the entire

calendar year.

(b) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will be a bona fide resident of Puerto Rico during the entire calendar year.

(1) Unless the employee is known by the employer to have maintained his abode at a place outside Puerto Rico at some time during the current or the preceding calendar year; or

(2) In any case where the employee files with the employer a statement (containing a declaration under the penalties of perjury that such statement is true to the best of the employee's knowledge and belief) that such employee has at all times during the current calendar year been a bona fide resident of Puerto Rico and that he intends to remain a bona fide resident of Puerto Rico during the entire remaining portion of such current calendar year.

(c) This section has no application to remuneration paid to a citizen of the United States for services performed in Puerto Rico as an employee of the United States or any agency thereof.

§ 31.3401(a)(9)-1 Remuneration for services performed by a minister of a church or a member of a religious order.

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(a) *In general.* Remuneration paid for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of duties required by such order, is excepted from wages and hence is not subject to withholding.

(b) *Service by a minister in the exercise of his ministry.* Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination. The following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(1) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenents and practices of the particular religious body constituting his church or church denomination.

(2) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or

church denomination if it is organized and dedicated to carrying out the tenents and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term "religious organization" has the same meaning and application as is given to the term for income tax purposes.

(3) (i) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

(ii) The rule in paragraph (b)(3)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(4) (i) If a minister is performing service for an organization which is operated as an integral agency of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control, conduct, and maintenance of such organization (see paragraph (b)(2) of this section) is in the exercise of his ministry.

(ii) The rule in paragraph (b)(4)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(5) (i) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry.

(ii) The rule in subdivision (i) of this subparagraph may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1) Section 3401(a)(9) does not except

from wages remuneration for service performed by a duly ordained, commissioned, or licensed minister of a church which is not in the exercise of his ministry.

(2) (i) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, paragraph (b)(3) of this section.

(ii) The rule in subdivision (i) of this subparagraph may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither a religious organization nor operated as an integral agency of a religious organization. M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the collection of income tax at source on wages, even though such service may involve the ministration of sacerdotal functions or the conduct of religious worship. Thus, for example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order.* Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such service is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.

§ 31.3401(a)(10)-1 Remuneration for services in delivery or distribution of newspapers, shopping news, or magazines.

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(a) *Services of individuals under age 18.* Remuneration for services performed by an employee under the age of 18 in the delivery or distribution of newspapers, or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or

distribution, is excepted from wages and hence is not subject to withholding. Thus, remuneration for services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, is excepted from wages. The remuneration is excepted irrespective of the form or method thereof. Remuneration for incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, is considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Remuneration for services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his remuneration being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, is excepted from wages and hence is not subject to withholding. The remuneration is excepted whether or not the employee is guaranteed a minimum amount or remuneration, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the remuneration is excepted without regard to the age of the employee. Remuneration for services performed other than at the time of sale to the ultimate consumer is not within the exception. Thus, remuneration for services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer is not within the exception. However, remuneration for incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, is considered to be within the exception.

§ 31.3401(a)(11)-1 Remuneration other than in cash for service not in the course of employer's trade or business.

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(a) Remuneration paid in any medium other than cash for services not in the course of the employer's trade or business is excepted from wages and hence is not subject to withholding. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for services not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exception from wages. For provisions relating to cash remuneration for service not in the course of employer's trade or business, see §31.3401(a)(4)–1.

(b) As used in this section, the term “services not in the course of the employer's trade or business” has the same meaning as when used in §31.3401(a)(4)–1.

§ 31.3401(a)(12)-1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans, or to individual retirement plans.

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(a) *Payments from or to certain taxexempt trusts.* The term "wages" does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of, an employee or his beneficiary from a trust,

if at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages. Also, since supplemental unemployment compensation benefits are treated under paragraph (b) (14) of §31.3401 (a)–1 as if they were wages for purposes of this chapter, this section does not apply to such benefits.

(b) *Payments under or to certain annuity plans.* (1) The term "wages" does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term "wages" does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan meets the requirements of section 401 (a) (3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term "wages" does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

(d) *Payment to individual retirement plans.* (1) The term "wages" does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1974, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee will be entitled to a deduction for such payment under section 219(a).

(2) The term "wages" does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1976, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 220(a).

(3) The term "wages" does not include any payment to a simplified employee pension arrangement described in section 408(k) by an employer after December 31, 1978, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 219(a).

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970; T.D. 7730, 45 FR 72652, Nov. 3, 1980]

§ 31.3401(a)(13)-1 Remuneration for services performed by Peace Corps volunteers.

top

(a) Remuneration paid after September 22, 1961, for services performed as a volunteer or volunteer leader within the meaning of the Peace Corps Act (22 U.S.C. 2501) is excepted from wages, and hence is not subject to withholding, unless the remuneration is paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act.

(b) Sections 5 and 6 of the Peace Corps Act (22 U.S.C. 2504, 2505) provide, in part, as follows:

Sec. 5 *Peace Corps Volunteers* [Peace Corps Act (75 Stat. 613); as amended by sec. 2(b), Act of December 13, 1963 (P.L. 88–200, 77 Stat. 359); sec. 2(a), Act of August 24, 1965, (P.L. 89–134, 79 Stat. 549); sec. 3(a), Act of July 24, 1970 (P.L. 91–352, 84 Stat. 464)]

* * * * *

(c) *Readjustment allowances.* Volunteers shall be entitled to receive a readjustment allowance at a rate not to exceed $75 for each month of satisfactory service as determined by the President; except that, in the cases of volunteers who have one or more minor children at the time of their entering a period of pre-enrollment training, one parent shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President. The readjustment allowance of each volunteer shall be payable on his return to the United States: *Provided, however,* That, under such circumstances as the President may determine, the accrued readjustment allowance, or any part thereof, may be paid to the volunteer, members of his family or others, during the period of his service, or prior to his return to the United

States. In the event of the volunteer's death during the period of his service, the amount of any unpaid readjustment allowance shall be paid in accordance with the provisions of section 5582(b) of Title 5. For purposes of the Internal Revenue Code of 1954, a volunteer shall be deemed to be paid and to receive each amount of a readjustment allowance to which he is entitled after December 31, 1964, when such amount is transferred from funds made available under this chapter to the fund from which such readjustment allowance is payable.

* * * * *

Sec. 6 Peace Corps Volunteer Leaders; number; applicability of chapter; benefits [Peace Corps Act (75 Stat. 615), as amended by sec. 3, Act of December 13, 1963 (P.L. 88–200, 77 Stat. 360)] The President may enroll in the Peace Corps qualified citizens or nationals of the United States whose services are required for supervisory or other special duties or responsibilities in connection with programs under this chapter (referred to in this Act as "volunteer leaders"). The ratio of the total number of volunteer leaders to the total number of volunteers in service at any one time shall not exceed one to twenty-five. Except as otherwise provided in this Act, all of the provisions of this Act applicable to volunteers shall be applicable to volunteer leaders, and the term "volunteers" shall include "volunteer leaders": *Provided, however,* That—

(1) Volunteer leaders shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President;

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7493, 42 FR 33729, July 1, 1977]

§ 31.3401(a)(14)-1 Group-term life insurance.

top

(a) The cost of group-term life insurance on the life of an employee is excepted from wages, and hence is not subject to withholding. For provisions relating generally to such remuneration, and for reporting requirements with respect to such remuneration, see sections 79 and 6052, respectively, and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(b) The cost of group-term life insurance on the life of an employee's spouse or children is not subject to withholding if it is excludable from the employee's gross income because it is merely incidental. See paragraph (d)(2)(ii)(*b*) of §1.61–2 in Part 1 of this chapter (Income Tax Regulations).

[T.D. 7493, 42 FR 33730, July 1, 1977]

§ 31.3401(a)(15)-1 Moving expenses.

top

(a) An amount paid to or on behalf of an employee after March 4, 1964, either as an advance or a reimbusement, specifically for moving expenses incurred or expected to be incurred is excepted from wages, and hence is not subject to withholding, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term "moving expenses" has the same meaning as when used in section 217. See §1.6041–2(a) in Part 1 of this chapter (Income Tax Regulations), relating to return of information as to payments to employees, and §31.6051–1(e), relating to the reporting of reimbursements of or payments of certain moving expenses.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3401(a), amounts paid to or on behalf of an employee for moving expenses constitute wages subject to withholding.

[T.D. 7493, 42 FR 33730, July 1, 1977]

§ 31.3401(a)(16)-1 Tips.

top

Tips paid to an employee are excepted from wages and hence not subject to withholding if—

(a) The tips are paid in any medium other than cash, or

(b) The cash tips received by an employee in any calendar month in the course of his employment by an employer are less than $20.

However, if the cash tips received by an employee in a calendar month in the course of his employment by an employer amount to $20 or more, none of the cash tips received by the employee in such calendar month are excepted from wages under this section. The cash tips to which this section applies include checks and other monetary media of exchange. Tips received by an employee in any medium other than cash, such as passes, tickets, or other goods or commodities do not constitute wages. If an employee in any calendar month performs services for two or more employers and receives tips in the course of his employment by each employer, the $20 test is to be applied separately with respect to the cash tips received by the employee in respect of his services for each employer and not to the total cash tips received by the employee during the month. As to the time tips are deemed paid, see §31.3401(f)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (b)(11) of §31.3401(a)–1.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§ 31.3401(a)(17)-1 Remuneration for services performed on a boat engaged in catching fish.

top

(a) Remuneration for services performed on or after December 31, 1954, by an individual on a boat engaged in catching fish or other forms of aquatic animal life (hereinafter "fish") is excepted from wages and hence is not subject to withholding if—

(1) The individual receives a share of the boat's (or boats' for a fishing operation involved more than one boat) catch of fish or a share of the proceeds from the sale of the catch,

(2) The amount of the individual's share depends solely on the amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish,

(3) The individual does not receive, and is not entitled to receive, any cash remuneration, other than remuneration that is described in subparagraph (1) of this paragraph, and

(4) The crew of the boat (or of each boat from which the individual receives a share of the catch) normally is made up of fewer than 10 individuals.

(b) The requirement of paragraph (a)(2) of this section is not satisfied if there exists an agreement with the boat's (or boats') owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.*, a union contract, which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than as a share of the catch and are not excepted from employment by section 3121(b)(20).

(c) The operating crew of a boat includes all persons on the boat (including the captain) who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish. See §1.6050A–1 for reporting requirements for the operator of a boat engaged in catching fish with respect to individuals performing services described in this section.

(d) During the same return period, service performed by a crew member may be excepted from employment by section 3121(b)(20) and this section for one voyage and not so excepted on a subsequent voyage on the same or on a different boat.

[T.D. 7716, 45 FR 57124, Aug. 27, 1980]

§ 31.3401(a)(18)-1 Payments or benefits under a qualified educational assistance program.

top

A payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, does not constitute wages and hence is not subject to withholding if, at the time of such payment or furnishing, it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3401(a)(19)-1 Reimbursements under a self-insured medical reimbursement plan.

top

Amounts reimbursed to or on behalf of an employee after December 31, 1979, as a medical care reimbursement under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6)) do not constitute wages and hence are not subject to withholding even though such reimbursement is includible in the gross income of an employee. For rules with respect to self-insured medical reimbursement plans, see section 105(h) and §1.105–11 of this Chapter (Income Tax Regulations).

(Secs. 105(h) and 7805 Internal Revenue Code of 1954; 94 Stat. 2855, 68A Stat. 917 (26 U.S.C. 105(h) and 7805))

[T.D. 7754, 46 FR 3509, Jan. 15, 1981. Redesignated by T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3401(b)-1 Payroll period.

top

(a) The term *payroll period* means the period of service for which a payment of wages is ordinarily made to an employee by his employer. It is immaterial that the wages are not always paid at regular intervals. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but if for some reason the employee in a given week receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the payroll period is still the calendar week; or if, instead, that employee is sent on a 3-week trip by his employer and receives at the end of the trip a single wage payment for three weeks' services, the payroll period is still the calendar week, and the wage payment shall be treated as though it were three separate weekly wage payments.

(b) For the purpose of section 3402, an employee can have but one payroll period with respect to wages paid by any one employer. Thus, if an employee is paid a regular wage for a weekly payroll period and in addition thereto is paid supplemental wages (for example, bonuses) determined with respect to a different period, the payroll period is the weekly payroll period. For computation of tax on supplemental wage payments, see §31.3402(g)–1.

(c) The term *payroll period* also means the period of accrual of supplemental unemployment compensation benefits for which a payment of such benefits is ordinarily made. Thus if benefits are ordinarily accrued and paid on a monthly basis, the payroll period is deemed to be monthly.

(d) The term *miscellaneous payroll period* means a payroll period other than a daily, weekly, biweekly, semi-monthly, monthly, quarterly, semiannual, or annual payroll period.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(c)-1 Employee.

top

(a) The term *employee* includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term includes officers and employees, whether elected or appointed, of the United States, a State, Territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(f) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(g) The term *employee* includes every individual who receives a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of §31.3401(a)–1 as if it were wages.

(h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(d)-1 Employer.

 top

(a) The term *employer* means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.

(b) It is not necessary that the services be continuing at the time the wages are paid in order that the status of employer exist. Thus, for purposes of withholding, a person for whom an individual has performed past services for which he is still receiving wages from such person is an *employer*.

(c) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group or entity. A trust or estate, rather than the fiduciary acting for or on behalf of the trust or estate, is generally the employer.

(d) The term *employer* embraces not only individuals and organizations engaged in trade or business, but organizations exempt from income tax, such as religious and charitable organizations, educational

institutions, clubs, social organizations and societies, as well as the governments of the United States, the States, Territories, Puerto Rico, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions.

(e) The term *employer* also means (except for the purpose of the definition of *wages*) any person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States (including Puerto Rico as if a part of the United States).

(f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term *employer* means (except for the purpose of the definition of *wages*) the person having such control. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the *employer*.

(g) The term *employer* also means a person making a payment of a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of §31.3401(a)–1 as if it were wages. For example, if supplemental unemployment compensation benefits are paid from a trust which was created under the terms of a collective bargaining agreement, the trust shall generally be deemed to be the employer. However, if the person making such payment is acting solely as an agent for another person, the term *employer* shall mean such other person and not the person actually making the payment.

(h) It is a basic purpose to centralize in the employer the responsibility for withholding, returning, and paying the tax, and for furnishing the statements required under section 6051 and §31.6051–1. The special definitions of the term *employer* in paragraphs (e), (f), and (g) of this section are designed solely to meet special or unusual situations. They are not intended as a departure from the basic purpose.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(e)-1 Number of withholding exemptions claimed.

top

(a) The term *number of withholding exemptions claimed* means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f) of the Internal Revenue Code of 1954 or in effect under section 1622(h) of the Internal Revenue Code of 1939. If no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero. The number of withholding exemptions claimed must be taken into account in determining the amount of tax to be deducted and withheld under section 3402, whether the employer computes the tax in accordance with the provisions of subsection (a) or subsection (c) of section 3402.

(b) The employer is not required to ascertain whether or not the number of withholding exemptions claimed is greater than the number of withholding exemptions to which the employee is entitled. For rules relating to invalid withholding exemption certificates, see §31.3402(f)(2)–1(e), and for rules relating to required submission of copies of certain withholding exemption certificates to the Internal Revenue Service, see §31.3402(f)(2)–1(g).

(c) As to the number of withholding exemptions to which an employee is entitled, see §31.3402(f)(1)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7423, 41 FR 26217, June 23, 1976; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7803, 47 FR 3547, Jan. 26, 1982]

§ 31.3401(f)-1 Tips.

top

(a) *Tips considered wages.* Tips received after 1965 by an employee in the course of his employment are considered to be wages, and thus subject to withholding of income tax at source. For an exception to the rule that tips constitute wages, see §§31.3401(a)(16) and 31.3401(a)(16)–1, relating to tips paid in a medium other than cash and cash tips of less than $20. For definition of the term "employee," see §§31.3401(c) and 31.3401(c)–1.

(b) *When tips deemed paid.* Tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) (see §31.6053–1) shall be deemed to be paid to the employee at the time the written statement is furnished to the employer. Tips received by an employee which are not reported to his employer in a written statement furnished pursuant to section 6053(a) shall be deemed to be paid to the employee at the time the tips are actually received by the employee.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§ 31.3402(a)-1 Requirement of withholding.

top

(a) Section 3402 provides alternative methods, at the election of the employer, for use in computing the amount of income tax to be collected at source on wages. Under the percentage method of withholding (see §31.3402(b)–1), the employer is required to deduct and withhold a tax computed in accordance with the provisions of section 3402(a). Under the wage bracket method of withholding (see §31.3402(c)–1), the employer is required to deduct and withhold a tax determined in accordance

with the provisions of section 3402(c). The employer may elect to use the percentage method, the wage bracket method, or certain other methods (see §31.3402(h) (4)–1). Different methods may be used by the employer with respect to different groups of employees.

(b) The employer is required to collect the tax by deducting and withholding the amount thereof from the employee's wages as and when paid, either actually or constructively. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case, the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition.

(c) Except as provided in sections 3402 (j) and (k) (see §§31.3402(j)–1 and 31.3402(k)–1, relating to noncash remuneration paid to retail commission salesman and to tips received by an employee in the course of his employment, respectively), an employer is required to deduct and withhold the tax notwithstanding the wages are paid in something other than money (for example, wages paid in stocks or bonds; see §31.3401 (a)–1) and to pay over the tax in money. If wages are paid in property other than money, the employer should make necessary arrangements to insure that the amount of the tax required to be withheld is available for payment in money.

(d) For provisions relating to the circumstances under which tax is required to be deducted and withheld from certain amounts received under accident and health plans, see paragraph (b)(8) of §31.3401(a)–1.

(e) As a matter of business administration, certain of the mechanical details of the withholding process may be handled by representatives of the employer. Thus, in the case of an employer having branch offices, the branch manager or other representative may actually, as a matter of internal administration, withhold the tax or prepare the statements required under section 6051. Nevertheless, the legal responsibility for withholding, paying, and returning the tax and furnishing such statements rests with the employer. For provisions relating to statements under section 6051, see §31.6051–1.

(f) The amount of any tax withheld and collected by the employer is a special fund in trust for the United States. See section 7501.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1001, Jan. 23, 1969; T.D. 7115, 36 FR 9209, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983]

§ 31.3402(b)-1 Percentage method of withholding.

top

With respect to wages paid after April 30, 1975, the amount of tax to be deducted and withheld under the percentage method of withholding shall be determined under the applicable percentage method withholding table contained in Circular E (Employer's Tax Guide) according to the instructions contained therein.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(c)-1 Wage bracket withholding.

top

(a) *In general.* (1) The employer may elect to use the wage bracket method provided in section 3402 (c) instead of the percentage method with respect to any employee. The tax computed under the wage bracket method shall be in lieu of the tax required to be deducted and withheld under section 3402(a). With respect to wages paid after July 13, 1968, the correct amount of withholding shall be determined under the applicable wage bracket withholding table contained in the Circular E (Employer's Tax Guide) issued for use with respect to the period in which such wages are paid.

(2) For provisions relating to the treatment of wages paid under accident and health plans and wages paid other than in cash to retail commission salesmen, see paragraph (b)(8) of §31.3401(a)–1 and §31.3402(j)–1, respectively.

(b) *Established payroll periods, other than daily or miscellaneous, covered by wage bracket withholding tables.* The wage bracket withholding tables contained in Circular E for established periods other than daily or miscellaneous should be used in determining the tax to be withheld for any such period without reference to the time the employee is actually engaged in the performance of services during such payroll period.

Example 1. On June 30, 1971, employee A is paid wages for a semimonthly payroll period. A has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. A's wages are determined at the rate of $2 per hour. During a certain payroll period he works only 24 hours and earns $48. Although A worked only 24 hours during the semimonthly payroll period, the applicable wage bracket withholding table contained in Circular E for a semimonthly payroll period for an employee who is married should be used in determining the tax to be withheld. Under this table it will be found that no tax is required to be withheld from a wage payment of $48 when two withholding exemptions are claimed.

Example 2. On May 14, 1971, employee B is paid wages for a weekly payroll period. B has in effect a withholding exemption certification indicating that he claims one withholding exemption and that he is single. B's wages are determined at the rate of $2 per hour. During a certain payroll period B works 18 hours and earns $36. Although B worked only 18 hours during the weekly payroll period the applicable wage bracket

withholding table for a weekly payroll period for an employee who is single should be used in determining the tax to be withheld. Under this table it will be found that $0.50 is the amount of tax to be withheld from a wage payment of $36 when one withholding exemption is claimed.

(c) *Periods to which the tables for a daily or miscellaneous payroll period are applicable*—(1) *In general.* The tables applicable to a daily or miscellaneous payroll period show the tax for employees who are to be withheld from as single persons and for employees who are to be withheld from as married persons on the amount of wages for one day. Where the withholding is computed under the rules applicable to a miscellaneous payroll period, the wages and the amounts shown in the applicable table must be placed on a comparable basis. This may be accomplished by reducing the wages paid for the period to a daily basis by dividing the total wages by the number of days (including Sundays and holidays) in the period. The amount of the tax shown in the applicable table as the tax required to be withheld from the wages, as so reduced to a daily basis, should then be multiplied by the number of days (including Sundays and holidays) in the period.

(2) *Period not a payroll period.* If wages are paid for a period which is not a payroll period, the amount to be deducted and withheld under the wage bracket method shall be the amount applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days (including Sundays and holidays) in the period with respect to which such wages are paid.

Example. An individual performs services for a contractor in connection with a construction project. He has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. Wages have been fixed at the rate of $36 per day, to be paid upon completion of the project. The project is completed before July 1, 1971, in 12 consecutive days, at the end of which period the individual is paid wages of $360 for 10 days' services performed during the period. Under the wage bracket method the amount to be deducted and withheld from such wages is determined by dividing the amount of the wages ($360) by the number of days in the period (12), the result being $30. The amount of tax required to be withheld is determined under the appropriate table applicable to a miscellaneous payroll period for an employee who is married. Under this table the tax required to be withheld is $47.40 (12 × $3.95).

(3) *Wages paid without regard to any period.* If wages are paid to an employee without regard to any particular period, as, for example, commissions paid to a salesman upon consummation of a sale, the amount of tax to be deducted and withheld shall be determined in the same manner as in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days (including Sundays and holidays) which have elapsed, beginning with the latest of the following days:

(i) The first day after the last payment of wages to such employee by such employer in the calendar year, or

(ii) The date on which such individual's employment with such employer began in the calendar year, or

(iii) January 1 of such calendar year, and ending with (and including) the date on which such wages are paid.

Example. On April 2, 1971, C is employed by the X Real Estate Company to sell real estate on a commission basis, commissions to be paid only upon consummation of sales. C has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. On May 22, 1971, C receives a commission of $300, his first commission since April 2, 1971. Again on June 19, 1971, C receives a commission of $420. Under the wage bracket method, the amount of tax to be deducted and withheld in respect of the commission paid on May 22, is $10, which amount is obtained by multiplying $0.20 (tax per day under the appropriate wage bracket table applicable to a daily or miscellaneous payroll period for an employee who is not married where wages are at least $6 but less than $6.25 a day) by 50 (number of days elapsed); and the amount of tax to be withheld with respect to the commission paid on June 19 is $54.60, which amount is obtained by multiplying $1.95 (tax under the appropriate wage bracket table for a daily or miscellaneous payroll period where wages are at least $15 but less than $15.50 a day) by 28 (number of days elapsed).

(d) *Period or elapsed time less than 1 week.* (1) It is the general rule that if wages are paid for a payroll period or other period of less than 1 week, the tax to be deducted and withheld under the wage bracket method shall be the amount computed for a daily payroll period, or for a miscellaneous payroll period containing the same number of days (including Sundays and holidays) as the payroll period, or other period, for which such wages are paid. In the case of wages paid without regard to any period, if the elapsed time computed as provided in paragraph (c) of this section is less than 1 week, the same rule is applicable.

Example 1. On May 14, 1971, an employee who has a daily payroll period is paid wages of $15 per day. The employee has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. Under the applicable table for a daily payroll period for an employee who is not married, the amount of tax to be deducted and withheld from each such payment of wages is $1.95.

Example 2. An employee works for a certain employer on 4 consecutive days for which he is paid wages totalling $60 on July 25, 1971. The employee has in effect a withholding exemption certificate claiming two withholding exemptions and indicating that he is married. The amount of tax to be deducted and withheld under the wage bracket method is $5.60 (4×$1.40).

(2) If the payroll period, other period or elapsed time where wages are paid without regard to any period, is less than one week, the employer may, under certain conditions, elect to deduct and withhold the tax determined by the application of the wage table for a weekly payroll period to the aggregate of the wages paid to the employee during the calendar week. The election to use the weekly wage table in such cases is subject to the limitations and conditions prescribed in Circular E with respect to employers using the percentage method in similar cases.

(3) As used in this paragraph the term “calendar week” means a period of seven consecutive days beginning with Sunday and ending with Saturday.

(e) *Rounding off of wage payment.* In determining the amount to be deducted and withheld under the

wage bracket method the wages may, at the election of the employer, be computed to the nearest dollar, provided such wages are in excess of the highest wage bracket of the applicable table. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to $1.00. Thus, if the payroll period of an employee is weekly and the wage payment of such employee is $255.49, the employer may compute the tax on the excess over $200 as if the excess were $55 instead of $55.49. If the weekly wage payment is $255.50, the employer may, in computing the tax, consider the excess over $200 to be $56 instead of $55.50.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13942, Nov. 4, 1965; T.D. 7115, 36 FR 9215, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(d)-1 Failure to withhold.

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If the employer in violation of the provisions of section 3402 fails to deduct and withhold the tax, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax under section 3402 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax applicable in respect of such failure to deduct and withhold. The employer will not be relieved of his liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 3402 may be credited has been paid. See §31.3403–1, relating to liability for tax.

§ 31.3402(e)-1 Included and excluded wages.

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(a) If a portion of the remuneration paid by an employer to his employee for services performed during a payroll period of not more than 31 consecutive days constitutes wages, and the remainder does not constitute wages, all the remuneration paid the employee for services performed during such period shall for purposes of withholding be treated alike, that is, either all included as wages or all excluded. The time during which the employee performs services, the remuneration for which under section 3401(a) constitutes wages, and the time during which he performs services, the remuneration for which under such section does not constitute wages, determine whether all the remuneration for services performed during the payroll period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular employer in a payroll

period is spent in performing services the remuneration for which consititutes wages, then all the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

(c) If less than one-half of the employee's time in the employ of a particular employer in a payroll period is spent in performing services the remuneration for which constitutes wages, then none of the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following examples:

Example 1. Employer B, who operates a store and a farm, employs A to perform services in connection with both operations. The remuneration paid A for services on the farm is excepted as remuneration for agricultural labor, and the remuneration for services performed in the store constitutes wages. Employee A is paid on a monthly basis. During a particular month, A works 120 hours on the farm and 80 hours in the store. None of the remuneration paid by B to A for services performed during the month is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the month constitutes wages. During another month A works 75 hours on the farm and 120 hours in the store. All of the remuneration paid by B to A for services performed during the month is deemed to be wages since the remuneration paid for one-half or more of the services performed during the month constitutes wages.

Example 2. Employee C is employed as a maid by D, a physician, whose home and office are located in the same building. The remuneration paid C for services in the home is excepted as remuneration for domestic service, and the remuneration paid for her services in the office constitutes wages. C is paid on a weekly basis. During a particular week C works 20 hours in the home and 20 hours in the office. All of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for one-half or more of the services performed during the week constitutes wages. During another week C works 22 hours in the home and 15 hours in the office. None of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the week constitutes wages.

(e) The rules set forth in this section do not apply (1) with respect to any remuneration paid for services performed by an employee for his employer if the periods for which remuneration is paid by the employer vary to the extent that there is no period which constitutes a payroll period within the meaning of section 3401(b) (see §31.3401(b)–1), or (2) with respect to any remuneration paid for services performed by an employee for his employer if the payroll period for which remuneration is paid exceeds 31 consecutive days. In any such case withholding is required with respect to that portion of such remuneration which constitutes wages.

§ 31.3402(f)(1)-1 Withholding exemptions.

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(a) *In general.* (1) Except as otherwise provided in section 3402(f)(6) (see §31.3402(f)(6)–1), an employee receiving wages shall on any day be entitled to withholding exemptions as provided in section 3402(f)(1). In order to receive the benefit of such exemptions, the employee must file with his employer a withholding exemption certificate as provided in section 3402(f)(2). See §31.3402(f)(2)–1.

(2) The number of exemptions to which an employee is entitled on any day depends upon his status as single or married, upon his status as to old age and blindness, upon the number of his dependents, upon the number of exemptions claimed by his spouse (if he is married), and upon the number of withholding allowances to which he is entitled under section 3402(m).

(b) *Withholding exemptions to which an employee is entitled in respect of himself.* An employee is entitled to one withholding exemption for himself. An employee shall on any day be entitled to an additional withholding exemption for himself if he will have attained the age of 65 before the close of his taxable year which begins in, or with, the calendar year in which such day falls. If the employee is blind, he may claim an additional withholding exemption for blindness. For purposes of claiming a withholding exemption for blindness, an individual shall be considered blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees. For definition of the term “blindness”, see section 151(d)(3). An employee may also be entitled under section 3402(m) to withholding exemptions with respect to withholding allowances (see §31.3402(m)–1).

(c) *Withholding exemptions to which an employee is entitled in respect to his spouse.* (1) A married employee, whose spouse is an employee receiving wages, is entitled to claim any withholding exemption to which his spouse is entitled under paragraph (b) of this section, unless the spouse has in effect a withholding exemption certificate claiming such withholding exemption. A married employee, whose spouse is not an employee receiving wages, is entitled to claim any withholding exemption to which his spouse would be entitled under paragraph (b) of this section if the spouse were an employee receiving wages.

Example 1. Assume that both the husband and wife have attained the age of 65 and are employees receiving wages. Each spouse is entitled under paragraph (b) of this section to claim 2 withholding exemptions in respect of himself or herself. Either spouse may claim, in addition to the withholding exemptions to which he or she is entitled in respect of himself or herself, any withholding exemption to which the other spouse is entitled under such paragraph (b) of this section but does not claim on a withholding exemption certificate.

Example 2. Assume the same facts as in Example 1 except that only the husband is an employee receiving wages. The husband is entitled to claim 4 withholding exemptions, that is, the 2 withholding exemptions to which he is entitled in respect of himself and the 2 withholding exemptions to which his spouse would be entitled under paragraph (b) of this section if she were an employee receiving wages.

(2) In determining the number of withholding exemptions to which an employee is entitled for himself and his spouse on any day, the employee's status as a single person or a married person and, if

married, whether a withholding exemption is claimed by his spouse, shall be determined as of such day. However, in the case of an employee whose spouse dies in the taxable year of the employee which begins in, or with, the calendar year in which the spouse dies, any withholding exemption which would be allowable to the employee in respect of such spouse, if living and not an employee receiving wages, may be claimed by the employee for that portion of the calendar year which occurs after his spouse's death. For provisions applicable in the case of an employee whose taxable year is not a calendar year, and whose spouse dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year, see paragraph (b) of §31.3402(f)(2)–1. An employee legally separated from his spouse under a decree of divorce or of separate maintenance or an employee who is a surviving spouse (as defined in section 2 and the regulations thereunder) shall not be entitled to any withholding exemptions in respect of his spouse.

(d) *Withholding exemptions to which an employee is entitled in respect of dependents.* Subject to the limitations stated in this paragraph, an employee shall be entitled on any day to a withholding exemption for each individual who may reasonably be expected to be his dependent for his taxable year beginning in, or with, the calendar year in which such day falls. For purposes of the withholding exemption for an individual who may reasonably be expected to be a dependent, the following rules shall apply:

(1) The determination that an individual may or may not reasonably be expected to be a dependent shall be made on the basis of facts existing at the beginning of the day for which a withholding exemption for such individual is to be claimed. The individual in respect of whom an exemption is claimed by an employee must, on the day in question, be in existence and be within one of the categories listed in section 152(a), which defines the term “dependent”. However, a withholding exemption for a dependent who dies continues for the portion of the calendar year which occurs after the dependent's death, except that, in the case of an employee whose taxable year is not a calendar year, the withholding exemption does not continue for a dependent, within the meaning of section 152 (a) (9) or (10), whose death occurs before the first day of the employee's taxable year beginning in the calendar year of death.

(2) The determination that an individual may or may not reasonably be expected to be a dependent shall be made for the taxable year of the employee in respect of which amounts deducted and withheld in the calendar year in which the day in question falls are allowed as a credit. In general, amounts deducted and withheld during any calendar year are allowed as a credit against the tax imposed by chapter 1 of the Code for the taxable year which begins in, or with, such calendar year. Thus, in order for an employee to be able to claim for a calendar year a withholding exemption with respect to a particular individual as a dependent there must be a reasonable expectation that the employee will be allowed an exemption with respect to such individual under section 151(e) for his taxable year which begins in, or with, such calendar year.

(3) For the employee to be entitled on any day of the calendar year to a withholding exemption for an individual as a dependent, such individual must on such day—

(i) Be an individual referred to in one of the numbered paragraphs in section 152(a),

(ii) Reasonably be expected to receive over one-half of his support, within the meaning of section 152, from the employee in the calendar year, and

(iii) Either (*a*) reasonably be expected to have gross income of less than the amount determined pursuant to §1.151–2 of this chapter (Income Tax Regulations) applicable to the calendar year in which the taxable year of the taxpayer begins, or (*b*) be a child (son, stepson, daughter, stepdaughter, adopted son, or adopted daughter) of the employee who (*1*) will not have attained the age of 19 at the close of the calendar year or (*2*) is a student as defined in section 151.

(4) An employee is not entitled to claim a withholding exemption for an individual otherwise reasonably expected to be a dependent of the employee if such individual is not a citizen of the United States, unless such individual (i) is at any time during the calendar year a resident of the United States (including, in regard to wages paid after February 28, 1979, and individual treated as a resident under section 6013 (g) or (h)) Canada, Mexico, the Canal Zone, or the Republic of Panama, or (ii) is a child of the employee born to him, or legally adopted by him, in the Philippine Islands before January 1, 1956, and the child is a resident of the Republic of the Philippines, and the employee was a member of the Armed Forces of the United States at the time the child was born to him or legally adopted by him.

(e) *Additional withholding exemption to which an employee is entitled in respect of the standard deduction.* After November 30, 1986, an employee is entitled to one additional withholding exemption unless:

(1) The employee is married (as determined under section 143) and the employee's spouse is an employee receiving wages subject to withholding, or

(2) The employee has withholding exemption certificates in effect with respect to more than one employer.

These restrictions do not apply if the combined wages of the employee and the spouse (if any) from other than one employer is less than the amount specified in the instructions to Form W–4 or W–4A (Employee's Withholding Allowance Certificate).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7114, 36 FR 9020, May 18, 1971; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987]

§ 31.3402(f)(2)-1 Withholding exemption certificates.

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(a) *On commencement of employment.* On or before the date on which an individual commences employment with an employer, the individual shall furnish the employer with a signed withholding exemption certificate relating to his marital status and the number of withholding exemptions which he claims, which number shall in no event exceed the number to which he is entitled, or, if the statements described in §31.3402(n)–1 are true with respect to an individual, he may furnish his employer with a signed withholding exemption certificate which contains such statements. For form and contents of such certificates, see §31.3402(f)(5)–1. The employer is required to request a withholding exemption certificate from each employee, but if the employee fails to furnish such certificate, such employee shall be considered as a single person claiming no withholding exemptions.

(b) *Change in status which affects calendar year.* (1) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which must in no event exceed the number to which he is entitled on such day. The number of withholding exemptions to which an employee is entitled decreases, for example, for any one of the following reasons:

(i) The employee's wife (or husband) for whom the employee has been claiming a withholding exemption (*a*) is divorced or legally separated from the employee, or (*b*) claims her (or his) own withholding exemption on a separate certificate.

(ii) In the case of an employee whose taxable year is not a calendar year, the employee's wife (or husband) for whom the employee has been claiming a withholding exemption dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year in which the spouse dies.

(iii) The employee finds that no exemption for his taxable year which begins in, or with, the current calendar year will be allowable to him under section 151(e) in respect of an individual claimed as a dependent on the employee's withholding exemption certificate.

(iv) It becomes unreasonable for the employee to believe that his wages for an estimation year will not be more, or that the determinable additional amounts for each item under §31.3402(m)–1 for an estimation year will not be less, than the corresponding figure used in connection with a claim by him under section 3402 (m) of a withholding allowance to such an extent that the employee would no longer be entitled to such withholding allowance.

(v) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m), computed on the basis of the

preceding taxable year, to believe that his wages and the determinable additional amounts for each item under §31.3402(m)–1 in such preceding taxable year or in his present taxable year will entitle him to such withholding allowance in the present taxable year.

(2) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is more than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee may furnish the employer with a new withholding exemption certificate on which the employee must in no event claim more than the number of withholding exemptions to which he is entitled on such day.

(3) If, on any day during the calendar year, the statements described in §31.3402(n)–1 are true with respect to an employee, such employee may furnish his employer with a withholding exemption certificate which contains such statements.

(4) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in §31.3402(n)–1, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in §31.3402(n)–1) for his current taxable year, the employee must within 10 days after such day furnish the employer with a new withholding exemption certificate which does not contain such statements. If, on any day during the calendar year, it is not reasonable for such an employee whose liability for income tax imposed under subtitle A is determined on a basis other than the calendar year to so anticipate with respect to his taxable year following his current taxable year, the employee must furnish the employer with a new withholding exemption certificate which does not contain such statements within 10 days after such day or on or before the first day of the last month of his current taxable year, whichever is later.

(c) *Change in status which affects next calendar year.* (1) If, on any day during the calendar year, the number of exemptions to which the employee will be, or may reasonably be expected to be, entitled under sections 151 and 3402(m) for his taxable year which begins in, or with, the next calendar year is different from the number to which the employee is entitled on such day, the following rules shall be applicable:

(i) If such number is less than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect in such day, the employee must, on or before December 1 of the year in which the change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the decrease in the number of withholding exemptions. If the change occurs in December, the new certificate must be furnished within 10 days after the change occurs. The number of exemptions to which an employee is entitled for his taxable year which begins in, or with, the next calendar year decreases, for example, for any of the following reasons:

(*a*) The spouse or a dependent of the employee dies.

(*b*) The employee finds that is not reasonable to expect that an individual claimed as a dependent on the employee's withholding exemption certificate will qualify as a dependent of the employee for such taxable year.

(*c*) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m) to believe that his wages and the determinable additional amounts for each item under §31.3402(m)–1 for his taxable year which begins in, or with, the next calendar year will entitle him to such withholding allowance for such taxable year.

(ii) If such number is greater than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect on such day, the employee may, on or before December 1 of the year in which such change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the increase in the number of withholding exemptions. If the change occurs in December, the certificate may be furnished on or after the date on which the change occurs.

(2) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in §31.3402(n)–1 and whose liability for such tax is determined on a calendar-year basis, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in §3l.3402(n)–1) for his taxable year which begins with the next calendar year, the employee must furnish his employer with a new withholding exemption certificate which does not contain such statements, on or before December 1 of the first-mentioned calendar year. If it first becomes unreasonable for the employee to so anticipate in December, the new certificate must be furnished within 10 days after the day on which it first becomes unreasonable for the employee to so anticipate.

(3) Before December 1 of each year, every employer should request each of his employees to file a new withholding exemption certificate for the ensuing calendar year, in the event of change in the employee's exemption status since the filing of his latest certificate.

(d) *Inclusion of account number on withholding exemption certificate.* Every individual to whom an account number has been assigned shall include such number of any withholding exemption certificate filed with an employer. For provisions relating to the obtaining of an account number, see §31.6011 (b)–2.

(e) *Invalid withholding exemption certificates.* Any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid; see paragraph (b) of §31.3402(f)(5)–1 for the definitions of alteration and unauthorized addition. Any withholding exemption certificate which the employee clearly indicates to be false by an oral statement or by a written statement (other than one made on the withholding exemption certificate itself) made by him to the employer on or before the date on which the employee furnishes such certificate is also invalid. For purposes of the preceding sentence, the term “employer” includes any individual authorized by the

employer either to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions. If an employer receives an invalid withholding exemption certificate, he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer shall withhold from the employee as from a single person claiming no exemptions (see §31.3402 (f)(2)–1(a)); if, however, a prior certificate is in effect with respect to the employee, the employer shall continue to withhold in accordance with the prior certificate.

(f) *Applicability of withholding exemption certificate to qualified State individual income taxes.* The withholding exemption certificate shall be use for purposes of withholding with respect to qualified State individual income taxes as well as Federal tax. For provisions relating to the withholding exemption certificate with respect to such State taxes, see paragraph (d)(3)(i) of §301.6361–1 of this chapter (Regulation on Procedure and Administration).

(g) For further guidance, *see* §31.3402(f)(2)–1T(g).

(68A Stat. 731 (26 U.S.C. 6001); 68A Stat. 732 (26 U.S.C. 6011); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 6516, 25 FR 13105, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7048, 35 FR 10291, June 24, 1970; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7598, 44 FR 14552, Mar. 13, 1979; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7772, 46 FR 17548, Mar. 19, 1981; T.D. 7803, 47 FR 3547, Jan. 26, 1982; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987; T.D. 9196, 70 FR 19696, Apr. 14, 2005]

§ 31.3402(f)(2)-1T Withholding exemption certificates (temporary).

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(a) through (f) [Reserved] For further guidance, see §31.3402(f)(2)–1(a) through (f).

(g) *Submission of certain withholding exemption certificates and notice of the maximum number of withholding exemptions permitted*—(1) *Submission of certain withholding exemption certificates.* (i) An employer must submit to the Internal Revenue Service (IRS) a copy of any currently effective withholding exemption certificate as directed in a written notice to the employer from the IRS or as directed in published guidance. A notice to the employer may relate either to one or more named employees; to one or more reasonably segregable units of the employer; or to withholding exemption certificates under certain specified criteria. The notice will designate the IRS office where the copies of the withholding exemption certificates must be submitted. Employers may also be required to submit copies of withholding exemption certificates under certain specified criteria when directed to do so by the IRS in published guidance. For purposes of the preceding sentence, the term published guidance means a revenue procedure or notice published in the Internal Revenue Bulletin (*see*

§601.601(d)(2) of this chapter). Alternatively, upon notice from the IRS, the employer must make withholding exemption certificates received from one or more named employees; from one or more reasonably segregable units of the employer; or from employees who have furnished withholding exemption certificates under certain specified criteria, available for inspection by an IRS employee (*e. g.,* a compliance check).

(ii) After a copy of a withholding exemption certificate has been submitted to the IRS under this paragraph (g)(1), the employer must withhold tax on the basis of the withholding exemption certificate, if the withholding exemption certificate meets the requirements of §31.3402(f)(5)–1, unless that certificate must be disregarded based on a notice of the maximum number of withholding exemptions permitted under the provisions of paragraph (g)(2) of this section.

(2) *Notice of maximum number of withholding exemptions permitted.* (i) The IRS may notify the employer in writing that the employee is not entitled to claim a complete exemption from withholding and the employee is not entitled to claim a total number of withholding exemptions more than the maximum number of withholding exemptions specified by the IRS in the written notice. The notice will specify the IRS office to be contacted for further information. The notice of maximum number of withholding exemptions permitted may be issued if—

(A) The IRS determines that a copy of a withholding exemption certificate submitted under paragraph (g)(1) of this section contains a materially incorrect statement or determines, after a request to the employee for verification of the statements on the certificate, that the IRS lacks sufficient information to determine if the certificate is correct; or

(B) The IRS otherwise determines that the employee is not entitled to claim a complete exemption from withholding and is not entitled to claim more than a specified number of withholding exemptions.

(ii) If the IRS provides a written notice to the employer under this paragraph (g)(2), the IRS will also provide the employer with a written notice for the employee (employee notice) that identifies the maximum number of withholding exemptions permitted and the process by which the employee can provide additional information to the IRS for purposes of determining the appropriate number of withholding exemptions. The IRS will also mail a similar written notice to the employee's last known address. For further guidance regarding the definition of last known address, *see* §301.6212–2 of this chapter.

(iii) If the employee is still employed by the employer, the employer must furnish the employee notice to the employee within 10 business days of receipt. If the employee is no longer employed by the employer, the employer is not required to furnish the employee notice to the employee but the employer must send a written response to the IRS office designated in the notice indicating that the employee is no longer employed by the employer.

(iv) Except as provided in paragraph (g)(2)(v) and (vi) of this section, the employer must withhold tax

on the basis of the maximum number of withholding exemptions specified in the written notice received from the IRS. The employer must withhold tax in accordance with the notice as of the date specified in the notice, which shall be no earlier than 45 calendar days after the date of the notice.

(v) If a withholding exemption certificate is in effect with respect to the employee before the employer receives a notice from the IRS of the maximum number of withholding exemptions permitted under this paragraph (g)(2), the employer must continue to withhold tax in accordance with the existing withholding exemption certificate rather than on the basis of the notice if the existing withholding exemption certificate does not claim complete exemption from withholding and claims a number of withholding exemptions less than the maximum number specified by the IRS in the written notice to the employer.

(vi) If the employee furnishes a new withholding exemption certificate after the employer receives a notice from the IRS of the maximum number of withholding exemptions permitted under this paragraph (g)(2), the employer must withhold tax on the basis of that new certificate as currently effective only if the new certificate does not claim complete exemption from withholding and claims a number of withholding exemptions less than the number specified by the IRS in the notice to the employer. If any new certificate claims complete exemption from withholding or claims a number of withholding exemptions more than the maximum number specified by the IRS in the notice, then the employer must disregard the new certificate and must continue to withhold tax on the basis of the maximum number specified in the notice received from the IRS unless the IRS by subsequent written notice advises the employer to withhold tax on the basis of that new certificate. If the employee wants to put a new certificate into effect to claim complete exemption from withholding or to claim a number of withholding exemptions more than the maximum number specified by the IRS in the notice to the employer, the employee must submit to the IRS office designated in the employee notice earlier furnished to the employee under this paragraph (g)(2) that new certificate and a written statement to support the claims made by the employee on the new certificate.

(3) *Definition of employer.* For purposes of this paragraph (g), the term employer includes any person authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions.

(4) *Effective date.* This paragraph (g) applies on April 14, 2005. The applicability of this paragraph (g) expires on or before April 11, 2008.

[T.D. 9196, 70 FR 19696, Apr. 14, 2005; 70 FR 28211, May 17, 2005]

§ 31.3402(f)(3)-1 When withholding exemption certificate takes effect.

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(a) A withholding exemption certificate furnished the employer in any case in which no previous

withholding exemption certificate is in effect with such employer, shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

(b) A withholding exemption certificate furnished the employer in any case in which a previous withholding exemption certificate is in effect with such employer shall, except as hereinafter provided, take effect with respect to the first payment of wages made on or after the first status determination date which occurs at least 30 days after the date on which such certificate is so furnished. However, at the election of the employer, except as hereinafter provided, such certificate may be made effective with respect to any payment of wages made on or after the date on which such certificate is so furnished and before such status determination date.

(c) A withholding exemption certificate furnished the employer pursuant to section 3402(f)(2)(C) (see paragraph (c) of §31.3402(f)(2)–1 or paragraph (b)(2)(ii) of §31.3402(1)–1) which effects a change for the next calendar year, shall not take effect, and may not be made effective, with respect to the calendar year in which the certificate is furnished. A withholding exemption certificate furnished the employer by an employee who determines his income tax liability on a basis other than a calendar-year basis, as required by paragraph (b)(4) of §31.3402(f)(2)–1, which effects a change for the employee's next taxable year, shall not take effect, and may not be made effective, with respect to the taxable year of the employee in which the certificate is furnished.

(d) For purposes of this section, the term “status determination date” means January 1, May 1, July 1, and October 1 of each year.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13106, Dec. 20, 1960, as amended by T.D. 7048, 35 FR 10291, June 24, 1970; T. D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(4)-1 Period during which withholding exemption certificate remains in effect.

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(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate which takes effect under section 3402(f) of the Internal Revenue Code of 1954, or which on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer before January 1, 1982. See §31.3402(f)(4)–2 for the rules applicable to withholding exemption certificates furnished by the

employee to the employer after December 31, 1981.

(b) *Withholding allowances under section 3402(m) for itemized deductions.* In no case shall the portion of a withholding exemption certificate relating to withholding allowances under section 3402 (m) for itemized deductions be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A of the Code is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his taxable year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in §31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be deemed to have been made also with respect to his current taxable year and his taxable year immediately thereafter, respectively, until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate which contains such statements expires. In no case shall a withholding exemption certificate which contains such statements be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his original current taxable year for purposes of such statements, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his original current taxable year for purposes of such statements.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7048, 35 FR 10291, June 24, 1970, as amended by T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(4)-2 Effective period of withholding exemption certificate.

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(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate that takes effect under section 3402(f) of the Internal Revenue Code of 1954, or that on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer after December 31, 1981. See §31.3402(f)(4)–1 for the rules applicable to withholding exemption certificates furnished by the employee to the employer before January 1, 1982.

(b) *Withholding allowances under section 3402(m).* See paragraphs (b) and (c) of §31.3402(f)(2)–1 (relating to withholding exemption certificates) for information as to when an employee claiming withholding allowances under section 3402(m) and the regulations thereunder must file a new withholding exemption certificate with his employer.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in §31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be effective until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate that contains such statements expires. In no case shall a withholding exemption certificate that contains such statements be effective with respect to any payment of wages made to an employee:

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar year basis, after February 15 of the calendar year following the estimation year, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the 15th day of the 2nd calendar month following the last day of the estimation year.

(d) *Estimation year.* The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(5)-1 Form and contents of withholding exemption certificates.

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(a) For further guidance, see §31.3402(f)(5)–1T(a).

(b) *Invalid Form W–4.* A Form W–4 does not meet the requirements of section 3402(f)(5) or this section and is invalid if it contains an alteration or unauthorized addition. For purposes of §31.3402(f)(2)–1(e) and this paragraph—

(1) An alteration of a withholding exemption certificate is any deletion of the language of the jurat or other similar provision of such certificate by which the employee certifies or affirms the correctness of the completed certificate, or any material defacing of such certificate;

(2) An unauthorized addition to a withholding exemption certificate is any writing on such certificate other than the entries requested (e.g., name, address, and number of exemptions claimed).

(c) *Electronic Form W–4*—(1) *In general.* An employer may establish a system for its employees to file withholding exemption certificates electronically.

(2) *Requirements*—(i) *In general.* The electronic system must ensure that the information received is the information sent, and must document all occasions of employee access that result in the filing of a Form W–4. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and filing the Form W–4 is the employee identified in the form.

(ii) *Same information as paper Form W–4.* The electronic filing must provide the employer with exactly the same information as the paper Form W–4.

(iii) *Jurat and signature requirements.* The electronic filing must be signed by the employee under penalties of perjury.

(A) *Jurat.* The jurat (perjury statement) must contain the language that appears on the paper Form W–4. The electronic program must inform the employee that he or she must make the declaration contained in the jurat and that the declaration is made by signing the Form W–4. The instructions and the language of the jurat must immediately follow the employee's income tax withholding selections and immediately precede the employee's electronic signature.

(B) *Electronic signature.* The electronic signature must identify the employee filing the electronic Form W–4 and authenticate and verify the filing. For this purpose, the terms “authenticate” and “verify” have the same meanings as they do when applied to a written signature on a paper Form W–4. An electronic signature can be in any form that satisfies the foregoing requirements. The electronic signature must be the final entry in the employee's Form W–4 submission.

(iv) *Copies of electronic Forms W–4.* Upon request by the Internal Revenue Service, the employer must supply a hardcopy of the electronic Form W–4 and a statement that, to the best of the employer's

knowledge, the electronic Form W–4 was filed by the named employee. The hardcopy of the electronic Form W–4 must provide exactly the same information as, but need not be a facsimile of, the paper Form W–4.

(3) *Effective date*—(i) *In general.* This paragraph applies to all withholding exemption certificates filed electronically by employees on or after January 2, 1997.

(ii) *Special rule for certain Forms W–4.* In the case of an electronic system that precludes the filing of Forms W–4 required on commencement of employment and Forms W–4 claiming more than 10 withholding exemptions or exemption from withholding, the requirements of paragraph (c)(2)(iii) of this section will be treated as satisfied if the Form W–4 is filed electronically before January 1, 1999.

[T.D. 7423, 41 FR 26217, June 25, 1976, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983; T. D. 8706, 62 FR 24, Jan. 2, 1997; T.D. 9196, 70 FR 19696, Apr. 14, 2005]

§ 31.3402(f)(5)-1T Form and contents of withholding exemption certificates (temporary).

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(a)(1) *Form W–4.* Form W–4, "Employee's Withholding Allowance Certificate," is the form prescribed for the withholding exemption certificate required to be furnished under section 3402(f)(2). A withholding exemption certificate must be prepared in accordance with the instructions and regulations applicable thereto, and must set forth fully and clearly the data therein called for. Blank copies of paper Forms W–4 will be supplied to employers upon request to the Internal Revenue Service (IRS). An employer may also download and print Form W–4 from the IRS Internet site at *http://www.irs.gov.* In lieu of the prescribed form, employers may prepare and use a form the provisions of which are identical with those of the prescribed form, but only if employers also provide employees with all the tables, instructions, and worksheets contained in the Form W–4 in effect at that time and only if employers comply with all revenue procedures relating to substitute forms in effect at that time. Employers may refuse to accept a substitute form developed by an employee and the employee submitting such form will be treated as failing to furnish a withholding exemption certificate. For further guidance regarding the employer's obligations when an employee is treated as failing to furnish a withholding exemption certificate, see §31.3402(f)(2)–1.

(2) *Effective date.* This paragraph (a) applies on April 14, 2005. The applicability of this paragraph (a) expires on or before April 11, 2008.

(b) through (c) [Reserved] For further guidance, see §31.3402(f)(5)–1(b) through (c).

[T.D. 9196, 70 FR 19697, Apr. 14, 2005; 70 FR 28211, May 17, 2005]

§ 31.3402(f)(6)-1 Withholding exemptions for nonresident alien individuals.

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A nonresident alien individual (other than, in regard to wages paid after February 28, 1979, a nonresident alien individual treated as a resident under section 6013(g) or (h)) subject to withholding under section 3402 is on any 1 day entitled under section 3402(f)(1) and §31.3402(f)(1)–1 to the number of withholding exemptions corresponding to the number of personal exemptions to which he is entitled on such day by reason of the application of section 873(b)(3) or section 876, whichever applies. Thus, a nonresident alien individual who is not a resident of Canada or Mexico and who is not a resident of Puerto Rico during the entire taxable year, is allowed under section 3402(f)(1) only one withholding exemption.

[T.D. 6908, 31 FR 16776, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980]

§ 31.3402(g)-1 Supplemental wage payments.

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Link to an amendment published at 71 FR 77612, Dec. 27, 2006.

(a) *In general and withholding on supplemental wages in excess of $1,000,000*—(1) *Determination of supplemental wages and regular wages*—(i) *Supplemental wages.* An employee's remuneration may consist of regular wages and supplemental wages. Supplemental wages are all wages paid by an employer that are not regular wages. Supplemental wages include wage payments made without regard to an employee's payroll period, but also may include payments made for a payroll period. Examples of wage payments that are included in supplemental wages include reported tips (except as provided in paragraph (a)(1)(v) of this section), overtime pay (except as provided in paragraph (a)(1)(iv) of this section), bonuses, back pay, commissions, wages paid under reimbursement or other expense allowance arrangements, nonqualified deferred compensation includible in wages, wages paid as noncash fringe benefits, sick pay paid by a third party as an agent of the employer, amounts that are includible in gross income under section 409A, income recognized on the exercise of a nonstatutory stock option, wages from imputed income for health coverage for a non-dependent, and wage income recognized on the lapse of a restriction on restricted property transferred from an employer to an employee. Amounts that are described as supplemental wages in this definition are supplemental wages regardless of whether the employer has paid the employee any regular wages during either the calendar year of the payment or any prior calendar year. Thus, for example, if the only wages that an employer has ever paid an employee are payments of noncash fringe benefits and income recognized on the exercise of a nonstatutory stock option, such payments are classified as supplemental wages.

(ii) *Regular wages.* As distinguished from supplemental wages, regular wages are amounts that are paid at a regular hourly, daily, or similar periodic rate (and not an overtime rate) for the current payroll period or at a predetermined fixed determinable amount for the current payroll period. Thus, among

other things, wages that vary from payroll period to payroll period (such as commissions, reported tips, bonuses, or overtime pay) are not regular wages, except that an employer may treat tips as regular wages under paragraph (a)(1)(v) of this section and an employer may treat overtime pay as regular wages under paragraph (a)(1)(iv) of this section.

(iii) *Amounts that are not wages subject to income tax withholding.* If an amount of remuneration is not wages subject to income tax withholding, it is neither regular wages nor supplemental wages. Thus, for example, income from the disqualifying dispositions of shares of stock acquired pursuant to the exercise of statutory stock options, as described in section 421(b), is not included in regular wages or supplemental wages.

(iv) *Optional treatment of overtime pay as regular wages.* Employers may treat overtime pay as regular wages rather than supplemental wages. For this purpose, *overtime pay* is defined as any pay required to be paid pursuant to federal (Fair Labor Standards Act), state, or local governmental laws at a rate higher than the normal wage rate of the employee because the employee has worked hours in excess of the number of hours deemed to constitute a normal work week or work day.

(v) *Optional treatment of tips as regular wages.* Employers may treat tips as regular wages rather than supplemental wages. For this purpose, tips are defined as including all tips which are reported to the employer pursuant to section 6053.

(vi) *Amount to be withheld.* The calculation of the amount of the income tax withholding with respect to supplemental wage payments is provided for under paragraph (a)(2) through (a)(7) of this section.

(2) *Mandatory flat rate withholding.* If a supplemental wage payment, when added to all supplemental wage payments previously made by one employer (as defined in paragraph (a)(3) of this section) to an employee during the calendar year, exceeds $1,000,000, the rate used in determining the amount of withholding on the excess (including any excess which is a portion of a supplemental wage payment) shall be equal to the highest rate of tax applicable under section 1 for such taxable years beginning in such calendar year. This flat rate shall be applied without regard to whether income tax has been withheld from the employee's regular wages, without allowance for the number of withholding allowances claimed by the employee on Form W–4, “Employee's Withholding Allowance Certificate,” without regard to whether the employee has claimed exempt status on Form W–4, without regard to whether the employee has requested additional withholding on Form W–4, and without regard to the withholding method used by the employer. Withholding under this paragraph (a)(2) is mandatory flat rate withholding.

(3) *Certain persons treated as one employer*—(i) *Persons under common control.* For purposes of paragraph (a)(2) of this section, all persons treated as a single employer under subsection (a) or (b) of section 52 shall be treated as one employer.

(ii) *Agents.* For purposes of paragraph (a)(2) of this section, any payment made to an employee by a

third party acting as an agent for the employer (regardless of whether such person shall have been designated as an agent pursuant to section 3504) shall be considered as made by the employer except as provided in paragraph (a)(4)(iii) of this section.

(4) *Treatment of certain items in determining applicability of mandatory flat rate withholding*—(i) *Optional treatment of compensation not subject to income tax withholding.* For purposes of paragraph (a)(2) of this section, employers may determine whether an employee has received $1,000,000 of supplemental wages during a calendar year by including in supplemental wages amounts includible in income but not subject to withholding that are reported as wages, tips, other compensation on Form W–2.

(ii) *Allocation of salary reduction deferrals.* In allocating salary reduction deferral amounts excludable from wages for purposes of determining whether the employer has paid $1,000,000 of supplemental wages under paragraph (a)(2) of this section, employers must allocate such salary reduction deferral amounts to the type of compensation (*i.e.*, gross amounts of regular wage payments or gross amounts of supplemental wage payments) actually being deferred.

(iii) *Optional de minimis exception for certain payments by agents.* For purposes of paragraph (a)(2) of this section, if an agent makes total wage payments (including regular wages and supplemental wages) of less than $100,000 to an individual during any calendar year, an employer or other agent may disregard such payments in determining whether the individual has received $1,000,000 of supplemental wages during the calendar year, and such agent need not consider whether the individual has received other supplemental wages in determining the amount of income tax to be withheld from the payments. An employer may not avail itself of this exception if the employer is making payments to the employee using five or more agents and a principal effect of such use of agents is to reduce the applicability of mandatory flat rate withholding to the employee. For purposes of paragraph (a)(2) of this section, if an agent makes total wage payments of $100,000 or more to an individual during any calendar year, the entire amount of supplemental wages paid by the agent during the calendar year to the employee must be taken into account (by other agents of the employer that make total wage payments to the employee of $100,000 or more, by the agent, and by the employer for which the agent is acting) in determining whether the employee has received $1,000,000 of supplemental wages.

(iv) *Treatment of supplemental wage payment exceeding $1,000,000 cumulative threshold.* In the case of a supplemental wage payment that, when added to all supplemental wage payments previously made by the employer to the employee in the calendar year, results in the employee having received in excess of $1,000,000 supplemental wages for the calendar year, the employer is required to impose withholding under paragraph (a)(2) of this section only on the portion of the payment that is in excess of $1,000,000 (taking into account all prior supplemental wage payments during the year). However, an employer may subject the entire amount of such supplemental wage payment to the withholding imposed by paragraph (a)(2) of this section.

(5) *Withholding on supplemental wages that are not subject to mandatory flat rate withholding.* To the

extent that paragraph (a)(2) of this section does not apply to a supplemental wage payment (or a portion of a payment), the amount of the tax required to be withheld on the supplemental wages when paid shall be determined under the rules provided in paragraphs (a)(6) and (7) of this section.

(6) *Aggregate procedure for withholding on supplemental wages*—(i) *Applicability.* The employer is required to determine withholding upon supplemental wages under this paragraph (a)(6) if paragraph (a)(2) of this section does not apply to the payment or portion of the payment and if paragraph (a)(7) of this section may not be used with respect to the payment. In addition, employers have the option of using this paragraph (a)(6) to calculate withholding with respect to a supplemental wage payment, if paragraph (a)(2) of this section does not apply to the payment, but if paragraph (a)(7) of this section could be used with respect to the payment.

(ii) *Procedure.* Provided this procedure applies under paragraph (a)(6)(i) of this section, the supplemental wages, if paid concurrently with wages for a payroll period, are aggregated with the wages paid for such payroll period. If not paid concurrently, the supplemental wages are aggregated with the wages paid or to be paid within the same calendar year for the last preceding payroll period or for the current payroll period, if any. The amount of tax to be withheld is determined as if the aggregate of the supplemental wages and the regular wages constituted a single wage payment for the regular payroll period. The withholding method used by the employer with respect to regular wages would then be used to calculate the withholding on this single wage payment and the employer would take into consideration the Form W–4 submitted by the employee. This procedure is the aggregate procedure for withholding on supplemental wages.

(7) *Optional flat rate withholding on supplemental wages*—(i) *Applicability.* The employer may determine withholding upon supplemental wages under this paragraph (a)(7) if three conditions are met —

(A) Paragraph (a)(2) of this section does not apply to the payment or the portion of the payment;

(B) The supplemental wages are either not paid concurrently with regular wages or are separately stated on the payroll records of the employer; and

(C) Income tax has been withheld from regular wages of the employee during the calendar year of the payment or the preceding calendar year.

(ii) *Procedure.* The determination of the tax to be withheld under paragraph (a)(7)(iii) of this section is made without reference to any payment of regular wages, without allowance for the number of withholding allowances claimed by the employee on Form W–4, and without regard to whether the employee has requested additional withholding on Form W–4. Withholding under this procedure is optional flat rate withholding.

(iii) *Rate applicable for purposes of optional flat rate withholding.* Provided the conditions of

paragraph (a)(7)(i) of this section have been met, the employer may determine the tax to be withheld—

(A) From supplemental wages paid after April 30, 1966, and prior to January 1, 1994, by using a flat percentage rate of 20 percent;

(B) From supplemental wages paid after December 31, 1993, and on or before August 6, 2001, by using a flat percentage rate of 28 percent;

(C) From supplemental wages paid after August 6, 2001, and on or before December 31, 2001, by using a flat percentage rate of 27.5 percent;

(D) From supplemental wages paid after December 31, 2001, and on or before May 27, 2003, by using a flat percentage rate of 27 percent;

(E) From supplemental wages paid after May 27, 2003, and on or before December 31, 2004, by using a flat percentage rate of 25 percent; and

(F) From supplemental wages paid after December 31, 2004, by using a flat percentage rate of 28 percent (or the corresponding rate in effect under section 1(i)(2) for taxable years beginning in the calendar year in which the payment is made).

(8) *Examples.* For purposes of these examples, it is assumed that the rate for purposes of mandatory flat rate withholding for 2007 is 35 percent, and the rate for purposes of optional flat rate withholding for 2007 is 25 percent. The following examples illustrate this paragraph (a):

Example 1. (i) Employee A is an employee of three entities (X, Y, and Z) that are treated as a single employer under section 52(a) or (b). In 2007, X pays regular wages to A on a monthly payroll period for services performed for X, Y, and Z. The regular wages are paid on the third business day of each month. Income tax is withheld from the regular wages of A during the year. A receives only the following supplemental wage payments during 2007 in addition to the regular wages paid by X—

(A) A bonus of $600,000 from X on March 15, 2007;

(B) A bonus of $2,300,000 from Y on November 15, 2007; and

(C) A bonus of $10,000 from Z on December 31, 2007.

(ii) In this *Example 1*, the $600,000 bonus from X is a supplemental wage payment. The withholding on the $600,000 payment from X could be determined under either paragraph (a)(6) or (7) of this section because income tax has been withheld from the regular wages of A. If X elects to use the aggregate procedure under paragraph (a)(6) of this section, the amount of withholding on the supplemental wages would be based on aggregating the supplemental wages and the regular wages paid by X either for the current or last payroll period and treating the total of the regular wages paid by X and the $600,000 supplemental wages as a single

wage payment for a regular payroll period. The withholding method used by the employer with respect to regular wages would then be used to calculate the withholding on this single wage payment, and the employer would take into consideration the Form W–4 furnished by the employee.

(iii) In this *Example 1*, the $2,300,000 bonus from Y is a supplemental wage payment. To calculate the withholding on the $2,300,000 supplemental wage payment from Y, the $600,000 of supplemental wages X has already paid to A in 2007 must be taken into account because X and Y are treated as the same employer under section 52(a) or (b). Thus, the withholding on the first $400,000 of the payment (i.e., the cumulative supplemental wages not in excess of $1,000,000) is computed separately from the withholding on the remaining $1,900,000 of the payment (i.e., the amount of the cumulative supplemental wages in excess of $1,000,000). With respect to the first $400,000, the withholding could be computed under either paragraph (a)(6) or (a)(7) of this section, because income tax has been withheld from the regular wages of the employee. If Y elected to withhold income tax using paragraph (a)(7) of this section, Y would withhold on the $400,000 component at 25 percent (pursuant to paragraph (a)(7)(iii)(F) of this section), which would result in $100,000 tax withheld. The remaining $1,900,000 of the bonus would be subject to mandatory flat rate withholding at the maximum rate of tax in effect under section 1 for 2007 (35%) without regard to the Form W–4 submitted by A. The amount withheld from the $1,900,000 would be $665,000. The withholding on the first component and the withholding on the second component then would be added together to determine the total income tax withholding on the supplemental wage payment from Y. Alternatively, under paragraph (a)(4)(iv) of this section, Y could treat the entire $2,300,000 bonus payment as subject to mandatory flat rate withholding at the maximum rate of tax (35%), in which case the amount to be withheld would be 35 percent of $2,300,000, or $805,000.

(iv) The $10,000 bonus paid from Z is also a supplemental wage payment. To calculate the withholding on the $10,000 bonus, the $2,900,000 in cumulative supplemental wages already paid to A in 2007 by X and Y must be taken into account because X, Y, and Z are treated as a single employer. The entire $10,000 bonus would be subject to mandatory flat rate withholding at the maximum rate of tax in effect under section 1 for 2007. The income tax required to be withheld on this payment would be 35 percent of $10,000 or $3,500.

Example 2. Employees B and C work for employer M. Each employee receives a monthly salary of $3,000 in 2007. As a result of the withholding allowances claimed by B, there has been no income tax withholding on the regular wages M pays to B during either 2007 or 2006. In contrast, M has withheld income tax from regular wages M pays to C during 2007. Together with the monthly salary check paid in December 2007 to each employee, M includes a bonus of $2,000, which is the only supplemental wage payment each employee receives from M in 2007. The bonuses are separately stated on the payroll records of M. Because M has withheld no income tax from B's regular wages during either the calendar year of the $2,000 bonus or the preceding calendar year, M cannot use optional flat rate withholding provided under paragraph (a)(7) of this section to calculate the income tax withholding on B's $2,000 bonus. Consequently, M must use the aggregate procedure set forth in paragraph (a)(6) of this section to calculate the income tax withholding due on the $2,000 bonus to B. With respect to the bonus paid to C, M has the option of using either the aggregate procedure provided under paragraph (a)(6) of this section or the optional flat rate withholding provided under paragraph (a)(7) of this section to calculate the income tax withholding due.

Example 3. (i) Employee D works as an employee of Corporation R. Corporations R and T are treated as a single employer under section 52(a) or (b). R makes regular wage payments to Employee D of $200,000 on a monthly basis in 2007, and income tax is withheld from those wages. R pays D a bonus for his services as an

employee equal to $3,000,000 on June 30, 2007. Unrelated company U pays D sick pay as an agent of the employer R and such sick pay is supplemental wages pursuant to §31.3401(a)-1(b)(8)(i)(*b*)(*2*). U pays D $50,000 of sick pay on October 31, 2007. Corporation T decides to award bonuses to all employees of R and T, and pays a bonus of $100,000 to D on December 31, 2007. D received no other payments from R, T, or U.

(ii) In chronological summary, D is paid the following wages other than the regular monthly wages paid by R:

(A) June 30, 2007—$3,000,000 (bonus from R);

(B) October 31, 2007—$50,000 (sick pay from U); and

(C) December 31, 2007—$100,000 (bonus from T).

(iii) In this *Example 3*, each payment of wages other than the regular monthly wage payments from R is considered to be supplemental wages for purposes of withholding under §31.3402(g)–1(a)(2). The amount of regular wages from R is irrelevant in determining when mandatory flat rate withholding on supplemental wages must be applied.

(iv) Because income tax has been withheld on D's regular wages, income tax may be withheld on $1,000,000 of the $3,000,000 bonus paid on June 30, 2007, under either paragraph (a)(6) or (7) of this section. If R elects to use optional flat rate withholding provided under paragraph (a)(7)(iii)(f) of this section, withholding would be calculated at 25 percent of the $1,000,000 portion of the payment and would be $250,000.

(v) Income tax withheld on the following supplemental wage payments (or portion of a payment) as follows is required to be calculated at the maximum rate in effect under section 1, or 35 percent in 2007—

(A) $2,000,000 of the $3,000,000 bonus paid by R on June 30, 2007; and

(B) all of the $100,000 bonus paid by T on December 31, 2007.

(vi) Pursuant to paragraph (a)(4)(iii) of this section, because the total wage payments made by U, an agent of the employer, to D are less than $100,000, U is permitted to determine the amount of income tax to be withheld without regard to other supplemental wage payments made to the employee. Income tax withholding on the $50,000 in sick pay may be determined under either paragraph (a)(6) or (7) of this section. If U elects to withhold income tax at the flat rate provided under paragraph (a)(7)(iii)(F) of this section, withholding on the $50,000 of sick pay would be calculated at 25 percent of the $50,000 payment and would be $12,500. Alternatively, U may choose to take account of the $3,000,000 in supplemental wages paid by the employer during 2007 prior to payment of the $50,000 sick pay, and withholding on the $50,000 of sick pay could be calculated applying the mandatory flat rate of 35 percent, resulting in withholding of $17,500 on the $50,000 payment.

Example 4. (i) Employer J has decided it wants to grant its employee B a $1,000,000 net bonus (after withholding) to be paid in 2007. Employer J has withheld income tax from the regular wages of the employee. Employer J has made no other supplemental wage payments to B during the year.

(ii) This *Example 4* requires grossing up the supplemental wage payment to determine the gross wages necessary to result in a net payment of $1,000,000. If the employer elected to use optional flat rate withholding, the first $1,000,000 of the wages would be subject to 25 percent withholding. However, any wages above that, including amounts representing gross-up payments, would be subject to mandatory 35 percent withholding. The withholding applicable to the first $1,000,000 (i.e., $250,000) would thus be required to be grossed-up at a 35 percent rate to determine the gross wage amount in excess of $1,000,000. Thus, the wages in excess of $1,000,000 would be equal to $250,000 divided by .65 (computed by subtracting .35 from 1) or $384,615.38. Thus the total supplemental wage payment, taking into account income tax withholding only (and not Federal Insurance Contributions Act taxes), to B would be $1,384,615.38, and the total withholding with respect to the payment if Employer J elected optional flat rate withholding with respect to the first $1,000,000, would be $384,615.38.

(9) *Certain noncash payments to retail commission salesmen.* For provisions relating to the treatment of wages that are not subject to paragraph (a)(2) of this section and that are paid other than in cash to retail commission salesmen, see §31.3402(j)–1.

(10) *Alternative methods.* The Secretary may provide by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter) for alternative withholding methods that will allow an employer to meet its responsibility for the mandatory flat rate withholding required by paragraph (a)(2) of this section.

(b) *Special rule where aggregate withholding exemption exceeds wages paid.* (1) This rule does not apply to the extent that paragraph (a)(2) of this section applies to the supplemental wage payment. If supplemental wages are paid to an employee during a calendar year for a period which involves two or more consecutive payroll periods, for which other wages also are paid during such calendar year, and the aggregate of such other wages is less than the aggregate of the amounts determined under the table provided in section 3402(b) (1) as the withholding exemptions applicable for such payroll periods, the amount of the tax required to be withheld on the supplemental wages shall be computed as follows:

Step 1. Determine an average wage for each of such payroll periods by dividing the sum of the supplemental wages and the wages paid for such payroll periods by the number of such payroll periods.

Step 2. Determine a tax for each payroll period as if the amount of the average wage constituted the wages paid for such payroll period.

Step 3. From the sum of the amounts of tax determined in Step 2 subtract the total amount of tax withheld, or to be withheld, from the wages, other than the supplemental wages, for such payroll periods. The remainder, if any shall constitute the amount of the tax to be withheld upon the supplemental wages.

Example. An employee has a weekly payroll period ending on Saturday of each week, the wages for which are paid on Friday of the succeeding week. On the 10th day of each month he is paid a bonus based upon production during the payroll periods for which wages were paid in the preceding month. The employee is paid a weekly wage of $64 on each of the five Fridays occurring in July 1966. On August 10, 1966, the employee is

paid a bonus of $125 based upon production during the five payroll periods covered by the wages paid in July. On the date of payment of the bonus, the employee, who is married and has three children, has a withholding exemption certificate in effect indicating that he is married and claiming five withholding exemptions. The amount of the tax to be withheld from the bonus paid on August 10, 1966, is computed as follows:

Wages paid in July 1966 for 5 payroll periods (5x$64).....		$320.00
Bonus paid August 10, 1966.....		125.00
Aggregate of wages and bonus.....		445.00
Average wage per payroll period ($445÷5).....	89.00	
Computation of tax under percentage method: Withholding exemptions (5x$13.50).....		67.50
Remainder subject to tax.....		21.50
Tax on average wage for 1 week under percentage method of withholding (married person with weekly payroll period) 14 percent of $17.50 (excess over $4)).....		2.45
Tax on average wage for 5 weeks.....		12.25
Less: Tax previously withheld on weekly wage payments of $64		None
Tax to be withheld on supplemental wages.....		12.25
Computation of tax under wage bracket method: Tax on $89 wage under weekly wage table for married person ($2.50 per week for 5 weeks).....		12.50
Less: Tax previously withheld on weekly wage payments of $64		None
Tax to be withheld on supplemental wages.....		12.50

(2) *Applicability.* The rules prescribed in this paragraph (b) shall, at the election of the employer, be applied in lieu of the rules prescribed in paragraph (a) of this section except that this paragraph shall not be applicable in any case in which the payroll period of the employee is less than one week or to the extent that paragraph (a)(2) of this section applies to the supplemental wage payment.

(c) *Vacation allowances.* Amounts of so-called "vacation allowances" shall be subject to withholding as though they were regular wage payments made for the period covered by the vacation. If the vacation allowance is paid in addition to the regular wage payment for such period, the rules applicable with respect to supplemental wage payments shall apply to such vacation allowance.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13947, Nov. 4, 1965; T.D. 6882, 31 FR 5661, Apr. 12, 1966; T.D. 9276, 71 FR 42054, July 25, 2006; T.D. 9276, 71 FR 58276, Oct. 3, 2006; T.D. 9276, 71 FR 77612, Dec. 27, 2006]

§ 31.3402(g)-2 Wages paid for payroll period of more than one year.

top

If wages are paid to an employee for a payroll period of more than one year, for the purpose of determining the amount of tax required to be deducted and withheld in respect of such wages—

(a) Under the percentage method, the amount of the tax shall be determined as if such payroll period constituted an annual payroll period, and

(b) Under the wage bracket method, the amount of the tax shall be determined as if such payroll period constituted a miscellaneous payroll period of 365 days.

§ 31.3402(g)-3 Wages paid through an agent, fiduciary, or other person on behalf of two or more employers.

top

(a) If a payment of wages is made to an employee by an employer through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays the wages payable by another employer to such employee, the amount of the tax required to be withheld on each wage payment made through such agent, fiduciary, or person shall, whether the wages are paid separately on behalf of each employer or paid in a lump sum on behalf of all such employers, be determined upon the aggregate amount of such wage payment or payments in the same manner as if such aggregate amount had been paid by one employer. Hence, under either the percentage method or the wage bracket method the tax shall be determined upon the aggregate amount of the wage payment.

(b) In any such case, each employer shall be liable for the return and payment of a pro rata portion of the tax so determined, such portion to be determined in the ratio which the amount contributed by the particular employer bears to the aggregate of such wages.

(c) For example, three companies maintain a central management agency which carries on the administrative work of the several companies. The central agency organization consists of a staff of clerks, bookkeepers, stenographers, etc., who are the common employees of the three companies. The expenses of the central agency, including wages paid to the foregoing employees, are borne by the several companies in certain agreed proportions. Company X pays 45 percent, Company Y pays 35 percent and Company Z pays 20 percent of such expenses. The amount of tax required to be withheld on the wages paid to persons employed in the central agency should be determined in accordance with the provisions of this section. In such event, Company X is liable as an employer for the return and payment of 45 percent of the tax required to be withheld, Company Y is liable for the return and payment of 35 percent of the tax and Company Z is liable for the return and payment of 20 percent of the tax. (See §31.3504–1, relating to acts to be performed by agents.)

§ 31.3402(h)(1)-1 Withholding on basis of average wages.

 top

(a) *In general.* An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee on the basis of the employee's average estimated wages, with necessary adjustments, for any quarter. This paragraph applies only where the method desired to be used includes wages other than tips (whether or not tips are also included).

(b) *Withholding on the basis of average estimated tips*—(1) *In general.* Subject to certain limitations and conditions, an employer may, at his discretion, withhold the tax under section 3402 in respect of tips reported by an employee to the employer on an estimated basis. An employer who elects to make withholding of the tax on an estimated basis shall:

(i) In respect of each employee, make an estimate of the amount of tips that will be reported, pursuant to section 6053, by the employee to the employer in a calendar quarter.

(ii) Determine the amount which must be deducted and withheld upon each payment of wages (exclusive of tips) which are under the control of the employer to be made during the quarter by the employer to the employee. The total amount which must be deducted and withheld shall be determined by assuming that the estimated tips for the quarter represent the amount of wages to be paid to the employee in the form of tips in the quarter and that such tips will be ratably (in terms of pay periods) paid during the quarter.

(iii) Deduct and withhold from any payment of wages (exclusive of tips) which are under the control of the employer, or from funds referred to in section 3402(k) (see §§31.3402(k) and 31.3402(k)–1),

such amount as may be necessary to adjust the amount of tax withheld on the estimated basis to conform to the amount required to be withheld in respect of tips reported by the employee to the employer during the calendar quarter in written statements furnished to the employer pursuant to section 6053(a). If an adjustment is required, the additional tax required to be withheld may be deducted upon any payment of wages (exclusive of tips) which are under the control of the employer during the quarter and within the first 30 days following the quarter or from funds turned over by the employee to the employer for such purpose within such period. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see §31.6413(a)–1.

(2) *Estimating tips employee will report*—(i) *Initial estimate.* The initial estimate of the amount of tips that will be reported by a particular employee in a calendar quarter shall be made on the basis of the facts and circumstances surrounding the employment of that employee. However, if a number of employees are employed under substantially the same circumstances and working conditions, the initial estimate established for one such employee may be used as the initial estimate for other employees in that group.

(ii) *Adjusting estimate.* If the quarterly estimate of tips in respect of a particular employee continues to differ substantially from the amount of tips reported by the employee and there are no unusual factors involved (for example, an extended absence from work due to illness) the employer shall make an appropriate adjustment of his estimate of the amount of tips that will be reported by the employee.

(iii) *Reasonableness of estimate.* The employer must be prepared, upon request of the district director, to disclose the factors upon which he relied in making the estimate, and his reasons for believing that the estimate is reasonable.

[T.D. 7053, 35 FR 11626, July 21, 1970]

§ 31.3402(h)(2)-1 Withholding on basis of annualized wages.

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An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee by taking the following steps:

Step 1. Multiply the amount of the employee's wages for the payroll period by the number of such periods in the calendar year.

Step 2. Determine the amount of tax which would be required to be deducted and withheld upon the amount determined in Step 1 if that amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period.

Step 3. Divide the amount of tax determined in Step 2 by the number of periods by which the employee's wages were multiplied in Step 1.

Example. On July 1, 1970, A, a single person who is on a weekly payroll period and claims one exemption, receives wages of $100 from X Co., his employer. X Co. multiplies the weekly wage of $100 by 52 weeks to determine an annual wage of $5,200. It then subtracts $650 for A's withholding exemption and arrives at a balance of $4,550. The applicable table in section 3402(a) for annual payroll periods indicates that the amount of tax to be withheld thereon is $376 plus $314.50 (17 percent of excess over $2,700), or a total of $690.50. The annual tax of $690.50, when divided by 52 to arrive at the portion thereof attributable to the weekly payroll period, equals $13.28. X Co. may, if it chooses, withhold $13.28 rather than the amount specified in section 3402 (a) or (c) for a weekly payroll period.

[T.D. 7053, 35 FR 11627, July 21, 1970]

§ 31.3402(h)(3)-1 Withholding on basis of cumulative wages.

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(a) *In general.* In the case of an employee who has in effect a request that the amount of tax to be withheld from his wages be computed on the basis of his cumulative wages, and whose wages since the beginning of the current calendar year have been paid with respect to the same category of payroll period (e.g., weekly or semimonthly), the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee after December 31, 1969, by taking the following steps:

Step 1. Add the amount of the wages to be paid the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year.

Step 2. Divide the aggregate amount of wages computed in Step 1 by the number of payroll periods to which that amount relates.

Step 3. Compute the total amount of tax that would have been required to be deducted and withheld under section 3402(a) if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed in Step 1) relates.

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee during the calendar year.

Example. On July 1, 1970, Y Co. employs B, a single person claiming one exemption. Y Co. pays B the following amounts of wages on the basis of a biweekly payroll period on the following pay days:

July 20	$1,000
August 3	300
August 17	300
August 31	300
September 14	300
September 28	300

On October 5, B requests that Y Co. withhold on the basis of his cumulative wages with respect to his wages to be paid on October 12 and thereafter. Y Co. adds the $300 in wages to be paid to B on October 12 to the payments of wages already made to B during the calendar year, and determines that the aggregate amount of wages is $2,800. The average amount of wages for the 7 biweekly payroll periods is $400. The total amount of tax required to be deducted and withheld for payments of $400 for each of 7 biweekly payroll periods is $485.87 under section 3402(a). Since the total amount of tax which has been deducted and withheld by Y Co. through September 28 is $484.86, Y Co. may, if it chooses, deduct and withhold $1.01 (the amount by which $485.87 exceeds the total amount already withheld by Y Co.) from the payment of wages to B on October 12 rather than the amount specified in section 3402 (a) or (c).

(b) *Employee's request and revocation of request.* An employee's request that his employer withhold on the basis of his cumulative wages and a notice of revocation of such request shall be in writing and in such form as the employer may prescribe. An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, after the furnishing of such request and before a revocation thereof is effective. A revocation of such request may be made at any time by the employee furnishing his employer with a notice of revocation. The employer may give immediate effect to a revocation, but, in any event, a revocation shall be effective with respect to payments of wages made on or after the first “status determination date” (see section 3402(f)(3)(B)) which occurs at least 30 days after the date on which such notice is furnished.

(c) *Requests due to increases or decreases in allowances.* An employee may request pursuant to this section that his employer withhold on the basis of the employee's cumulative wages when the employee is entitled to claim an increased or decreased number of withholding allowances under §31.3402(m)–1 during the estimation year (as defined in §31.3402(m)–1(c)(1)).

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(h)(4)-1 Other methods.

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(a) *Maximum permissible deviations.* An employer may use any other method of withholding under which the employer will deduct and withhold upon wages paid to an employee after December 31, 1969, for a payroll period substantially the same amount as would be required to be deducted and withheld by applying section 3402(a) with respect to the payroll period. For purposes of section 3402 (h)(4) and this section, an amount is substantially the same as the amount required to be deducted and withheld under section 3402(a) if its deviation from the latter amount is not greater than the maximum permissible deviation prescribed in this paragraph. The maximum permissible deviation under this paragraph is determined by annualizing wages as provided in Step 1 of §31.3402(h)(2)–1 and applying the following table to the amount of tax required to be deducted and withheld under section 3402(a) with respect to such annualized wages, as determined under Step 2 of §31.3402(h)(2)–1:

If the tax required to be withheld under the annual percentage rate schedule is_	The maximum permissible annual deviation is_
$10 to $100.....	$10, plus 10 percent of excess over $10.
$100 to $1,000.....	$19, plus 3 percent of excess over $100.
$1,000 or over.....	$46, plus 1 percent of excess over $1,000.

In any case, an amount which is less than $10 more or less per year than the amount required to be deducted and withheld under section 3402(a) is substantially the same as the latter amount. If any method produces results which are not greater than the prescribed maximum deviations only with respect to some of his employees, the employer may use such method only with respect to such employees. An employer should thoroughly test any method which he contemplates using to ascertain whether it meets the tolerances prescribed by this paragraph. An employer may not use any method, one of the principal purposes of which is to consistently produce amounts to be deducted and withheld which are less (though substantially the same) than the amount required to be deducted and withheld by applying section 3402(a).

(b) *Combined FICA and income tax withholding.* In addition to the methods authorized by paragraph (a) of this section, an employer may determine the amount of tax to be deducted and withheld under section 3402 upon a payment of wages to an employee by using tables prescribed by the Commissioner which combine the amounts of tax to be deducted under sections 3102 and 3402. Such tables shall provide for the deduction of the sum of such amounts, computed on the basis of the midpoints of the wage brackets in the tables prescribed under section 3402(c). The portion of such sum which is to be treated as the tax deducted and withheld under section 3402 shall be the amount obtained by subtracting from such sum the amount of tax required to be deducted by section 3102. Such tables may be used only with respect to payments which are wages under both sections 3121(a) and 3401(a).

(c) *Part-year employment method of withholding*—(1) *In general.* In addition to the methods authorized by other paragraphs of this section, in the case of part-year employment (as defined in subparagraph (4) of this paragraph) of an employee who determines his liability for tax under subtitle A of the Code on a calendar-year basis and who has in effect a request that the amount of tax to be withheld from his wages be computed according to the part-year employment method described in this paragraph, the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee on or after January 5, 1973, by taking the following steps:

Step 1. Add the amount of wages to be paid to the employee for the current payroll period to the total amount of wages paid by the employer to the employee for all preceding payroll periods included in the current term of continuous employment (as defined in subparagraph (3) of this paragraph) of the employee by the employer;

Step 2. Divide the aggregate amount of wages computed in Step 1 by the total of the number of payroll periods to which that amount relates plus the equivalent number of payroll periods (as defined in subparagraph (2) of this paragraph) in the employee's term of continuous unemployment immediately preceding the current term of continuous employment, such term of continuous unemployment to be exclusive of any days prior to the beginning of the current calendar year;

Step 3. Determine the total amount of tax that would have been required to be deducted and withheld under section 3402 if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods determined in Step 2 (including the equivalent number of payroll periods); and

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee for all payroll periods during the current term of continuous employment.

The use of the method described in this paragraph does not preclude the employee from claiming additional withholding allowances pursuant to section 3402(m) or the standard deduction allowance pursuant to section 3402(f)(1)(G).

(2) *Equivalent number of payroll periods.* For purposes of this paragraph, the equivalent number of payroll periods shall be determined by dividing the number of calendar days contained in the current payroll period into the number of calendar days between the later of (i) the day certified by the employee as his last day of employment prior to his current term of continuous employment during the calendar year in which such term commenced, or (ii) the last day of the calendar year immediately preceding the current calendar year, and the first day of the current term of continuous employment. For purposes of the preceding sentence, the term "calendar days" includes holidays, Saturdays, and Sundays. In determining the equivalent number of payroll periods, any fraction obtained in the division described in the first sentence of this subparagraph shall be disregarded. An employee paid for a miscellaneous payroll period shall be considered to have a daily payroll period for purposes of this subparagraph. In a case in which an employee is paid for a daily or miscellaneous payroll period and the employer elects under Circular E to compute the tax to be withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly period, the employer shall determine the equivalent number of payroll periods for purposes of the computation of the tax to be withheld for the calendar week on the basis of a weekly payroll period (notwithstanding the fact that a determination of the equivalent number of payroll periods for purposes of the computation of the tax to be withheld upon wages paid for daily or miscellaneous payroll periods within such calendar week has been made on the basis of a daily or miscellaneous payroll period).

(3) *Term of continuous employment.* For purposes of this paragraph, a term of employment is continuous if it is either a single term of employment or two or more consecutive terms of employment with the same employer. A term of continuous employment begins on the first day on which any services are performed by the employee for the employer for which compensation is paid or payable. Such term ends on the earlier of (i) the last day during the current term of continuous employment on which any services are performed by the employee for the employer, or (ii) if the employee performs no services for the employer for a period of more than 30 calendar days, the last day preceding such period on which any services are performed by the employee for the employer. For example, a professional athlete who signs a contract on December 31, 1973, to perform services from July 1 through December 31 for the calendar years 1974, 1975, and 1976 has a new term of employment beginning each July 1 and accordingly may qualify for use of the part-year withholding method in each of such years. Likewise, a term of continuous employment is not broken by a temporary layoff of no more than 30 days. On the other hand, when an employment relationship is actually terminated the term of continuous employment is ended even though a new employment relationship is established with the same employer within 30 days. A "term of continuous employment" includes all days on which an employee performs any services for an employer and

includes days on which services are not performed because of illness or vacation, or because such days are holidays or are regular days off (such as Saturdays and Sundays, or days off in lieu of Saturdays and Sundays), or other days for which the employee is not scheduled to work. For example, an employee who is employed 2 days a week for the same employer from March 1 through December 31 has a term of continuous employment of 306 days.

(4) *Part-year employment.* For purposes of this paragraph, "part-year employment" means one or more terms of continuous employment with all employers which term or terms will not aggregate more than 245 days within a calendar year. For example, A graduates from college in May and was not employed from January through May. A accepts a permanent position with X Co., beginning June 1. Since the total duration of A's term of continuous employment will, during the current calendar year, not exceed 245 days it does qualify as part-year employment for purposes of this section.

If, however, A had also worked for Y Co. from December 15 of the previous year through February 5 of the current calendar year, the total duration of A's terms of continuous employment will, during the current calendar year, exceed 245 days (36 days (January 1 through February 5) plus 214 days (June 1 through December 31) equals 250 days). This year's employment does not therefore qualify as part-year employment for purposes of this section.

(5) *Employee's request.* (i) An employee's request that his employer withhold according to the part-year employment method shall be in writing and in such form as the employer may prescribe. Such request shall be made under the penalties of perjury and shall contain the following information—

(*a*) The last day of employment (if any) by any employer prior to the current term of continuous employment during the calendar year in which such term commenced.

(*b*) A statement that the employee reasonably anticipates that he will be employed for an aggregate of no more than 245 days in all terms of continuous employment during the current calendar year, and

(*c*) The employee uses a calendar-year accounting period.

An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, with respect to wages paid after the furnishing of such request, and shall cease to be effective with respect to any wages paid on or after the beginning of the payroll period during which the current calendar year will end.

(ii) If, on any day during the calendar year, any of the anticipations stated by the employee in his statement provided pursuant to subdivision (i)(*b*) of this subparagraph becomes unreasonable, the employee shall revoke the request described in this subparagraph before the end of the payroll period during which it becomes unreasonable. The revocation shall be effective as of the beginning of the payroll period during which it is made.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7251, 38 FR 867, Jan 5, 1973; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)-1 Additional withholding.

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(a) In addition to the tax required to be deducted and withheld in accordance with the provisions of section 3402, the employer and employee may agree that an additional amount shall be withheld from the employee's wages. The agreement shall be in writing and shall be in such form as the employer may prescribe. The agreement shall be effective for such period as the employer and employee mutually agree upon. However, unless the agreement provides for an earlier termination, either the employer or the employee, by furnishing a written notice to the other, may terminate the agreement effective with respect to the first payment of wages made on or after the first "status determination date" (see paragraph (d) of §31.3402(f)(3)–1) which occurs at least 30 days after the date on which such notice if furnished.

(b) The amount deducted and withheld pursuant to an agreement between the employer and employee shall be considered as tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld pursuant to the agreement.

(c) This section is applicable only to agreements made before October 1, 1981. Any such agreement shall remain in effect in accordance with paragraph (a). See §31.3402 (i)–2 for rules relating to increases in withholding after September 30, 1981.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 65l6, 25 FR 13108, Dec. 20, 1960, as amended by T.D. 7065, 35 FR 16540, Oct. 23, 1970; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)-2 Increases or decreases in withholding.

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(a) *Increases in withholding*—(1) *In general.* In addition to the tax required to be deducted and

withheld in accordance with the provisions of section 3402, the employee may request, after September 30, 1981, that the employer deduct and withhold an additional amount from the employee's wages. The employer must comply with the employee's request, except that the employer shall comply with the employee's request only to the extent that the amount that the employee requests to be deducted and withheld under this section does not exceed the amount that remains after the employer has deducted and withheld all amounts otherwise required to be deducted and withheld by Federal law (other than by section 3402(i) and this section), State law, and local law (other than by State or local law that provides for voluntary withholding). The employer must comply with the employee's request in accordance with the time limitations of §31.3402(f)(3)–1 (relating to when withholding exemption certificate takes effect). The employee must make his request on Form W–4 as provided in §31.3402(f)(5)–1 (relating to form and contents of withholding exemption certificates), and this Form W–4 shall take effect and remain effective in accordance with section 3402(f) and the regulations thereunder.

(2) *Amount deducted considered to be tax.* The amount deducted and withheld pursuant to paragraph (a)(1) of this section shall be considered to be tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld under paragraph (a)(1) of this section.

(b) *Decreases in withholding.* [Reserved]

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(j)-1 Remuneration other than in cash for service performed by retail commission salesman.

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(a) *In general.* (1) An employer, in computing the amount to be deducted and withheld as tax in accordance with section 3402, may, at his election, disregard any wages paid, after August 9, 1955, in a medium other than cash for services performed for him by an employee if (i) the noncash remuneration is paid for services performed by the employee as a retail commission salesman and (ii) the employer ordinarily pays the employee remuneration solely by way of cash commissions for services performed by him as a retail commission salesman.

(2) Section 3402(j) and this section are not applicable with respect to wages paid to the employee that are subject to withholding under §31.3402(g)–1(a)(2). Section 3402(j) and this section are not applicable with respect to noncash wages paid to a retail commission salesman for services performed by him in a capacity other than as such a salesman. Such sections are not applicable with respect to noncash wages paid by an employer to an employee for services performed as a retail commission

salesman if the employer ordinarily pays the employee remuneration other than by way of cash commissions for such services. Thus, noncash remuneration may not be disregarded in computing the amount to be deducted and withheld in a case where the employee, for services performed as a retail commission salesman, is paid both a salary and cash commissions on sales, or is ordinarily paid in something other than cash (stocks, bonds, or other forms of property) notwithstanding that the amount of remuneration paid to the employee is measured by sales.

(b) *Retail commission salesman.* For purposes of section 3402(j) and this section, the term "retail commission salesman" includes an employee who is engaged in the solicitation of orders at retail, that is, from the ultimate consumer, for merchandise or other products offered for sale by his employer. The term does not include an employee salesman engaged in the solicitation on behalf of his employer of orders from wholesalers, retailers, or others, for merchandise for resale. However, if the salesman solicits orders for more than one principal, he is not excluded from the term solely because he solicits orders from wholesalers or retailers on behalf of one or more principals. In such case the salesman may be a retail commission salesman with respect to services performed for one or more principals and not with respect to services performed for his other principals.

(c) *Noncash remuneration.* The term "noncash remuneration" includes remuneration paid in any medium other than cash, such as goods or commodities, stocks, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

(d) *Cross reference.* For provisions relating to records required to be kept and statements which must be furnished an employee with respect to wage payments, see sections 6001 and 6051 and the regulations thereunder in Subpart G of this part.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 9276, 71 FR 42057, July 25, 2006]

§ 31.3402(k)-1 Special rule for tips.

top

(a) *Withholding of income tax in respect of tips*—(1) *In general.* Subject to the limitations set forth in paragraph (a)(2) of this section, an employer is required to deduct and withhold from each of his employees tax in respect of those tips received by the employee which constitute wages. (For provisions relating to the treatment of tips as wages, see §§3401(a)(16) and 3401(f).) The employer shall make the withholding by deducting or causing to be deducted the amount of the tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see paragraph (a)(3) of this section). For purposes of this section the terms "wages (exclusive of tips) which are under the control of the employer" means, with respect to a payment of wages, an amount equal to wages as defined in section 3401(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to deduct and withhold the tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of the tax on tips reported to him only to the extent that the emloyer can, during the period beginning at the time the written statement is submitted to him and ending at the close of the calendar year in which the statement was submitted, collect the tax by deducting it or causing it to be deducted as provided in subparagraph (1) of this paragraph.

(3) *Furnishing of funds to employer.* If the amount of the tax in respect of tips reported by the employee to the employer in a written statement furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer from which the employer is required to withhold the tax in respect of such tips, the employee may furnish to the employer, within the period specified in subparagraph (2) of this paragraph, an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and such statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to the tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts

deducted from an employee's remuneration in excess of the correct amount of tax, see §31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see §31.3401(a)(16)–1.)

(c) *Priority of tax collection*—(1) *In general.* In the case of a payment of wages (exclusive of tips), the employer shall deduct or cause to be deducted in the following order:

(i) The tax under section 3101 and the tax under section 3402 with respect to such payment of wages.

(ii) Any tax under section 3101 which, at the time of payment of the wages, the employer is required to collect—

(*a*) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(*b*) By reason of the employer's election to make collection of the tax under section 3101 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. (See §31.3102–3, relating to collection of, and liability for, employee tax on tips.)

(iii) Any tax under section 3402 which, at the time of the payment of the wages, the employer is required to collect—

(*a*) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(*b*) By reason of the employer's election to make collection of the tax under section 3402 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. For provisions relating to the witholding of tax on the basis of average estimated tips, see paragraph (b) of §31.3402(h)(1)–1.

(2) *Examples.* The application of paragraph (b)(1) of this section may be illustrated by the following examples (The amounts used in the following examples are intended for illustrative purposes and do not necessarily reflect currently effective rates or amounts.):

Example 1. W is a waiter employed by R restaurant. W's principal remuneration for his services is in the form of tips received from patrons of R; however, he also receives a salary from R of $40 per week, which is paid to him every Friday. W is a member of a labor union which has a contract with R pursuant to which R is to collect dues for the union by withholding from the wages of its employees at the rate of $1 per week. In

addition to the taxes required to be withheld under the Internal Revenue Code, W's wages are subject to withholding of a state income tax imposed upon both his regular wage and his tips received and reported to R.

On Monday of a given week W furnishes a written statement to R pursuant to section 6053(a) in which he reports the receipt of $160 in tips. The $40 wage to be paid to W on Friday of the same week is subject to the following items of withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.).....	$1.76	$7.04	$8.80
Section 3402 (income tax at source)....	5.65	28.30	33.95
State income tax.....	1.20	4.80	6.00
Union dues.....	.....	.....	1.00
Total.....	.....	.....	49.75

W does not turn over any funds to R. R should satisfy the taxes imposed by sections 3101 and 3402 out of W's $40 wage as follows: The taxes imposed with respect to the regular wage (a total of $74l) should be satisfied first. The taxes imposed with respect to tips are to be withheld only out of “wages (exclusive of tips) which are under the control of the employer” as that phrase is defined in §§31.3102–3(a)(1) and 31.3402(k)–1(a)(1). The amount of such wages under the control of employer in this example is $31.39, or $40, less the amounts applied in satisfaction of the Federal and State withholding taxes imposed with respect to the regular $40 wage ($8.61). This $31.39 is applied first in satisfaction of the tax under section 3101 with respect to tips ($7.04) in the balance of $24.35 is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($3.95) should be withheld from wages under the control of the employer the following week.

Example 2. During the week following the week dealt with in example 1, W furnishes a written statement to R pursuant to withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.)	$1.76	$5.72	$7.48
Section 3402 (Income tax at source):			
Current week	5.65	22.30	27.95
Carryover from prior week	.....	3.95	3.95
State income tax	1.20	3.90	5.10
Union dues	.....	.....	1.00
Garnishment	.....	.....	10.00
Total	.....	.....	55.48

As in example 1, the amount of "wages (exclusive of tips) which are under the control of the employer" is $31.39. This amount is applied first in satisfaction of the tax under section 3101 with respect to tips ($5.72) and the balance is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips (a total of $26.25), including that portion of the amount required to be withheld from the prior week's wages which remained unsatisfied. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($0.58) should be withheld from wages under the control of the employer the following week.

[T.D. 7001, 34 FR 1002, Jan. 23, 1969, as amended by T.D. 7053, 35 FR 11628, July 21, 1970]

§ 31.3402(l)-1 Determination and disclosure of marital status.

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(a) *Determination of status by employer.* An employer in computing the tax to be deducted and withheld from an employee's wages paid after April 30, 1966, shall apply the applicable percentage method or wage bracket method withholding table (see section 3402 (a), (b), and (c) and the regulations thereunder) for the pertinent payroll period which relates to employees who are single persons, unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after March 15, 1966, indicating that the

employee is married in which case the employer shall apply the applicable table relating to employees who are married persons.

(b) *Disclosure of status by employee.* (1) An employee shall be entitled to furnish the employer with a withholding exemption certificate indicating he is married only if, on the day of such furnishing, he is married (determined by application of the rules in paragraph (c) of this section). Thus, an employee who is contemplating marriage may not, prior to the actual marriage, furnish the employer with a withholding exemption certificate indicating that he is a married person.

(2) (i) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a married person, changes from married to single, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate indicating that the employee is a single person.

(ii) If an employee who has in effect a withholding exemption certificate indicating that he is a married person, is considered married solely because of the application of subparagraph (2)(ii) of paragraph (c) of this section, and his spouse died during the taxable year which precedes by 2 years the current taxable year, the employee must, on or before December 1 of the current taxable year, furnish the employer with a new withholding exemption certificate indicating that he is a single person. Such certificate shall not, however become effective until the next calendar year (see paragraph (c) of §31.3402(f)(3)–1).

(3) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a single person changes from single to married, the employee may furnish the employer with a new withholding exemption certificate indicating that the employee is a married person.

(c) *Determination of marital status.* For the purposes of section 3402(l)(2) and paragraph (b) of this section, the following rules shall be applied in determining whether an employee is a married person or a single person—

(1) An employee shall on any day be considered as a single person if—

(i) He is legally separated from his spouse under a decree of divorce or separate maintenance, or

(ii) Either he or his spouse is, or on any preceding day within the same calendar year was, a nonresident alien.

(2) An employee shall on any day be considered as a married person if—

(i) His spouse (other than a spouse referred to in paragraph (c)(1) of this section) died within the portion of his taxable year which precedes such day, or

(ii) His spouse died during one of the two taxable years immediately preceding the current taxable year and, on the basis of facts existing at the beginning of such day, he reasonably expects, at the close of his taxable year, to be a surviving spouse as defined in section 2 and the regulations thereunder.

[T.D. 7115, 36 FR 9234, May 21, 1971]

§ 31.3402(m)-1 Withholding allowances.

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(a) *General rule.* An employee may claim, with respect to wages paid after December 31, 1981, a number of withholding allowances determined in accordance with this section. In order to receive the benefit of such allowances, the employee must have in effect with his employer a withholding exemption certificate claiming such allowances.

(b) *Items that may be taken into account.* The following items may be taken into account in determining the number of withholding allowances an employee may claim:

(1) Estimated itemized deductions allowable under chapter 1,

(2) The estimated tax credits allowable under Subpart A of Part IV of Subchapter A of Chapter 1, except:

(i) For the credit for tax withheld on wages under section 31(a) (relating to wage withholding),

(ii) For the credit for tax withheld at source on nonresident aliens and foreign corporations and on tax-free covenant bonds under section 32,

(iii) That the employee may claim the credit for certain uses of gasoline and special fuels under section 39 only to the extent the employee has not filed for a quarterly tax refund of the credit on Form 843,

(iv) That the employee may claim the credit for earned income under section 43 only to the extent the employee has not filed for advance payments of the credit on Form W–5, and

(v) For the credit for overpayment of tax under section 45,

(3) The estimated trade and business deductions of employees described in section 62 (2) and allowed

by Part VI of Subchapter B of Chapter 1,

(4) The estimated deduction for payments to pension, profit-sharing, annuity, and bond purchase plans of self-employed individuals described in section 62(7) and allowed by section 404 and section 405(c),

(5) The estimated deduction for penalties forfeited because of premature withdrawal of funds from time savings accounts or deposits described in section 62(12) and allowed by section 165,

(6) The estimated direct charitable deduction under section 170(i),

(7) The estimated deduction for net operating loss carryovers under section 172,

(8) The estimated deduction for alimony, etc., payments under section 215,

(9) The estimated deduction for moving expenses under section 217 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(15),

(10) The estimated deduction for certain retirement savings under section 219 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(12)(D),

(11) The estimated deduction for two-earner married couples under section 221,

(12) The estimated net losses from schedules C (Profit or (Loss) From Business or Profession), D (Capital Gains and Losses), E (Supplemental Income Schedule), and F (Farm Income and Expenses) of Form 1040 and from the last line of Part II of Form 4797 (Supplemental Schedule of Gains and Losses),

(13) The estimated amount of decrease of tax due attributable to income averaging under sections 1301 through 1305.

The employee must first use these items ((1) through (13) of this paragraph (b)) to eliminate any payment of estimated tax (as defined in section 6015(d)). Only amounts of these items remaining after the employee has done this may be taken into account in determining the number of withholding allowances the employee may claim.

(c) *Definitions*—(1) *Estimated.* The term “estimated” as used in this section to modify the terms “deduction”, “deductions”, “credits”, “losses”, and “amount of decrease” means with respect to an employee the aggregate dollar amount of a particular item that the employee reasonably expects will be allowable to him for the estimation year under the section of the Code specified for each item. In no event shall that amount exceed the sum of:

(i) The amount shown for that particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year), which amount the employee also reasonably expects to show on the income tax return for the estimation year, plus

(ii) The determinable additional amounts for each item for the estimation year.

The determinable additional amounts are amounts that are not included in paragraph (c)(1)(i) of this section and that are demonstrably attributable to indentifiable events during the estimation year or the preceding year. Amounts are demonstrably attributable to identifiable events if they relate to payments already made during the estimation year, to binding obligations to make payments (including the payment of taxes) during the year, and to other transactions or occurrences, the implementation of which has begun and is verifiable at the time the employee files a withholding exemption certificate claiming withholding allowances relating thereto. The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date. It is not reasonable for an employee to include in his or her withholding computation for the estimation year any amount that is shown for a particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year) and that has been disallowed by the Service as part of a proposed adjustment described in §601.103(b) (relating to examination and determination of tax liability) and §601.105(b) (relating to examination of returns).

(2) *Amount of decrease of tax due.* The term “amount of decrease of tax due” as used in paragraph (b)(13) of this section means:

(i) The amount of tax that the taxpayer would owe on his taxable income without using Schedule G (Form 1040), minus

(ii) The amount of tax that the taxpayer would owe on his taxable income using Schedule G (Form 1040).

(3) *Itemized deductions.* The term “itemized deductions” as used in paragraph (b)(1) of this section has the same meaning as ascribed thereto by section 63(f) and the regulations thereunder.

(d) *Computing allowances.* (1) The employee shall compute the number of allowances he may claim for the items specified in paragraph (b) of this section in accordance with the tables and instructions on Form W–4.

(2) If the employee:

(i) Pays or accrues amounts demonstrably attributable to identifiable events (as defined in paragraph (c)(1) of this section) that are:

(A) Interest attributable to ownership of real property and deductible under section 163(a), or

(B) Taxes deductible under section 164(a)(1), or

(C) Interest or taxes deductible under section 216(a), and

(ii) Is obligated to pay or accrue such amounts for at least 2 years subsequent to the estimation year,

then the employee may compute the portion of estimated itemized deductions attributable to such amounts for purposes of paragraph (b)(1) of this section by multiplying the total of such amounts to be paid or accrued in the estimation year by 12 and by then dividing that result by the number of months from the 1st month in the estimation year in which the employee pays or accrues such amounts through the last month of the estimation year. If such amounts decrease during the term of obligation, the employee must, at the beginning of each subsequent calendar year, recompute the number of allowances being claimed as required by paragraph (c)(1) of this section. If the employee uses the computation described in this subparagraph (2), the employee may not request that his employer withhold on the basis of the employee's cumulative wages as provided in §31.3402 (h)(3)–1.

(e) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. Employee A has an estimated net loss from a partnership of $2,000 which would be reported on Schedule E. Employee A is not required to make any payments of estimated tax. Employee A may take her $2,000 partnership loss into consideration in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

Example 2. Employee B has an estimated net loss from a business of $3,000 which would be reported on Schedule C. Employee B would also otherwise be required to make payments of estimated tax on income of $3,000. Employee B may not take his business loss into consideration in determining the number of withholding allowances to which he is entitled in accordance with the tables and instructions on Form W–4.

Example 3. Employee C has an estimated net loss from a farm of $5,000 which would be reported on Schedule F. Employee C would also otherwise be required to make payments of estimated tax on income of $4,000. Employee C may only take her farm loss into consideration to the extent of $1,000 ($5,000–4,000) in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

(f) *Special rules*—(1) *Married individuals.* (i) Except as provided in subdivision (ii) of this subparagraph, a husband and wife shall determine the number of withholding allowances to which they are entitled under section 3402(m) on the basis of their combined wages and allowable items. The

withholding allowances to which a husband and wife are entitled may be claimed by the husband, by the wife, or they may be allocated between them. However, they may not both have withholding exemption certificates in effect claiming the same withholding allowance.

(ii) If a husband and wife filed separate income tax returns for the taxable year preceding the estimation year and reasonably expect to file separate returns for the estimation year, the husband and wife shall determine the number of withholding exemptions to which they are entitled under section 3402(m) on the basis of their individual wages and allowable items, and they shall be considered to be single for purposes of the tables on Form W–4.

(2) *Only one certificate to be in effect.* An employee who is entitled to one or more withholding allowances under section 3402(m) and who has, at the same time, two or more employers, may claim such withholding allowance or allowances with only one of his employers.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44075, Sept. 27, 1983]

§ 31.3402(n)-1 Employees incurring no income tax liability.

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(a) *In general.* Notwithstanding any other provision of this subpart (except to the extent a payment of wages is subject to withholding under §31.3402(g)–1(a)(2)), an employer shall not deduct and withhold any tax under chapter 24 upon a payment of wages made to an employee, if there is in effect with respect to the payment a withholding exemption certificate furnished to the employer by the employee which certifies that—

(1) The employee incurred no liability for income tax imposed under subtitle A of the Internal Revenue Code for his preceding taxable year; and

(2) The employee anticipates that he will incur no liability for income tax imposed under subtitle A for his current taxable year.

(b) *Mandatory flat rate withholding.* To the extent wages are subject to income tax withholding under §31.3402(g)–1(a)(2), such wages are subject to such income tax withholding regardless of whether a withholding exemption certificate under section 3402(n) and the regulations thereunder has been furnished to the employer.

(c) *Rules about withholding exemption certificates.* For rules relating to invalid withholding exemption certificates, see §31.3402(f)(2)–1(e), and for rules relating to disregarding certain

withholding exemption certificates on which an employee claims a complete exemption from withholding, see §31.3402(f)(2)–1T(g).

(d) *Examples.* The following examples illustrate this section:

Example 1. Employee A, an unmarried, calendar-year basis taxpayer, files his income tax return for 2005 on April 10, 2006. A has adjusted gross income of $5,000 and is not liable for any income tax. He had $180 of income tax withheld during 2005. A anticipates that his gross income for 2006 will be approximately the same amount, and that he will not incur income tax liability for that year. On April 20, 2006, A commences employment and furnishes his employer a withholding exemption certificate certifying that he incurred no liability for income tax imposed under subtitle A for 2005, and that he anticipates that he will incur no liability for income tax imposed under subtitle A for 2006. A's employer shall not deduct and withhold on payments of wages made to A on or after April 20, 2006. Under §31.3402(f)(4)–2(c), unless A furnishes a new withholding exemption certificate certifying the statements described in paragraph (a) of this section to his employer, his employer is required to deduct and withhold upon payments of wages to A made after February 15, 2007.

Example 2. Assume the facts are the same as in *Example 1* except that A had been employed by his employer prior to April 20, 2006, and had furnished his employer a withholding exemption certificate prior to furnishing the withholding exemption certificate certifying the statements described in paragraph (a) of this section on April 20, 2006. Under section 3402(f)(3)(B)(i), his employer would be required to give effect to the new withholding exemption certificate no later than the beginning of the first payroll period ending (or the first payment of wages made without regard to a payroll period) on or after May 20, 2006. However, under section 3402(f)(3)(B)(ii), his employer could, if it chose, make the new withholding exemption certificate effective with respect to any payment of wages made on or after April 20, 2006, and before the effective date mandated by section 3402(f)(3)(B)(i). Under §31.3402(f)(4)–2(c), unless A furnishes a new withholding exemption certificate certifying the statements described in §31.3402(n)–1(a) to his employer, his employer is required to deduct and withhold upon payments of wages to A made after February 15, 2007.

Example 3. Assume the facts are the same as in *Example 1* except that for 2005 A has taxable income of $8,000, income tax liability of $839, and income tax withheld of $1,195. Although A received a refund of $356 due to income tax withholding of $1,195, he may not certify on his withholding exemption certificate that he incurred no liability for income tax imposed by subtitle A for 2005.

[T.D. 9276, 71 FR 42057, July 25, 2006]

§ 31.3402(o)-1 Extension of withholding to supplemental unemployment compensation benefits.

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(a) *In general.* Withholding of income tax is required under section 3402(o) with respect to payments of supplemental unemployment compensation benefits made after December 31, 1970, which are treated under paragraph (b)(14) of §31.3401(a)–1 as if they were wages.

(b) *Withholding exemption certificates.* For purposes of section 3402(f) (2) and (3) and the regulations

thereunder (relating to withholding exemption certificates), in the case of supplemental unemployment compensation benefits an employment relationship shall be considered to commence with either the date on which such benefits begin to accrue or January 1, 1971, whichever is later, and the withholding exemption certificate furnished the employer with respect to such commencement of employment shall be considered the first certificate furnished the employer. The withholding exemption certificate furnished by the employee to his former employer (with whom his employment has been involuntarily terminated, within the meaning of paragraph (b)(14)(ii) of §31.3401(a)–1) shall be treated as meeting the requirements of section 3402(f)(2)(A) and the regulations thereunder if such former employer furnishes such certificate to the employee's current employer, as defined in paragraph (g) of §31.340(d)–1, or if such former employer is the agent of such current employer with respect to the employee's withholding exemption certificate. However, the preceding sentence shall not be applicable if such employee furnishes a new withholding exemption certificate to such current employer (or his agent), provided that such withholding exemption certificate meets the requirements of section 3402(f)(2)(A) and the regulations thereunder. See the definitions of payroll period in paragraph (c) of §31.3401(b)–1 and of employee in paragraph (g) of §31.3401(c)–1.

[T.D. 7068, 35 FR 17329, Nov. 11, 1970, as amended by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§ 31.3402(o)-2 Extension of withholding to annuity payments if requested by payee.

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(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (g)(2) of this section) of an annuity (as defined in paragraph (g)(1) of this section) may request the payor (as defined in paragraph (g)(3) of this section) of the annuity to withhold income tax with respect to payments of the annuity made after December 31, 1970. If such a request is made, the payor shall deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from annuity payments shall file a request with the payor to deduct and withhold a specific whole dollar amount from each annuity payment. Such specific dollar amount requested shall be at least $5 per month and shall not reduce the net amount of any annuity payment received by the payee below $10. The request shall be made on Form W–4P (annuitant's withholding exemption certificate and request) in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4P, payors may prepare and use a form the provisions of which are identical with those of Form W–4P.

For the requirements relating to Form W–4P with respect to qualified State individual income taxes, see paragraph (d)(3)(i) of §301.6361–1 of this chapter (Regulations on Procedure and Administration).

(c) *When request takes effect.* Upon receipt of a request under this section the payor of the annuity with respect to which such request was made shall deduct and withhold the amount specified in such

request from each annuity payment commencing with the first annuity payment made on or after the date which occurs—

(1) In a case in which no previous request is in effect, 3 calendar months after the date on which such request is furnished to such payor, and

(2) In a case in which a previous request is in effect, the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of §31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such request is so furnished.

However, the payor may, at his election, commence to deduct and withhold such specified amount with respect to an annuity payment which is made prior to the annuity payment described in the preceding sentence with respect to which the payor must commence to deduct and withhold.

(d) *Duration and termination of request.* A request under this section shall continue in effect until terminated. The payee may terminate the request by furnishing the payor a signed written notice of termination. Such notice of termination shall, except as hereinafter provided, take effect with respect to the first payment of an amount in respect of which the request is in effect which is made on or after the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of §31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such notice is so furnished. However, at the election of such payor, such notice may be made effective with respect to any payment of an amount in respect of which the request is in effect which is made on or after the date on which such notice is so furnished and before such status determination date.

(e) *Special rules.* For purposes of chapter 24 of subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of such Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term “wages” includes the gross amount of an annuity payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages in section 3401(a) which are made in section 6014 (relating to election by the taxpayor not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals) shall not be deemed to include any portion of such an annuity payment.

(4) The term “employer” includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term "employee" includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term "payroll period" includes the period of accrual with respect to which payments of an annuity which is subject to withholding under this section are ordinarily made.

(f) *Returns of income tax withheld and statements for payees.* (1) Form W-2P is to be used in lieu of Form W-2, which is required to be furnished by an employer to an employee under §31.6051–1 of this chapter and to the Social Security Administration under paragraph (a) of §31.6051–2 of this chapter, with respect to an annuity subject to withholding under this section. If an amount is required to be deducted and withheld under this section from any or all of the payments made to a payee under an annuity contract during a calendar year, all payments with respect to that annuity contract are required to be reported on Form W-2P, in lieu of Form 1099, as prescribed in §§1.6041–1, 1.6041–2, and 1.6047–1 of this chapter; any other annuity payments made by the same payor to the same payee may, at the option of the payor, be reported on Form W-2P.

(2) Each statement on Form W-2P shall show the following:

(i) The gross amount of annuity payments made during the calendar year, whether or not income tax withholding under this section was in effect with respect to all such payments,

(ii) The total amount deducted and withheld as tax under section 3402 of this section, and

(iii) The information required to be shown by Form W-2P and the instructions applicable thereto.

For the requirements relating to Form W-2P with respect to qualified State individual income taxes, see paragraph (d)(3)(ii) of §301.6361–1 of this chapter (Regulations on Procedure and Administration).

(3) The provisions of §1.9101–1 of this chapter (relating to permission to submit information required by certain returns and statements on magnetic tape) shall be applicable to the information required to be furnished on Form W-2P.

(4) The provisions of §31.6109–1 of this chapter (relating to supplying of identifying numbers) shall be applicable to Form W-2P and to any payee of an annuity to whom a statement on Form W-2P is required to be furnished.

(g) *Definitions.* For purposes of this section—

(1) The term "annuity" means periodic payments which are payable over a period greater than 1 year and which are treated under section 72 as amounts received as an annuity, whether or not such periodic payments are variable in amount. Also, periodic payments to an individual who is retired

before the normal retirement age for reasons of disability, to which the provisions of section 105(d) apply, shall be deemed to be an annuity for purposes of this section. A lump-sum payment (including a total distribution under section 72(n)) is not an annuity.

(2) The term “payee” means an individual who is a citizen or resident of the United States and who receives an annuity payment.

(3) The term “payor” means a person making an annuity payment except that, if the person making the payment is acting soley as an agent for another person, the term “payor” shall mean such other person and not the person actually making the payment. For example, if a bank makes an annuity payment only as agent for an employees' trust, the trust shall be deemed to be the “payor.” Notwithstanding the preceding two sentences, any person who, under section 3401(a) (5) or (8), would not be required to deduct and withhold the tax under section 3402 if the annuity payment were remuneration for services shall not be considered a “payor.”

(Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805; 86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 747, 26 U.S.C. 6051)

[T.D. 7056, 35 FR 13436, Aug. 22, 1970, as amended by T.D. 7577, 43 FR 59360, Dec. 20, 1978: T. D. 7580, 43 FR 60160, Dec. 26, 1978. Redesignated by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§ 31.3402(o)-3 Extension of withholding to sick pay.

top

(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (h)(2) of this section) of sick pay (as defined in paragraph (h)(1) of this section) may request the payor (as defined in paragraph (h)(3) of this section) of the sick pay to withhold income tax with respect to payments of sick pay made on or after May 1, 1981. If such a request is made, the payor must deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from sick pay shall file a written request with the payor to deduct and withhold a specific whole dollar amount (subject to the limitations of paragraph (c) of this section) from each sick pay payment. The request shall be made on Form W–4S in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4S, payors may prepare and use a form the provisions of which are identical to those of Form W–4S. The payee must include his social security account number in the request.

(c) *Amount requested to be withheld.* The payee shall request that the payor withhold a specific whole dollar amount. The specific whole dollar amount shall be at least $20 per weekly payment of sick pay. If the payee is paid sick pay computed on a daily basis, the specific whole dollar amount shall be at

least $4 per daily payment of sick pay. If the payee is paid sick pay on a biweekly basis, the specific whole dollar amount shall be at least $40 per 2 week payment of sick pay. If the payee is paid sick pay on a semat least $4 per day, assuming a 5 day work week of 8 hours per day (40 hours total) in each 7 day calendar week. In the case of a payment which is greater or less than a full payment, the amount withheld is to bear the same relation to the specific whole dollar amount requested to be withheld as such payment bears to a full payment. For example, assume an individual receives sick pay of $100 per week and requests that $25 per week be withheld for taxes. After 4 full weeks of absence, the individual returns to work on a Wednesday (having been absent on sick leave Monday and Tuesday). For the week the individual returns to work, the individual would be entitled to $40 of sick pay, $10 of which would be withheld for taxes. The payor may, at his option, permit the payee to request that the payor withhold a specific percentage from each payment. The specific percentage shall be at least 10 percent. If the payor so opts, the payor must also accept requests under the whole dollar method. If the amount requested to be withheld under either the whole dollar method or the optional percentage method reduces the net amount of a sick pay payment received by the payee to below $10, no income tax shall be withheld from that payment by the payor.

(d) *When request takes effect.* The payor must deduct and withhold the amount specified in the request with respect to payments made more than 7 days after the date on which the request is received by the payor. At the election of the payor, the request may take effect before this deadline.

(e) *Duration and termination of request.* A request under this section shall continue in effect until changed or terminated. The payee may change the request by filing a new written request that meets all of the requirements of paragraphs (b) and (c) of this section. The new request shall take effect as specified in paragraph (d) of this section and the old request shall be deemed terminated when the new request takes effect. The payee may terminate the request by furnishing the payor a signed written notice of termination containing both a request to terminate withholding and all the information contained in the request to withhold. This written notice of termination shall take effect with respect to payments made more than 7 days after the date on which the notice of termination is received by the payor. At the election of the payor, the request may take effect before this deadline.

(f) *Special rules.* For purposes of chapter 24 on subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of the Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term “wages” includes the gross amount of a sick pay payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages

in section 3401(a) which are made in section 6014 (relating to election by the taxpayer not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals) shall not be deemed to include any portion of such a sick pay payment.

(4) The term "employer" includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term "employee" includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term "payroll period" includes the period of accrual with respect to which payments of sick pay which are subject to withholding under this section are ordinarily made.

(g) *Statements required to be furnished to payees.* See section 6051(f) and the regulations thereunder for requirements relating to statements required to be furnished to payees.

(h) *Definitions.* (1) (i) The term "sick pay" means any payment made to an individual which does not constitute wages (determined without regard to section 3402(o) and this section), which is paid to an employee pursuant to a plan to which the employer is a party, and which constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of personal injuries or sickness. The term "personal injuries or sickness" shall have the same meaning as ascribed thereto by section 105(a) and the regulations thereunder. The term "sick pay" does not include any amounts either excludable from gross income under section 104(a) (1), (2), (4) or (5) or section 105(b) or (c) or paid under section 3402(o)(1)(B). The term "sick pay" does not include amounts paid under a plan if all amounts paid under the plan are paid to individuals who are described in the first sentence of section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. Amounts paid under any other plan shall be deemed to be paid for a period during which the employee is temporarily absent from work. For sick pay paid in 1981 only, however, the payor may opt not to follow the rules of the two preceding sentences but to follow instead the rule that an employee is temporarily absent if his absence is not described in section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. An employer is not a party to the plan if the plan is a contract between only employees and a third party payor or the employer makes no contributions to provide sick pay benefits under the plan, even if the employer withholds amounts from the employees' salaries and pays the amounts over to the third party payor.

(ii) This paragraph (h)(1) may be illustrated by the following examples:

Example 1. Employee A works for P Company and Employee B works for Q Company. P Company has contracted with R Insurance Company for R to pay P's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Q Company has neither entered into such a contract, nor will it make such payments directly from it own funds. B consequently goes to S Insurance Company and purchases directly an insurance policy which will pay him the equivalent of his

normal wages when he is unable to work because of sickness or personal injury. Both A and B are subsequently temporarily absent from work on account of sickness or personal injuries. A receives payments from R and B receives payments from S. Neither the payments made by R to A nor the payments made by S to B constitute wages (determined without regard to section 3402(o) and this section). A may request that R withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are sick pay as defined in section 3402(o) and this section. B may not request that S withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are not paid pursuant to a plan to which Q Company is a party and thus are not sick pay as defined in section 3402(o) and this section.

Example 2. Employees C and D both work for T Company , which has contracted with U Insurance Company for U to pay T's employees for all sickness or injury claims Employee C is sick and out from work for a month. U pays C the equivalent of C's regular pay. Employee D loses his arm in an accident and U pays D $10,000. C may request that U withhold income taxes under section 3402(o) and this section from the payments he receives because the payments constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries. D may not request that U withhold income taxes from the payments he receives because the payments do not constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries.

(2) The term “payee” means an individual who is a citizen or resident of the United States and who receives a sick pay payment.

(3) (i) The term “payor” means any person making a sick pay payment who is not the employer (as defined in section 3401 and in §31.3401(d)–1 (except paragraph (f) thereof)) of the payee. If however the person making the payment is acting solely as an agent for another person, the term “payor” shall mean the other person and not the person actually making the payment.

(ii) This paragraph (h)(3) may be illustrated by the following examples:

Example 1. X Company contracts with Y Insurance Company for Y to pay X's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Y computes the amount to be paid and determines the date payment is to be made for each of X's employees. Y then instructs Z Bank to issue a check for that amount on that date. Y reimburses Z for the amount of the check plus Z's administrative costs. Under these circumstances, Z is the agent of Y and Y is the payor under section 3402(o) and this section.

Example 2. V Company contracts with W Company for W to pay V's employees the equivalent of their normal wages when they are temporarily absent from work on account of sickness or personal injury. Under the contractual arrangement, V advises W of the wages normally paid to each of V's employees. V tells W when an employee of V is temporarily absent from work on account of sickness or personal injury, and W computes the amount to be paid the employee and makes payments of sick pay to the employee during the period of the employee's absence. V subsequently reimburses W for the amount of those payments and pays W a fee for W's services. Under these circumstances, W is acting solely as the agent of V, and a payee may not request under section 3402(o) and these regulations that W withhold income taxes from his payments.

However, see section 3401 and the regulations thereunder for the obligation of V to withhold income taxes from the payments that W makes as the agent of V, which are not excluded from income under section 105 and the regulations thereunder and which are wages under section 3401 and the regulations thereunder. See also §31.3402(g)–1 (relating to supplemental wage payments) for the conditions under which a flat percentage rate of withholding may be used.

Example 3. Assume the same facts as in Example 2, except that the consideration for W's services is a set insurance premium rather than reimbursement for costs plus a fee. Under these circumstances W is the payor and is not acting solely as the agent of V. An employee of V to whom W makes payments under the agreement may request under section 3402(o) and the regulations thereunder that W withhold income taxes from those payments.

(i) *Special rules for sick pay paid pursuant to certain collective-bargaining agreements.* (1) Special rules (enumerated in subparagraph (2)) apply to sick pay where all of the following tests are met.

(i) The sick pay must be paid pursuant to a collective-bargaining agreement between employee representatives and one or more employers.

(ii) The agreement must contain a provision that section 3402(o)(5) is to apply to sick pay paid pursuant to the agreement.

(iii) The agreement must contain a provision for determining the amount to be deducted and withheld from each payment of sick pay.

(iv) The social security number of the payee must be furnished to the payor. The agreement may provide that the employer will furnish this or the payee may furnish his social security number directly to the payor.

(v) The payor must be furnished with information that is necessary for the payor to determine whether the payment is pursuant to the agreement and to determine the amount to be deducted and withheld. The agreement may provide that the employer will furnish this information directly to the payor.

(2) The following special rules apply to sick pay where all of the tests of subparagraph (1) are met.

(i) The requirement of section 3402(o)(1)(c) and this section that a request for withholding be in effect does not apply.

(ii) The amount to be deducted and withheld from the sick pay shall be determined according to the provisions of the agreement and not according to this section. This rule shall not however apply—

(A) To payments enumerated in section 3402(n) (relating to employees incurring no income tax liability) and the regulations thereunder, or

(B) To payments made to a payee more than 7 days after the date that the payor receives a statement from the payee that the payee expects to claim an exclusion from gross income under section 105(d). Such statement must include adequate verification of disability. A certificate from a qualified physician attesting that the employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. If the payor receives such a statement, the payor shall not withhold any income tax from the payments made to the payee, regardless of the provisions of the collective bargaining agreement. This exception from withholding does not affect the requirements of §31.6051–3.

(Secs. 3402(o), 7805, Internal Revenue Code of 1954 (94 Stat. 3495, (26 U.S.C. 3402(o)); 68A Stat. 917 (26 U.S.C. 7805)))

[T.D. 7813, 47 FR 11277, Mar. 16, 1982, as amended by T.D. 7915, 48 FR 44076, Sept. 27, 1983]

§ 31.3402(p)-1 Voluntary withholding agreements.

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(a) *In general.* An employee and his employer may enter into an agreement under section 3402(b) to provide for the withholding of income tax upon payments of amounts described in paragraph (b)(1) of §31.3401(a)–3, made after December 31, 1970. An agreement may be entered into under this section only with respect to amounts which are includible in the gross income of the employee under section 61, and must be applicable to all such amounts paid by the employer to the employee. The amount to be withheld pursuant to an agreement under section 3402(p) shall be determined under the rules contained in section 3402 and the regulations thereunder. See §31.3405(c)–1, Q&A–3 concerning agreements to have more than 20-percent Federal income tax withheld from eligible rollover distributions within the meaning of section 402.

(b) *Form and duration of agreement.* (1)(i) Except as provided in subdivision (ii) of this subparagraph, an employee who desires to enter into an agreement under section 3402(p) shall furnish his employer with Form W–4 (withholding exemption certificate) executed in accordance with the provisions of section 3402(f) and the regulations thereunder. The furnishing of such Form W–4 shall constitute a request for withholding.

(ii) In the case of an employee who desires to enter into an agreement under section 3402(p) with his employer, if the employee performs services (in addition to those to be the subject of the agreement) the remuneration for which is subject to mandatory income tax withholding by such employer, or if the employee wishes to specify that the agreement terminate on a specific date, the employee shall furnish the employer with a request for withholding which shall be signed by the employee, and shall contain—

(*a*) The name, address, and social security number of the employee making the request,

(*b*) The name and address of the employer,

(*c*) A statement that the employee desires withholding of Federal income tax, and applicable, of qualified State individual income tax (see paragraph (d)(3)(i) of §301.6361–1 of this chapter (Regulations on Procedures and Administration)), and

(*d*) If the employee desires that the agreement terminate on a specific date, the date of termination of the agreement.

If accepted by the employer as provided in subdivision (iii) of this subparagraph, the request shall be attached to, and constitute part of, the employee's Form W–4. An employee who furnishes his employer a request for withholding under this subdivision shall also furnish such employer with Form W–4 if such employee does not already have a Form W–4 in effect with such employer.

(iii) No request for withholding under section 3402(p) shall be effective as an agreement between an employer and an employee until the employer accepts the request by commencing to withhold from the amounts with respect to which the request was made.

(2) An agreement under section 3402 (p) shall be effective for such period as the employer and employee mutually agree upon. However, either the employer or the employee may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other. Unless the employer and employee agree to an earlier termination date, the notice shall be effective with respect to the first payment of an amount in respect of which the agreement is in effect which is made on or after the first "status determination date" (January 1, May 1, July 1, and October 1 of each year) that occurs at least 30 days after the date on which the notice is furnished. If the employee executes a new Form W–4, the request upon which an agreement under section 3402 (p) is based shall be attached to, and constitute a part of, such new Form W–4.

(86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7096, 36 FR 5216, Mar. 18, 1971, as amended by T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 8619, 60 FR 49215, Sept. 22, 1995]

§ 31.3402(q)-1 Extension of withholding to certain gambling winnings.

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(a)(1) *General rule.* Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentality of any of the foregoing making any payment of "winnings subject to withholding" (defined in paragraph (b) of the section) shall deduct and withhold

a tax in an amount equal to 20 percent of the payment. The tax shall be deducted and withheld upon payment of the winnings by the person making such payment ("payer"). See paragraph (c)(5)(ii) of this section for a special rule relating to the time for making deposits of withheld amounts and filing the return with respect to those amounts. Any person receiving a payment of winnings subject to withholding must furnish the payer a statement as required in paragraph (e) of this section. Payers of winnings subject to withholding must file a return as required in paragraph (f) of this section. With respect to reporting requirements for certain payments of gambling winnings not subject to withholding, see section 6041 and the regulations thereunder.

(2) *Exceptions.* The tax imposed under section 3402(q)(1) and this section shall not apply (i) with respect to a payment of winnings which is made to a nonresident alien individual or foreign corporation under the circumstances described in paragraph (c)(4) of this section or (ii) with respect to a payment of winnings from a slot machine play, or a keno or bingo game.

(b) *Winnings subject to withholding.* Winnings subject to withholding means any payment from—

(1) A wager placed in a State-conducted lottery (defined in paragraph (c)(2) of this section) but only if the proceeds from the wager exceed $5,000;

(2) A wager placed in a sweepstakes, wagering pool, or lottery other than a State-conducted lottery but only if the proceeds from the wager exceed $1,000; or

(3) Any other wagering transaction (as defined in paragraph (c)(3) of this section) but only if the proceeds from the wager (i) exceed $1,000 and (ii) are at least 300 times as large as the amount of the wager.

If proceeds from the wager qualify as winnings subject to withholding, then the total proceeds from the wager, and not merely amounts in excess of $1,000 (or $5,000 in the case of winnings from a State-conducted lottery), are subject to withholding.

(c) *Definitions; special rules*—(1) *Rules for determining amount of proceeds from a wager*. (i) The amount of "proceeds from a wager" is the amount paid after January 2, 1977, with respect to the wager, less the amount of the wager. However, for any wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai, only amounts paid after April 30, 1977, are taken into account.

(ii) Amounts paid after December 31, 1983, with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. For example, amounts paid on two bets placed in a parimutuel pool on a particular horse to win a particular race are treated as paid with respect to the same wager. However, those two bets would not be identical were one "to win" and the other "to place", or if the bets were placed in different parimutuel pools, *e.g.*, a pool conducted by the racetrack and a separate pool conducted by an off-track

betting establishment in which the wagers are not pooled with those placed at the track. Tickets purchased in a lottery generally are not identical wagers, because the designation of each ticket as a winner generally would not be based on the occurrence of the same event, *e.g.*, the drawing of a particular number. If the recipient makes the statement which may be required pursuant to §1.6011–3, indicating whether or not the recipient (and any other persons entitled to a portion of the winnings) is entitled to winnings from identical wagers and indicating the amount of such winnings, if any, then the payer may rely upon such statement in determining the total amount of proceeds from the wager under paragraph (c)(1) of this section attributable to identical wagers.

(iii) In determining the amount paid with respect to a wager, proceeds which are not money shall be taken into account at the fair market value.

(iv) Periodic payments, including installment payments or payments which are to be made periodically for the life of a person, are aggregated for purposes of determining the proceeds from a wager. The aggregate amount of periodic payments to be made for a person's life shall be based on that person's life expectancy. See §§1.72–5 and 1.72–9 for rules used in computing the expected return on annuities. For purposes of determining the amount subject to withholding, the first periodic payment shall be reduced by the amount of the wager.

(2) *Wager placed in a State-conducted lottery.* The term "wager placed in a State-conducted lottery" means a wager placed in a lottery conducted by an agency of a State acting under authority of State law provided that the wager is placed with the State agency conducting such lottery or with its authorized employees or agents. This term includes wagers placed in State-conducted lotteries in which the amount of winnings is determined by a parimutuel system.

(3) *Other wagering transaction.* The term "other wagering transaction" means any wagering transaction other than one in a lottery, sweepstakes, or wagering pool. This term includes a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai.

(4) *Certain payments to nonresident aliens or foreign corporations.* A payment of winnings subject to withholding made to a nonresident alien individual or a foreign corporation is not subject to the tax imposed by section 3402(q) and this section if such payment is subject to withholding of tax under section 1441(a) (relating to withholding on nonresident aliens) or 1442(a) (relating to withholding on foreign corporations) and the payer complies with the requirements of those sections. For purposes of this section, a payment is treated as being subject to tax under section 1441(a) or 1442(a) notwithstanding that the rate of such tax is reduced (even to zero) as may be provided by an applicable treaty with another country. However, a reduced or zero rate of withholding of tax shall not be applied by the payer in lieu of the rate imposed by sections 1441 and 1442 unless the person receiving the winnings has completed, signed, and furnished the payer Form 1001 as required by §1.1441–6. See sections 1441 and 1442 and the regulations thereunder for rules regarding the withholding of tax on nonresident aliens and foreign corporations.

(5) *Gambling winnings treated as payments by employer to employee.* (i) Except as provided in subdivision (ii), for purposes of sections 3403 and 3404 and the regulations thereunder and for purposes of so much of subtitle F (except section 7205) and the regulations thereunder as relate to chapter 24, payments to any person of winnings subject to withholding under this section shall be treated as if they are wages paid by an employer to an employee.

(ii) Solely for purposes of applying the deposit rules under 6302(c) and the return requirement of section 6011, the withholding from winnings shall be deemed to have been made no earlier than at the time the winner's identity is known to the payer. Thus, for example, winnings from a State-conducted lottery are subject to withholding when actually or constructively paid, whichever is earlier; however, the time for depositing the withheld taxes and filing a return with respect thereto shall be determined by reference to the date on which the winner's identity is known to the State, if such date is later than the date on which the winnings are actively or constructively paid. If a payer's obligation to pay winnings terminates other than by payment, all liabilities and requirements resulting from the requirement that the payer deduct and withhold with respect to such winnings shall also terminate.

(d) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. A purchases a lottery ticket for $1 in the State W lottery from an authorized agent of State W. On February 1, 1977, the drawing is held and A wins $5,001. Since the proceeds of the wager ($5,001—$1) are not greater than $5,000, State W is not required to withhold or deduct any amount from A's winnings.

Example 2. Assume the same facts as in example 1 except that A purchases two $1 tickets and that A wins $5,002 when one of the tickets is drawn. State W must deduct and withhold tax at a rate of 20% from $5,001 ($5,002 less the $1 wager), or $1,000.20.

Example 3. On January 1, 1984, B makes two $2 bets in a parimutuel pool for a horse race. Each bet is on the same horse to win a particular race. B wins a total of $1,300 on those bets. B cashes the tickets at different cashier windows indicating on the statement demanded by each cashier the amount of winnings from identical wagers. Although the payment by each cashier ($650) is less than the $1,000 floor for the withholding requirement on payments of winnings from horse race parimutuel pools, each cashier is required to deduct and withhold tax from B's winnings equal to $129.60 (($650−$2) × 20 percent = $129.60) based on the information B submitted indicating that the aggregated proceeds from the identical wagers ($1,300−$4=$1,296) exceed $1,000 and the amount is at least 300 times as great as the amount wagered ($4×300=$1,200). Had B refused to make the statements, the payer would have no basis provided by the payee upon which to rely in determining whether the payment is subject to withholding. Under these circumstances, the payer would be required to deduct and withhold tax from the payment.

Example 4. C purchases a lottery ticket for $1. On June 1, 1979, the lottery drawing is held and C wins the grand prize of $50,000, payable $500 monthly. The payer must deduct and withhold tax at a rate of 20% from each payment of winnings. Therefore, $99.80 must be withheld from the first monthly payment to B ($500−$1) ×20%=$99.80) and $100 ($500×20%) must be withheld from each monthly payment thereafter.

Example 5. Assume the same facts as in example 4, except that C wins an automobille rather than the grand

prize. The fair market value of the automobile on the date on which it is made available to C is $10,000. the payer must deduct and withhold a tax of $2,000 (($10,001−$1)×20%). This may be accomplished, for example, if C pays $2,000 to the payer. Alternatively, if the payer, as part of the prize, pays all taxes required to be duducted and withheld, the payer must deduct and withhold tax not only on the fair market value of the automobile less the wager, but also on the taxes it pays that are required to be deducted and withheld. This results in a pyramiding of taxes requiring the use of an algebraic formula. Under this formula, the payer must deduct and withhold a tax of 25 percent of the fair market value of the automobile less the wager ($2,500) and, in addition, the payer must indicate on Form W-2G the amount of such winnings as $12,501 ($10,001+25% ($10,001−$1)).

Example 6. D purchases a ticket for $1 in the State Y lottery from an authorized agent of State Y On January 1, 1976, a drawing is held and D wins $100 a month for the rest of D's life. It is actuarially determined that, on January 3, 1977, D's life expectancy is 5 years. Based on that determination, the proceeds from the wager paid to D on or after January 3, 1977, will exceed $5,000. Therefore, State Y must deduct and withhold $20 from each monthly payment made on or after January 3, 1977. (None of such payments is reduced by the amount of the wager because the amount of the wager was offset by the first payment of winnings which was made before January 3, 1977)).

Example 7. Assume the same facts as in example 6 except that State Y purchases in its own name, as owner, an annuity of $100 a month for D's life from E Corporation, in order to fund its own obligation to make the payments. Although State Y remains liable for the withholding of tax, E Corporation as paying agent for State Y, making payments directly to D, should deduct and withhold from each monthly payment in the manner described in example 6.

Example 8. E purchases a sweepstakes ticket for $1 in a sweepstakes conducted by W. E purchases the ticket on behalf of himself and on behalf of F and G, who have contributed equal amounts toward the purchase of the ticket and who have agreed to share equally in any prizes won. The ticket which E purchases wins $1,002. Since the proceeds of the wager ($1,002—$1) are greater than $1,000 W is required to withhold and deduct 20 percent of such proceeds.

Example 9. On February 1, 1977, a drawing is held in the State X lottery in which a winning ticket is selected. The person holding the winning ticket is entitled to proceeds of $100,000 payable either as a lump sum upon demand or $10,000 a year for 10 years. Under State law, the winning ticket must be presented to an authorized agent of State X before February 1, 1978. Until the ticket is presented, State X does not know the identity of the winner. On December 1, 1977, H, the winner, presents the winning ticket to an authorized agent of the State X lottery. The winnings are constructively paid to H on February 1, 1977. Since H, has the option of receiving the entire proceeds upon demand, State X is required to deduct and withhold $20,000 ($100,000×20%) from the proceeds of H's winnings on February 1, 1977; but for purposes of determining the time at which the deposit and inclusion on Form 941 of these taxes is to be made, the withholding shall be deemed to have beem made on December 1, 1977.

Example 10. J purchases a subscription to N magazine, at the regular subscription price. All new subscribers are automatically eligible for a special drawing. The drawing is held and J wins $50,000. Since J has not paid any more than the regular subscription price, J has not placed a wager or entered a wagering transaction. Therefore, N is not required to deduct and withhold J's winnings.

Example 11. C makes two $2 bets in the same parimutuel pool for a horse race. One bet is an "exacta" in which C bets on horse M to win and horse N to "place". The other bet is a "trifecta". C bets on horse M to win, horse N to "place" and horse O to "show". C wins both bets and is paid $600 with respect to the "exacta" and $900 with respect to the "trifecta". The bets are not identical wagers, however, and on these facts neither payment is subject to withholding.

(e) *Statement by recipient.* Each person who is to receive a payment of winnings subject to withholding shall furnish the payer a statement on Form W-2G or 5754 (whichever is applicable) made under the penalties of perjury containing—

(1) The name, address, and taxpayer identification number of the winner accompanied by a declaration that no other person is entitled to any portion of such payment, or

(2) The name, address, and taxpayer identification number of the recipient and of every person entitled to any portion of such payment.

If more than one payment of winnings subject to withholding is to be made with respect to a single wager, for example in the case of an annuity, the recipient is required by paragraph (e) of this section to furnish the payer a statement with respect to the first such payment only, provided that such other payments are taken into account in a return required by paragraph (f) of this section.

(f) *Return of payer*—(1) *In general.* Every person making payment of winnings for which a statement is required under paragraph (e) of this section shall file a return on Form W-2G with the Internal Revenue Service Center serving the district in which is located the principal place of business of the person making the return on or before February 28 (March 31 if filed electronically) of the calendar year following the calendar year in which the payment of winnings is made. The return required by this paragraph (f) of the section, need not include the statement by the recipient required by paragraph (e) of this section and, therefore, need not be signed by the recipient, provided such statement is retained as long as the contents thereof may become material in the administration of any internal revenue law. For payments to more than one winner, a separate Form W-2G, which in no event need be signed by the winner, shall be filed with respect to each such winner. Each Form W-2G shall contain the following:

(i) The name, address, and employer identification number of the payer;

(ii) The name, address, and social security account number of the winner;

(iii) The date, amount of the payment, and amount withheld;

(iv) The type of wagering transaction;

(v) Except with respect to winnings from a wager placed in a State-conducted lottery, a specific

description of two types of identification, *e.g.,* driver's license number and issuing State, social security account number of voter registration number and jurisdiction, furnished the payer for verification of the recipient's name, address, and social security account number; and

(vi) With respect to amounts paid after December 31, 1983, the amount of winnings from identical wagers.

The return of the payer need not contain the information required by subdivision (v) of this paragraph (f)(1) provided such information is obtained with respect to the recipient of such winnings and retained as long as the contents thereof may become material in the administration of any internal revenue law.

(2) *Transmittal form.* Persons making payments of winnings subject to withholding shall use Form W-3G to transmit Forms W-2G to the Internal Revenue Service Centers.

(Secs. 6011 and 7805 of the Internal Revenue Code of 1954 (68A Stat. 732, 917; 26 U.S.C. 6011, 7805)

[T.D. 7787, 46 FR 46908, Sept. 23, 1981, as amended by T.D. 7919, 48 FR 46298, Oct. 12, 1983; 48 FR 55728, Dec. 15, 1983; T.D. 7943, 49 FR 5345, Feb. 13, 1984; 49 FR 8437, Mar. 7, 1984; T.D. 8895, 65 FR 50408, Aug. 18, 2000]

§ 31.3402(r)-1 Withholding on distributions of Indian gaming profits to tribal members.

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(a) (1) *General rule.* Section 3402(r)(1) requires every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity, as defined in 25 U.S.C. 2703, conducted or licensed by such tribe to deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax, as that term is defined in section 3402(r)(3).

(2) *Withholding tables.* Except as provided in paragraph (a)(4) of this section, the amount of a payment's proportionate share of the annualized tax shall be determined under the applicable table provided by the Commissioner.

(3) *Annualized amount of payment.* Section 3402(r)(5) provides that payments shall be placed on an annualized basis under regulations prescribed by the Secretary. A payment may be placed on an annualized basis by multiplying the amount of the payment by the total number of payments to be made in a calendar year. For example, a monthly payment may be annualized by multiplying the amount of the payment by 12. Similarly, a quarterly payment may be annualized by multiplying the amount of the payment by 4.

(4) *Alternate withholding procedures*—(i) *In general.* Any procedure for determining the amount to be deducted and withheld under section 3402(r) may be used, provided that the amount of tax deducted and withheld is substantially the same as it would be using the tables provided by the Commissioner under paragraph (a)(2) of this section. At the election of an Indian tribe, the amount to be deducted and withheld under section 3402(r) shall be determined in accordance with this alternate procedure.

(ii) *Method of election.* It is sufficient for purposes of making an election under this paragraph (a)(4) that an Indian tribe evidence the election in any reasonable way, including use of a particular method. Thus, no written election is required.

(5) *Additional withholding permitted.* Consistent with the provisions of section 3402(p), a tribal member and a tribe may enter into an agreement to provide for the deduction and withholding of additional amounts from payments in order to satisfy the anticipated tax liability of the tribal member. The agreement may be made in a manner similar to that described in §31.3402(p)–1 (with respect to voluntary withholding agreements between employees and employers).

(b) Effective date. This section applies to payments made after December 31, 1994.

[T.D. 8634, 60 FR 65238, Dec. 19, 1995]

§ 31.3403-1 Liability for tax.

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Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. See, however, §31.3402(d)–1. The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depositary of the United States.

§ 31.3404-1 Return and payment by governmental employer.

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If the United States, or a State, Territory, Puerto Rico, or a political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, is an employer required to deduct and withhold tax under Chapter 24, the return of the amount deducted and withheld as such tax may be made by the officer or employee having control of the payment of the wages or

other officer or employee appropriately designated for that purpose. (For provisions relating to the execution and filing of returns, see Subpart G of the regulations in this part.)

§ 31.3405(c)-1 Withholding on eligible rollover distributions; questions and answers.

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The following questions and answers relate to withholding on eligible rollover distributions under section 3405(c) of the Internal Revenue Code of 1986, as added by section 522(b) of the Unemployment Compensation Amendments of 1992 (Public Law 102– 318, 106 Stat. 290) (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 402(f), and 403(b)(8) and (10), see §§1.401(a)(31)–1, 1.402(c)–2, 1.402(f)–1, and 1.403(b)–2 of this chapter, respectively.

List of Questions

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?

Q–11: Are there special rules for applying the 20-percent withholding requirement to employer securities and a plan loan offset amount distributed in an eligible rollover distribution?

Q–12: How does the mandatory withholding rule apply to net unrealized appreciation from employer securities?

Q–13: Does the 20-percent withholding requirement apply to eligible rollover distributions from a qualified plan distributed annuity contract?

Q–14: Must a payor or plan administrator withhold tax from an eligible rollover distribution for which a direct rollover election was not made if the amount of the distribution is less than $200?

Q–15: If eligible rollover distributions are made from a qualified plan, who has responsibility for making the returns and reports required under these regulations?

Q–16: What eligible rollover distributions must be reported on Form 1099–R?

Q–17: Must the plan administrator, trustee or custodian of the eligible retirement plan report amounts received in a direct rollover?

Questions and Answers

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Q–1: What are the withholding requirements under section 3405 for distributions from qualified plans and section 403(b) annuities?

A–1: (a) *General rule.* Section 3405(c), added by UCA, provides that any designated distribution that is an eligible rollover distribution (as defined in section 402(f)(2)(A)) from a qualified plan or a section 403(b) annuity is subject to income tax withholding at the rate of 20 percent unless the distributee of the eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan in a direct rollover. See §1.402(c)–2, Q&A–2 of this chapter for the definition of a qualified plan and §1.403(b)–2, Q&A–1 of this chapter for the definition of a section 403(b) annuity. For purposes of section 3405 and this section, with respect to a distribution from a qualified plan, an eligible retirement plan is a trust qualified under section 401(a), an annuity plan described in section 403(a), or an individual retirement plan (as described in §1.402(c)–2, Q&A–2 of this chapter). For purposes of section 3405 and this section, with respect to a distribution from a section 403(b) annuity, an eligible retirement plan is an annuity contract, a custodial account, a retirement income account described in section 403(b), or an individual retirement plan. If a designated distribution is not an eligible rollover distribution, it is subject to the elective withholding provisions of section 3405(a) and (b) and §35.3405–1 of this chapter and is not subject to the mandatory withholding provisions of section 3405(c)

and this section.

(b) *Application of other statutory provisions.* See §1.401(a)(31)–1 of this chapter concerning the requirements and the procedures for electing a direct rollover under section 401(a)(31). See section 402(c)(2) and (4), and §1.402(c)–2, Q&A–3 through Q&A–10 and Q&A–14 of this chapter for rules to determine what constitutes an eligible rollover distribution. See §1.402(f)–1, Q&A–1 through Q&A–3 and §1.403(b)–2, Q&A–3 of this chapter concerning the notice that must be provided to a distributee, within a reasonable period of time before making an eligible rollover distribution. See §1.403(b)–2, Q&A–1 and Q&A–2 of this chapter for guidance concerning the rollover provisions and direct rollover requirements for distributions from annuities described in section 403(b).

(c) *Effective date*—(1) *Statutory effective date*—(i) *General rule.* Section 3405(c), as added by UCA, applies to eligible rollover distributions made on or after January 1, 1993, even if the employee's employment with the employer maintaining the plan terminated before January 1, 1993 and even if the eligible rollover distribution is part of a series of payments that began before January 1, 1993.

(ii) *Special rule for governmental section 403(b) annuities.* Section 522 of UCA provides a special effective date for governmental section 403(b) annuities. This special effective date appears in §1.403(b)–2T of this chapter (as it appeared in the April 1, 1995 edition of 26 CFR part 1).

(2) *Regulatory effective date.* This section applies to eligible rollover distributions made on or after October 19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, §31.3405(c)–1T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, a plan administrator or payor may comply with the withholding requirements of section 3405(c) by substituting any or all provisions of this section for the corresponding provisions of §31.3405(c)–1T, if any.

Q–2: May a distributee elect under section 3405(c) not to have Federal income tax withheld from an eligible rollover distribution?

A–2: No. The 20-percent income tax withholding imposed under section 3405(c)(1) applies to an eligible rollover distribution unless the distributee elects under section 401(a)(31) to have the eligible rollover distribution paid directly to an eligible retirement plan in a direct rollover. See §1.401(a)(31)–1 and §1.403(b)–2, Q&A–2 of this chapter for provisions concerning the requirement that a distributee of an eligible rollover distribution be permitted to elect a distribution in the form of a direct rollover.

Q–3: May a distributee be permitted to elect to have more than 20-percent Federal income tax withheld from an eligible rollover distribution?

A–3: Yes. Under section 3402(p), a distributee of an eligible rollover distribution and the plan administrator or payor are permitted to enter into an agreement to provide for withholding in excess of 20 percent from an eligible rollover distribution. Any agreement must be made in accordance with applicable forms and instructions. However, no request for withholding will be effective between the plan administrator or payor and the distributee until the plan administrator or payor accepts the request by commencing to withhold from the amounts with respect to which the request was made. An agreement under section 3402(p) shall be

effective for such period as the plan administrator or payor and the distributee mutually agree upon. However, either party to the agreement may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other.

Q–4: Who has responsibility for complying with section 3405(c) relating to the 20-percent income tax withholding on eligible rollover distributions?

A–4: Section 3405(d) generally requires the plan administrator of a qualified plan and the payor of a section 403(b) annuity to withhold under section 3405(c)(1) an amount equal to 20 percent of the portion of an eligible rollover distribution that the distributee does not elect to have paid in a direct rollover. When an amount is paid under a qualified plan distributed annuity contract as defined in §1.402(c)–2, Q&A–10 of this chapter, the payor is treated as the plan administrator. See Q&A–13 of this section concerning eligible rollover distributions from a qualified plan distributed annuity contract.

Q–5: May the plan administrator shift the withholding responsibility to the payor and, if so, how?

A–5: Yes. The plan administrator may shift the withholding responsibility to the payor by following the procedures set forth in §35.3405–1, Q&A E–2 through E–5 of this chapter (relating to elective withholding on pensions, annuities and certain other deferred income) with appropriate adjustments, including the plan administrator's identification of amounts that constitute required minimum distributions.

Q–6: How does the 20-percent withholding requirement under section 3405(c) apply if a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

A–6: If a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to receive the remainder of the distribution, the 20-percent withholding requirement under section 3405(c) applies only to the portion of the eligible rollover distribution that the distributee receives and not to the portion that is paid in a direct rollover.

Q–7: Will the plan administrator be subject to liability for tax, interest, or penalties for failure to withhold 20 percent from an eligible rollover distribution that, because of erroneous information provided by a distributee, is not paid to an eligible retirement plan even though the distributee elected a direct rollover?

A–7: (a) *General rule.* If the plan administrator reasonably relied on adequate information provided by the distributee (as described in paragraph (b) of this Q&A), the plan administrator will not be subject to liability for taxes, interest, or penalties for failure to withhold income tax from an eligible rollover distribution solely because the distribution is paid to an account or plan that is not an eligible retirement plan (as defined, with respect to distributions from qualified plans, in section 402(c)(8)(B) and §1.402(c)–2, Q&A–2 of this chapter and, with respect to a distributions from section 403(b) annuities, in §1.403(b)–2), Q&A–1 of this chapter. Although the plan administrator is not required to verify independently the accuracy of information provided by the distributee, the plan administrator's reliance on the information furnished must be reasonable. For example, it is not reasonable for the plan administrator to rely on information that is clearly erroneous on its face.

(b) *Adequate information.* The plan administrator has obtained from the distributee adequate information on which to rely in making a direct rollover if the distributee furnishes to the plan administrator: the name of the eligible retirement plan; a representation that the recipient plan is an individual retirement plan, a qualified plan, or a section 403(b) annuity, as appropriate; and any other information that is necessary in order to permit the plan administrator to accomplish the direct rollover by the means it has selected. This information must include any information needed to comply with the specific requirements of §1.401(a)(31)–1, Q&A–3 and Q&A–4 of this chapter. For example, if the direct rollover is to be made by mailing a check to the trustee of an individual retirement account, the plan administrator must obtain, in addition to the name of the individual retirement account and the representation described above, the name and address of the trustee of the individual retirement account.

Q–8: Is an eligible rollover distribution that is paid to a qualified defined benefit plan subject to 20-percent withholding?

A–8: No. If an eligible rollover distribution is paid in a direct rollover to an eligible retirement plan within the meaning of section 402(c)(8), including a qualified defined benefit plan, it is reasonable to believe that the distribution is not includible in gross income pursuant to section 402(c)(1). Accordingly, pursuant to section 3405(e)(1)(B), the distribution is not a designated distribution and is not subject to 20-percent withholding.

Q–9: If property other than cash, employer securities, or plan loans is distributed, how is the 20-percent income tax withholding required under section 3405(c) accomplished?

A–9: When all or a portion of an eligible rollover distribution subject to 20-percent income tax withholding under section 3405(c) consists of property other than cash, employer securities, or plan loan offset amounts, the plan administrator or payor must apply §35.3405–1, Q&A F–2 of this chapter and may apply §35.3405–1, Q&A F–3 of this chapter in determining how to satisfy the withholding requirements.

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?

A–10: (a) *In general.* For purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding, a plan administrator may make the assumptions described in paragraphs (b), (c), and (d) of this Q&A in determining the amount of a distribution that is an eligible rollover distribution and a designated distribution. Section 1.401(a)(31)–1, Q&A–18 of this chapter provides assumptions for purposes of complying with section 401(a)(31). See §1.402(c)–2, Q&A–15 of this chapter concerning the effect of these assumptions for purposes of section 402(c).

(b) *$5,000 death benefit.* A plan administrator may assume that a distribution that qualifies for the $5,000 death benefit exclusion under section 101(b) is the only death benefit being paid with respect to a deceased employee that qualifies for that exclusion. Thus, in such a case, the plan administrator may assume that the distribution is not an eligible rollover distribution to the extent that it would be excludible from gross income based on this assumption.

(c) *Required minimum distributions.* The plan administrator is permitted to determine the amount of the

minimum distribution required to satisfy section 401(a)(9)(A) for any calendar year by assuming that there is no designated beneficiary.

(d) *Valuation of property.* In the case of a distribution that includes property, in calculating the amount of the distribution for purposes of applying section 3405(c), the value of the property may be determined in accordance with §35.3405–1, Q&A F–1 of this chapter.

Q–11: Are there special rules for applying the 20-percent withholding requirement to employer securities and a plan loan offset amount distributed in an eligible rollover distribution?

A–11: Yes. The maximum amount to be withheld on any designated distribution (including any eligible rollover distribution) under section 3405(c) must not exceed the sum of the cash and the fair market value of property (excluding employer securities) received in the distribution. The amount of the sum is determined without regard to whether any portion of the cash or property is a designated distribution or an eligible rollover distribution. For purposes of this rule, any plan loan offset amount, as defined in §1.402(c)–2, Q&A–9 of this chapter, is treated in the same manner as employer securities. Thus, although employer securities and plan loan offset amounts must be included in the amount that is multiplied by 20-percent, the total amount required to be withheld for an eligible rollover distribution is limited to the sum of the cash and the fair market value of property received by the distributee, excluding any amount of the distribution that is a plan loan offset amount or that is distributed in the form of employer securities. For example, if the only portion of an eligible rollover distribution that is not paid in a direct rollover consists of employer securities or a plan loan offset amount, withholding is not required. In addition, if a distribution consists solely of employer securities and cash (not in excess of $200) in lieu of fractional shares, no amount is required to be withheld as income tax from the distribution under section 3405 (including section 3405(c) and this section). For purposes of section 3405 and this section, employer securities means securities of the employer corporation within the meaning of section 402(e)(4)(E)(ii).

Q–12: How does the mandatory withholding rule apply to net unrealized appreciation from employer securities?

A–12: An eligible rollover distribution can include net unrealized appreciation from employer securities, within the meaning of section 402(e)(4), even if the net unrealized appreciation is excluded from gross income under section 402(e)(4). However, to the extent that it is excludable from gross income pursuant to section 402 (e)(4), net unrealized appreciation is not a designated distribution pursuant to section 3405(e)(1)(B) because it is reasonable to believe that it is not includable in gross income. Thus, to the extent that net unrealized appreciation is excludable from gross income pursuant to section 402(e)(4), net unrealized appreciation is not included in the amount of an eligible rollover distribution that is subject to 20-percent withholding.

Q–13: Does the 20-percent withholding requirement apply to eligible rollover distributions from a qualified plan distributed annuity contract?

A–13: The 20-percent withholding requirement applies to eligible rollover distributions from a qualified plan distributed annuity contract as defined in Q&A–10 of §1.402(c)–2 of this chapter. In the case of an eligible rollover distribution from such an annuity contract, the payor is treated as the plan administrator for purposes of section 3405. See §1.401(a)(31)–1, Q&A–17 of this chapter concerning the direct rollover requirements that

apply to distributions from such an annuity contract and see §1.402(c)–2, Q&A–10 of this chapter concerning the treatment of distributions from such annuity contracts as eligible rollover distributions.

Q–14: Must a payor or plan administrator withhold tax from an eligible rollover distribution for which a direct rollover election was not made if the amount of the distribution is less than $200?

A–14: No. However, all eligible rollover distributions received within one taxable year of the distributee under the same plan must be aggregated for purposes of determining whether the $200 floor is reached. If the plan administrator or payor does not know at the time of the first distribution (that is less than $200) whether there will be additional eligible rollover distributions during the year for which aggregation is required, the plan administrator need not withhold from the first distribution. If distributions are made within one taxable year under more than one plan of an employer, the plan administrator or payor may, but need not, aggregate distributions for purposes of determining whether the $200 floor is reached. However, once the $200 threshold has been reached, the sum of all payments during the year must be used to determine the applicable amount to be withheld from subsequent payments during the year.

Q–15: If eligible rollover distributions are made from a qualified plan, who has responsibility for making the returns and reports required under these regulations?

A–15: Generally, the plan administrator, as defined in section 414(g), is responsible for maintaining the records and making the required reports with respect to eligible rollover distributions from qualified plans. However, if the plan administrator fails to keep the required records and make the required reports, the employer maintaining the plan is responsible for the reports and returns.

Q–16: What eligible rollover distributions must be reported on Form 1099–R?

A–16: Each eligible rollover distribution, including each eligible rollover distribution that is paid directly to an eligible retirement plan in a direct rollover, must be reported on Form 1099–R in accordance with the instructions for Form 1099–R. For purposes of the reporting required under section 6047(e), a direct rollover is treated as a distribution that is immediately rolled over to an eligible retirement plan. Distributions that are not eligible rollover distributions are subject to the reporting requirements set forth in §35.3405–1 of this chapter and applicable forms and instructions.

Q–17: Must the plan administrator, trustee or custodian of the eligible retirement plan report amounts received in a direct rollover?

A–17: (a) *Individual retirement plan.* If a distributee elects to have an eligible rollover distribution paid to an individual retirement plan in a direct rollover, the eligible rollover distribution is reported on Form 5498 as a rollover contribution to the individual retirement plan, in accordance with the instructions for Form 5498.

(b) *Qualified plan or section 403(b) annuity.* If a distributee elects to have an eligible rollover distribution paid to a qualified plan or section 403(b) annuity, the recipient plan or annuity is not required to report the receipt of the rollover contribution.

[T.D. 8619, 60 FR 49215, Sept. 22, 1995, as amended by T.D. 8880, 65 FR 21315, Apr. 21, 2000]

§ 31.3406-0 Outline of the backup withholding regulations.

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This section lists paragraphs contained in §§31.3406(a)–1 through 31.3406(i)–1.

§31.3406(a)–1 Backup withholding requirement on reportable payments.

(a) Overview.

(b) Conditions that invoke the backup withholding requirement.

(1) Conditions applicable to all reportable payments.

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(2) Accounts or instruments that are pre-1984 accounts and brokerage relationships that are not post-1983 brokerage accounts.

(h) Cross references.

§31.3406(i)–1 Effective date.

[T.D. 8637, 60 FR 66112, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 9010, 67 FR 48759, July 26, 2002]

§ 31.3406(a)-1 Backup withholding requirement on reportable payments.

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(a) *Overview.* Under section 3406, a payor must deduct and withhold 31 percent of a reportable payment if a condition for withholding exists. *Reportable payments* mean interest and dividend payments (as defined in section 3406(b)(2)) and other reportable payments (as defined in section 3406 (b)(3)). The conditions described in paragraph (b)(1) of this section apply to all reportable payments, including reportable interest and dividend payments. The conditions described in paragraph (b)(2) of this section apply only to reportable interest and dividend payments.

(b) *Conditions that invoke the backup withholding requirement*—(1) *Conditions applicable to all reportable payments.* A payor of a reportable payment must deduct and withhold under section 3406 if —

(i) The payee of the reportable payment does not furnish the payee's taxpayer identification number to the payor, as required in section 3406(a)(1)(A) and §31.3406(d)–1; or

(ii) The Internal Revenue Service or a broker notifies the payor that the taxpayer identification number furnished by its payee for a reportable payment is incorrect, as described in section 3406(a)(1)(B) and §31.3406(d)–5.

(2) *Conditions applicable only to reportable interest or dividend payments.* A payor of a reportable interest or dividend payment must deduct and withhold under section 3406 if—

(i) The Internal Revenue Service or a broker notifies the payor that its payee has underreported interest or dividend income, as described in section 3406(a)(1)(C) and §31.3406(c)–1; or

(ii) The payee fails to certify to the payor or broker that the payee is not subject to withholding due to notified payee underreporting, as described in section 3406(a)(1)(D) and §31.3406(d)–2.

(c) *Exceptions.* The requirement to withhold does not apply to certain minimal payments as described in §31.3406(b)(4)–1 or to payments exempt from withholding under §§31.3406(g)–1 through 31.3406 (g)–3.

(d) *Cross references.* For the definition of *payor*, see §31.3406(a)–2. For the definition of *taxpayer identification number*, see §31.3406(h)–1(b).

[T.D. 8637, 60 FR 66114, Dec. 21, 1995]

§ 31.3406(a)-2 Definition of payors obligated to backup withhold.

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(a) *In general. Payor* means the person that is required to make an information return under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, or 6050N, with respect to any reportable payment (as described in section 3406(b)), or that is described in paragraph (b) of this section.

(b) *Persons treated as payors.* The following persons are treated as payors for purposes of section 3406 —

(1) A grantor trust established after December 31, 1995, all of which is owned by two or more grantors (treating for this purpose spouses filing a joint return as one grantor);

(2) A grantor trust with ten or more grantors established on or after January 1, 1984 but before January 1, 1996;

(3) A common trust fund; and

(4) A partnership or an S corporation that makes a reportable payment.

(c) *Persons not treated as payors.* A person on the following list is not treated as a payor for purposes of section 3406 if the person does not have a reporting obligation under the section on information reporting to which the payment relates—

(1) A trust (other than a grantor trust as described in paragraph (b)(1) or (2) of this section) that files a Form 1041 containing information required to be shown on an information return, including amounts withheld under section 3406; or

(2) A partnership making a payment of a distributive share or an S corporation making a similar distribution.

(d) *Effective date.* The provisions of this section apply to payments made after December 31, 2002.

[T.D. 9010, 67 FR 48759, July 26, 2002]

§ 31.3406(a)-3 Scope and extent of accounts subject to backup withholding.

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A payor who is required to withhold under §31.3406(a)–1 must withhold—

(a) On the accounts subject to withholding under §31.3406(a)–1 (b)(1)(i) or (b)(2)(ii); and

(b) On the accounts subject to withholding under §31.3406(a)–1(b)(1)(ii) or (b)(2)(i), as described under §31.3406(d)–5 (relating to notification of incorrect TIN) or §31.3406(c)–1 (relating to notified payee underreporting), respectively.

[T.D. 8637, 60 FR 66114, Dec. 21, 1995]

§ 31.3406(a)-4 Time when payments are considered to be paid and subject to backup withholding.

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(a) *Timing*—(1) *In general.* If backup withholding is required under section 3406 on a reportable payment (as defined in section 3406(b)), the payor must withhold at the time it makes the payment to the payee or to the payee's account that is subject to withholding. Amounts are considered paid when

they are credited to the account of, or made available to, the payee. Amounts are not considered paid solely because they are posted (e.g., an informational notation on the payee's passbook) if they are not actually credited to the payee's account or made available to the payee. See paragraph (c) of this section for the timing of withholding by a middleman.

(2) *Special rules for dividends.* For purposes of section 3406 and this section—

(i) *Record date earlier than payment date.* In the case of stock for which the record date is earlier than the payment date, the dividends are considered paid on the payment date.

(ii) *Dividends paid in corporate reorganizations.* In the case of a corporate reorganization, if a payee is required to exchange stock held in the former corporation for stock in the new corporation before the dividends that have been paid with respect to the stock in the new corporation will be provided to the payee, the dividend is considered paid on the date the payee actually exchanges the stock and receives the dividend.

(b) *Amounts reportable under section 6045*—(1) *In general.* Notwithstanding paragraph (a) of this section, in the case of a transaction reportable under section 6045 (except in the case of forward contracts (including foreign currency contracts), regulated futures contracts, and security short sales), the obligation to withhold under section 3406 arises on the date the sale is entered on the books of the broker or the date the exchange occurs as provided in §1.6045–1(f)(3) of this chapter. A broker (in its capacity as payor) is not required, however, to satisfy its withholding liability until payment is made. See §31.3406(b)(3)–2(b)(2) for special rules applicable to forward contracts (including foreign currency contracts), regulated futures contracts, and security short sales.

(2) *Special rule for interest accrued on bonds.* For purposes of determining the time that interest is considered paid and subject to withholding under section 3406 when bonds are sold between interest payment dates, the portion of the sales price representing interest accrued to the date of sale is considered a portion of a reportable payment of gross proceeds under section 6045 (provided that the accrued interest is not tax-exempt as described in section 103(a), relating to certain governmental obligations), and is not considered to be a payment of interest for purposes of section 6049.

(c) *Middlemen*—(1) *In general.* A person that is a middleman and is a person defined in §31.3406(a)–2(b) or in the section on information reporting to which the payment relates must withhold under section 3406 at the time the reportable payment is received by or credited to the middleman. If the middleman makes or credits the reportable payment to the payee prior to the middleman's receipt of the corresponding payment, the middleman may withhold at the time the reportable payment is made or credited to the payee.

(2) *Special rule for common trust funds.* A common trust fund (as defined in section 584) must withhold either—

(i) At the time the reportable payment is received by or credited to the common trust fund as provided in paragraph (c)(1) of this section;

(ii) On the date on which the assets of the common trust fund are valued; or

(iii) At the time the common trust fund pays or credits the reportable payment to a participant of the common trust fund.

(3) *Special rule for certain grantor trusts.* For grantor trusts described in §31.3406(a)–2(b)(1) or (2), reportable payments made to the trust are treated as paid by the trust to each grantor, in an amount equal to the distribution made by the trust to each grantor, on the date that the reportable payment is paid to the trust (except for gross proceeds reportable under section 6045). Paragraph (b)(2) of this section applies to a grantor trust making a payment of gross proceeds under section 6045 subject to withholding under section 3406. For purposes of this paragraph (c)(3) a husband and wife filing a joint return are considered to be one grantor.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995, as amended by T.D. 9010, 67 FR 48760, July 26, 2002]

§ 31.3406(b)(2)-1 Reportable interest payment.

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(a) *Interest subject to backup withholding*—(1) *In general.* A payment of a kind, and to a payee, that is required to be reported under section 6049 (relating to returns regarding interest and original issue discount) is a reportable payment for purposes of section 3406, subject to the special rules of §31.3406 (b)(2)–2 (relating to original issue discount) and §31.3406(b)(2)–3 (relating to window transactions). See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(2) *Special rule for tax-exempt interest.* When an issuer is required to make an information return under §1.6049–4(d)(8) of this chapter because a payee provided a signed written statement on the envelope or shell incorrectly claiming that the interest was exempt from taxation under section 103(a) (as described in §1.6049–5(b)(1)(ii) of this chapter), the issuer is not required to impose withholding under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount of interest subject to withholding under section 3406 is the amount subject to reporting under section 6049.

(2) *Special rule to adjust for premature withdrawal penalty.* Solely for purposes of computing the amount subject to withholding under section 3406, the payor may elect not to withhold from the portion of any interest payment that is not received by the payee because a penalty is in fact imposed for premature withdrawal of funds deposited in a time savings account, certificate of deposit, or

similar class of deposit.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995]

§ 31.3406(b)(2)-2 Original issue discount.

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(a) *Original issue discount subject to backup withholding.* The amount of original issue discount, treated as interest, subject to withholding under section 3406 is the amount subject to reporting under section 6049, but is limited to the amount of cash paid. In addition, if an original issue discount obligation, subject to reporting under section 6045, is sold prior to maturity and with respect to the seller a condition exists for imposing withholding under section 3406 on the gross proceeds, then withholding under §31.3406(b)(3)–2 applies to the gross proceeds of the sale reportable under section 6045, and not to the amount of any original issue discount includible in the gross income of the seller for the calendar year of the sale. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding and time when backup withholding is imposed with respect to short-term obligations.* In the case of an obligation with a fixed maturity date not exceeding one year from the date of issue (a short-term obligation), withholding under section 3406 applies to any payment of original issue discount on the obligation includible in the gross income of the holder to the extent of the cash amount of the payment. See §1.1273–1 of this chapter to determine the amount of original issue discount on a short-term obligation. See §1.446–2(e)(1) of this chapter to determine the amount of a payment treated as original issue discount.

(c) *Transferred short-term obligations*—(1) *Subsequent holder may establish purchase price*—(i) *In general.* At maturity of a short-term obligation, a subsequent holder (i.e., any person who purchased or otherwise obtained the obligation after the obligation was issued to the original holder) may establish the price of the obligation. The price established by the subsequent holder must then be treated as the original issue price for purposes of computing the amount of the original issue discount subject to withholding under section 3406. The price of a short-term obligation may be established by confirmation receipt or other record of a similar type or, if the obligation is redeemed by or through the person from whom the obligation was purchased or otherwise obtained, by the records of the person from whom or through whom the obligation was purchased or otherwise obtained. The subsequent holder is not required to certify under penalties of perjury that the price determined under this paragraph (c)(1)(i) is correct.

(ii) *Exception.* A payor may elect to disregard the price at which the subsequent holder purchased or otherwise obtained the obligation if the payor's computer or recordkeeping system on which the details of the obligation are stored is not able to accept that price without significant manual intervention.

(2) *Subsequent holder unable (or not permitted) to establish purchase price.* If a subsequent holder fails (or is unable, pursuant to paragraph (c)(1)(ii) of this section) to establish the purchase price of the obligation, then the person redeeming the obligation must determine the amount subject to withholding under section 3406 as though the obligation had been purchased by the holder on the date of issue. If the person redeeming the obligation is the issuer of the obligation, then the issuer must determine the amount subject to withholding from its records. If a person other than the issuer of the obligation redeems the obligation and the obligation is listed in Internal Revenue Service Publication 1212, List of Original Issue Discount Obligations, that person must determine the amount subject to withholding by using the issue price indicated in Publication 1212.

(3) *Transferred obligation.* If a short-term obligation is transferred, no part of the purchase price is considered a reportable interest payment under section 6049. Withholding under section 3406 applies, however, to the gross proceeds of the sale of the obligation if the transfer is subject to reporting under section 6045 and a condition exists for imposing withholding. For the rules regarding withholding for amounts subject to reporting under section 6045, see §31.3406(b)(3)-2.

(d) *Amount subject to backup withholding and time when backup withholding is imposed with respect to long-term obligations*—(1) *No cash payments prior to maturity.* In the case of an obligation with a fixed maturity date that is more than one year from the date of issue (a long-term obligation) and with no cash payments prior to maturity, withholding under section 3406 applies at the maturity of the obligation to the amount of original issue discount includible in the gross income of the holder for the calendar year in which the obligation matures. The amount required to be withheld must not exceed the amount of the cash payment.

(2) *Registered long-term obligations with cash payments prior to maturity.* In the case of a long-term obligation in registered form that provides for cash payments prior to maturity, withholding under section 3406 applies at the time cash payments are made to the sum of the amounts of qualified stated interest and original issue discount includible in the gross income of the holder for the calendar year in which the cash payments are made. The amount required to be withheld at the time of any cash payment, however, must not exceed the amount of the cash payment. If more than one cash payment is made during a calendar year, the tax that is required to be withheld with respect to original issue discount must be allocated among all the expected cash payments in the ratio that each cash payment bears to the total of the expected cash payments.

(3) *Transferred registered long-term obligations with payments prior to maturity.* In the case of a long-term obligation that is transferred after its issuance from the original holder, the amount subject to withholding under section 3406 with respect to a subsequent holder is the amount of original issue discount includible in the gross income of all holders during the calendar year (without regard to any amount paid by a subsequent holder at the time of transfer). If the person redeeming the obligation at maturity is the issuer of the obligation, the issuer must determine the amount subject to withholding through its records by treating the holder as if he were the original holder. If a person redeeming the obligation at maturity is a person other than the issuer of the obligation, and the obligation is listed in Internal Revenue Service Publication 1212, List of Original Issue Discount Obligations, the person

must determine the amount subject to withholding by using the issue price indicated in Publication 1212.

(e) *Bearer long-term obligations.* In the case of a bearer long-term obligation with cash payments prior to maturity—

(1) *Payments prior to maturity.* Withholding under section 3406 applies prior to maturity only to the payment of qualified stated interest (and not to any amount of original issue discount) includible in the gross income of the holder for the calendar year.

(2) *Payments at maturity.* At maturity of the obligation, withholding applies to the sum of any qualified stated interest payment made at maturity and the total amount of original issue discount includible in the gross income of the holder during the calendar year of maturity. The amount required to be withheld at the time of the cash payment, however, must not exceed the amount of the cash payment.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995; 61 FR 12135, Mar. 25, 1996]

§ 31.3406(b)(2)-3 Window transactions.

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(a) *Requirement to backup withhold.* Withholding under section 3406 applies to a window transaction (as defined in paragraph (b) of this section) only if the payee does not furnish a taxpayer identification number to the payor in the manner required in paragraph (c) of this section or furnishes an obviously incorrect number as described in §31.3406(h)–1(b)(2). Withholding does not apply to a window transaction even though the Internal Revenue Service notifies the payor of the payee's incorrect taxpayer identification number under section 3406(a)(1)(B) or of notified payee underreporting under section 3406(a)(1)(C). The payee in a window transaction is not required to certify under penalties of perjury that the payee is not subject to withholding due to notified payee underreporting (as described in §31.3406(d)–2(b)(2)).

(b) *Window transaction defined. Window transaction* means a payment of interest with respect to any of the following obligations:

(1) An interest coupon in bearer form that is subject to taxation (i.e., other than exempt interest described in §1.6049–5(b)(1)(ii) of this chapter);

(2) A United States savings bond; or

(3) A discount obligation having a maturity at issue of one year or less, including commercial paper

and bankers' acceptances that are in definitive form (i.e., evidenced by a paper document other than a confirmation receipt) but not including short-term government obligations (as defined in section 1271 (a)(3)(B)).

(c) *Manner of furnishing taxpayer identification number in the case of a window transaction.* A payee must furnish the payee's taxpayer identification number to the payor with respect to a window transaction either orally or in writing at the time that the window transaction occurs. See §31.3406(g)–3(c)(1)(i), which provides that a payee may not claim the payee is awaiting receipt of a taxpayer identification number with respect to a window transaction. The payee is not required to certify, under penalties of perjury, that the taxpayer identification number provided is correct.

[T.D. 8637, 60 FR 66116, Dec. 21, 1995]

§ 31.3406(b)(2)-4 Reportable dividend payment.

top

(a) *Dividends subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6042 (relating to returns regarding payments of dividends and corporate earnings and profits) is a reportable payment for purposes of section 3406. See paragraph (b) of this section for certain dividends not subject to withholding under section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Dividends not subject to backup withholding.* Except as provided in §31.3406(b)(3)–2 (relating to transactions reportable under section 6045), withholding under section 3406 does not apply to—

(1) Any amount treated as a taxable dividend by reason of section 302 (relating to redemptions of stock), section 304 (relating to redemptions through the use of related corporations), section 306 (relating to disposition of certain stock), section 356 (relating to receipt of additional consideration in connection with certain reorganizations), or section 1081(e)(2) (relating to certain distributions pursuant to an order of the Securities and Exchange Commission);

(2) Any exempt-interest dividend, as defined in section 852(b)(5)(A), paid by a regulated investment company; or

(3) Any amount paid or treated as paid during a year by a regulated investment company, provided that the payor reasonably estimates, as provided in paragraph (c)(2) of this section, that 95 percent or more of all dividends paid or treated as paid during the year are exempt-interest dividends.

(c) *Amount subject to backup withholding*—(1) *In general.* The amount of a dividend subject to withholding under section 3406 is the amount subject to reporting under section 6042, including any dividend that is reinvested pursuant to a plan under which a shareholder may elect to receive stock as a

dividend instead of property. Except as otherwise provided in this paragraph (c), withholding applies to the entire amount of the distribution.

(2) *Reasonable estimate of amount of dividend subject to backup withholding.* Pursuant to section 6042 (b)(3) and §1.6042–3(c) of this chapter, if the payor is unable to determine the portion of a distribution that is a dividend, the entire amount of the distribution must be treated as a dividend for information reporting under section 6042. Hence, withholding applies to the entire amount of the distribution. If a payor is able reasonably to estimate under section 6042 and §1.6042–3(c) of this chapter the portion of a distribution that is not a dividend, however, the payor must not withhold on that portion (which is not considered a dividend). A payor making a payment, all or a portion of which may not be a dividend, may use previous experience to estimate the portion of a distribution that is not a dividend. The payor's estimate is considered reasonable if—

(i) The estimate does not exceed the proportion of the distributions made by the payor during the most recent calendar year for which a Form 1099 was required to be filed that was not reported by the payor as a dividend; and

(ii) The payor has no reasonable basis to expect that the proportion of the distribution that is not a dividend will be substantially different for the current year.

(3) *Reinvested dividends.* In the case of a dividend paid pursuant to a dividend reinvestment plan, withholding under section 3406 applies, pursuant to §31.3406(a)–4(a), at the time and to the amount made available to the shareholder or credited to the shareholder's account. At the discretion of the payor, withholding under section 3406 need not be applied to any excess of the fair market value of the shares of stock received by the shareholder or credited to the shareholder's account over the purchase price of the shares (including shares acquired by the shareholder at a discount in connection with the dividend distribution) or to any fee that is paid by the payor in the nature of a broker's fee for purchase of the stock or service charge for maintenance of the shareholder's account. The payor must, however, treat any excess amounts and fees on a consistent basis for each calendar year.

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(2)-5 Reportable patronage dividend payment.

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(a) *Patronage dividends subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6044 (relating to returns regarding patronage dividends) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *Failure to provide taxpayer identification number or*

notification of incorrect taxpayer identification number. For purposes of sections 3406(a)(1) (A) and (B), the amount of a payment described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to reporting under section 6044, but only to the extent the payment is made in money. For purposes of this paragraph (b), *money* includes cash or a qualified check (as defined in section 1388(c)(4)).

(2) *Notified payee underreporting or payee certification failure.* For purposes of sections 3406(a)(1) (C) and (D), the amount of a payment described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to withholding under paragraph (b)(1) of this section, but only if 50 percent or more of that reportable amount is paid in money. Thus, a payor is required to withhold according to this paragraph (b)(2) on a payment if—

(i) There has been a notified payee underreporting described in section 3406(a)(1)(C) and §31.3406 (c)–1 or there has been a payee certification failure described in section 3406(a)(1)(D) and §31.3406 (d)–2;

(ii) The payor makes a reportable payment subject to reporting under section 6044 to the payee; and

(iii) Fifty percent or more of the payment is in cash or by qualified check.

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(3)-1 Reportable payments of rents, commissions, nonemployee compensation, etc.

top

(a) *Section 6041 and 6041A(a) payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6041 (relating to information reporting of rents, commissions, nonemployee compensation, etc.) or a payment that is required to be reported under section 6041A(a) (relating to information reporting of payments to nonemployees for services) is a reportable payment for purposes of section 3406. See paragraph (b) of this section for an exception concerning payments aggregating less than $600. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount of a payment described in paragraph (a) of this section subject to withholding under section 3406 is the amount subject to reporting under section 6041 or section 6041A(a).

(2) *Net commissions.* Withholding under section 3406 does not apply to net commissions paid to unincorporated special agents with respect to insurance policies that are subject to reporting under section 6041, provided that no cash is actually paid by the payor to the special agent.

(3) *Payments aggregating $600 or more for the calendar year*—(i) *In general.* A payment is a reportable payment under paragraph (a) of this section only if the aggregate amount of the current payment and all previous payments to the payee during the calendar year aggregate $600 or more. The amount subject to withholding is the entire amount of the payment that causes the total amount paid to the payee to equal $600 or more and the amount of any subsequent payments made to the payee during the calendar year. This paragraph (b)(3)(i) does not apply to gambling winnings (as provided in §31.3406(g)–2(e)(1)).

(ii) *Exceptions*—(A) *The $600 aggregation rule.* The $600 aggregation rule of paragraph (b)(3)(i) of this section does not apply if the payor was required to make an information return under section 6041 or 6041A(a) for the preceding calendar year with respect to payments to the payee, or the payor was required to withhold under section 3406 during the preceding calendar year with respect to payments to the payee that were reportable under section 6041 or 6041A(a).

(B) *Determination of whether payments aggregate $600 or more.* In determining whether payments to a payee aggregate $600 or more during a calendar year for purposes of withholding under section 3406, the payor must aggregate only payments of the same kind made to the same payee. For this purpose, payments are of the same kind if they are of the same type, regardless of whether they are reportable under the same section. However, a payor with different paying departments making reportable payments of the same kind is not required to aggregate payments made by all those departments unless it is the payor's customary method to aggregate those payments. A payor may, in its discretion, aggregate—

(*1*) Payments not of the same kind to the same payee, reportable under either section 6041 or 6041A (a); and

(*2*) Payments reportable under section 6041 with payments reportable under section 6041A(a).

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(3)-2 Reportable barter exchanges and gross proceeds of sales of securities or commodities by brokers.

top

(a) *Transactions subject to backup withholding.* A payment of a kind, and to a payee, that any broker (as defined in section 6045(c) and §1.6045–1(a)(1) of this chapter) or any barter exchange (as defined in section 6045(c) and §1.6045–1(a)(4) of this chapter) is required to report under section 6045 is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount subject to withholding under

section 3406 is the amount subject to reporting under section 6045. The amount subject to withholding with respect to broker reporting is the amount of gross proceeds (as determined under §1.6045–1(d)(5) of this chapter). The amount subject to withholding with respect to barter exchanges is the amount received by any member or client (as determined under §1.6045–1(f)(4) of this chapter).

(2) *Forward contracts, including foreign currency contracts, and regulated futures contracts*—(i) *In general.* If a customer is subject to withholding under section 3406 with respect to a forward contract (subject to information reporting under §1.6045–1(c)(5) of this chapter), including a foreign currency contract (as defined in section 1256(g)(2)), or a regulated futures contract (as defined in section 1256 (g)(1)), or with respect to an account through which those contracts are disposed of or acquired, the broker must withhold on both of the following amounts:

(A) All cash or property withdrawn from the account by the customer during the relevant year; and

(B) The amount of cash in the account available for withdrawal by the customer at the relevant year-end (including both gross proceeds and variation margin).

(ii) *Rules concerning withdrawals.* A withdrawal includes the use of money (including both gross proceeds and variation margin) or property in the account to purchase any property other than property acquired in connection with the closing of a contract. For this purpose, the acceptance of a warehouse receipt or other taking of delivery to close a contract is in connection with the closing of a contract only if the property acquired is disposed of by the close of the seventh trading day following the trading day that the customer takes delivery under the contract. In addition, making delivery to close a contract is in connection with the closing of a contract only if the broker is able to determine that the property used to close the contract was acquired no earlier than the seventh trading day prior to the trading day on which delivery is made. Withdrawals do not include repayments of debt incurred in connection with making or taking delivery that meets the requirements of this paragraph (b)(2). Withdrawals also do not include payments of commissions, fees, transfers of cash from the account to another futures account that is subject to this paragraph (b)(2) or cash withdrawals traceable to dispositions of property other than futures (not including profit on the contract separately reportable under §1.6045–1(c)(5)(i)(*b*) of this chapter).

(iii) *Special rule for forward contracts, including foreign currency contracts, and regulated futures contracts.* The determination of whether the customer is subject to withholding under section 3406 with respect to an account containing forward contracts, including foreign currency contracts, or regulated futures contracts must be made at the time of the cash or property withdrawals or the relevant year-end, whichever is applicable.

(3) *Security sales made through a margin account.* The amount described in paragraph (a) of this section that is subject to withholding under section 3406 in the case of a security sale made through a margin account (as defined in 12 CFR part 220 (Regulation T)) is the gross proceeds (as defined in §1.6045–1(d)(5) of this chapter) of the sale. The amount required to be withheld with respect to the

sale, however, is limited to the amount of cash available for withdrawal by the customer immediately after the settlement of the sale. For this purpose, the amount available for withdrawal by the customer does not include amounts required to satisfy margin maintenance under Regulation T, rules and regulations of the National Association of Securities Dealers and national securities exchanges, and generally applicable self-imposed rules of the margin account carrier.

(4) *Security short sales*—(i) *Amount subject to backup withholding.* The amount subject to withholding under section 3406 with respect to a short sale of securities is the gross proceeds (as defined in §1.6045–1(d)(5) of this chapter) of the short sale. At the option of the broker, however, the amount subject to withholding may be the gain upon the closing of the short sale (if any); consequently, the obligation to withhold under section 3406 would be deferred until the closing transaction. A broker may use this alternative method of determining the amount subject to withholding under section 3406 with respect to a short sale only if at the time the short sale is initiated, the broker expects that the amount of gain realized upon the closing of the short sale will be determinable from the broker's records. If, due to events unforeseen at the time the short sale was initiated, the broker is unable to determine the basis of the property used to close the short sale, the property must be assumed for this purpose to have a basis of zero.

(ii) *Time of backup withholding.* The determination of whether a short seller is subject to withholding under section 3406 must be made on the date of the initiation or closing, as the case may be, or on the date that the initiation or closing, as the case may be, is entered on the broker's books and records.

(5) *Fractional shares.* A broker is not required to withhold under section 3406 with respect to a sale of a fractional share of stock resulting in less than $20 of gross proceeds (as described in §5f.6045–1(c)(3)(x) of this chapter).

[T.D. 8637, 60 FR 66118, Dec. 21, 1995, as amended by T.D. 9010, 67 FR 48760, July 26, 2002]

§ 31.3406(b)(3)-3 Reportable payments by certain fishing boat operators.

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(a) *Payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6050A (relating to information reporting by certain fishing boat operators) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding.* The amount described in paragraph (a) of this section subject to withholding under section 3406 is the amount subject to reporting under section 6050A, but only to the extent the amount is paid in money and represents a share of the proceeds of the catch.

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(b)(3)-4 Reportable payments of royalties.

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(a) *Royalty payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6050N (relating to information reporting of payments of royalties) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding.* In general, the amount described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to reporting under section 6050N. However, if the reportable payment is for an oil or gas interest, the amount subject to withholding is the net amount the payee receives (i.e., the gross proceeds less production-related taxes such as state severance taxes).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(b)(4)-1 Exemption for certain minimal payments.

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(a) *In general.* A payor of reportable interest or dividends (as described in section 3406(b)(2)) or of royalties (as described in section 3406(b)(3)(E)) may elect not to withhold from a payment that does not exceed $10 and that on an annualized basis does not exceed $10 (see paragraph (c) of this section). A broker or barter exchange may elect not to withhold on gross proceeds of $10 or less without regard to the annualization requirement. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Manner of making the election.* The election not to withhold from payments that do not exceed $10 can be made only for payments described in paragraph (a) of this section. The election may be made on a payment-by-payment basis.

(c) *How to annualize*—(1) *In general.* To annualize a reportable interest payment, dividend payment, or royalty payment, a payor must calculate what the amount of the payment would be if it were paid for a 1-year period (instead of the period for which it actually is paid). The annualized amount is determined by dividing the amount of the payment by the number of days in the period for which it is being paid and then multiplying that result by the number of days in the year. If the annualized amount is $10 or less, the payor may elect not to withhold on that payment regardless of whether more than $10 may be or has been paid to the payee in other reportable payments during the calendar year. Conversely, if the annualized amount is more than $10, withholding applies even if $10 or less is actually paid to the payee during the calendar year. For purposes of computing the annualized amount,

the payor may assume that February always consists of 28 days and that the year always consists of 360 days. For amounts that are deposited with a payor in a new account or certificate between the dates on which the payor customarily pays or credits interest, the payor may assume that the period for which the interest is paid is the payor's customary period for paying or crediting interest.

(2) *Special aggregation rule for reportable interest and dividends.* If a payor maintains records that reflect multiple holdings of one payee and the payor makes an aggregate payment of reportable interest or dividends (as defined in section 3406(b)(2)) with respect to those multiple holdings (such as a dividend check that reflects payment on all stock owned by the payee), the payor must annualize the aggregate payment.

(d) *Exception for window transactions and original issue discount.* A payor is not required to annualize payments made in window transactions (as defined in §31.3406(b)(2)–3(b)) or payments of original issue discount. With respect to a window transaction, however, the payor is required to aggregate all payments made in the same transaction (e.g., payments made with respect to coupons or obligations presented for payment at the same time as described in §1.6049–4(e)(4) of this chapter).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(c)-1 Notified payee underreporting of reportable interest or dividend payments.

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(a) *Overview.* Withholding under section 3406(a)(1)(C) applies to any reportable interest or dividend payment (as defined in section 3406(b)(2)) made with respect to an account of a payee if the Internal Revenue Service or a broker notifies a payor under paragraph (c) (1) or (2) of this section that the payee is subject to withholding due to notified payee underreporting (as defined in paragraph (b)(1) of this section), and the payor is required under paragraph (c)(3) of this section to identify that account. After receiving the notice and identifying accounts, the payor must notify the payee, in accordance with paragraph (d) of this section, that withholding due to notified payee underreporting has started. Paragraph (e) of this section describes the period for which withholding due to notified payee underreporting is required. Paragraph (f) of this section provides rules concerning notices that the Internal Revenue Service will send to a payee before notifying a payor that the payee is subject to withholding due to notified payee underreporting. Paragraph (g) of this section provides rules that a payee can use to prevent withholding due to notified payee underreporting from starting or to stop it once it has started. Paragraph (h) of this section provides special rules for joint accounts of payees who have filed a joint return. See section 6682 for the penalties that may apply to a payee subject to withholding under section 3406(a)(1)(C).

(b) *Definitions*—(1) *Notified payee underreporting. Notified payee underreporting* means that the Internal Revenue Service has—

(i) Determined that there was a payee underreporting (as defined in paragraph (b)(2) of this section);

(ii) Mailed at least four notices under paragraph (f)(1) of this section to the payee (over a period of at least 120 days) with respect to the underreporting; and

(iii) Assessed any deficiency attributable to the underreporting in the case of any payee who has filed a return.

(2) *Payee underreporting*—(i) *In general. Payee underreporting* means that the Internal Revenue Service has determined, for a taxable year, that—

(A) A payee failed to include in the payee's return of tax under chapter 1 of the Internal Revenue Code for that year any portion of a reportable interest or dividend payment required to be shown on that tax return; or

(B) A payee may be required to file a return for that year and to include a reportable interest or dividend payment in the return, but failed to file the return.

(ii) *Payments included in making payee underreporting determination.* The determination of whether there is payee underreporting is made by treating as reportable interest or dividend payments, all payments of dividends reported under section 6042, all patronage dividends reported under section 6044, and all interest and original issue discount reported under section 6049, regardless of whether withholding due to notified payee underreporting applies to those payments.

(c) *Notice to payors regarding backup withholding due to notified payee underreporting*—(1) *In general.* If the Internal Revenue Service or a broker notifies a payor that a payee is subject to withholding due to notified payee underreporting, the payor must—

(i) Identify any accounts of the payee under the rules of paragraph (c)(3) of this section; and

(ii) Notify the payee and withhold under section 3406 on reportable interest or dividend payments made with respect to any identified account under the rules of paragraphs (d) and (e) of this section.

(2) *Additional requirements for payors that are also brokers*—(i) *In general.* A broker must notify the payor of a readily tradable instrument that the payee of the instrument is subject to withholding due to notified payee underreporting if—

(A) The broker (in its capacity as a payor) receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section that a payee is subject to withholding due to notified payee underreporting and the broker is required to identify an account of the payee under paragraph (c)(3) of this section;

(B) The payee subsequently acquires the instrument from the broker through the same account; and

(C) The acquisition of the instrument occurs after the close of the 30th business day after the date that the broker receives the notice (or on any earlier date that the broker may begin applying this paragraph (c)(2) after receipt of the notice described in paragraph (c)(1) of this section).

(ii) *Transfer out of street name.* For purposes of this paragraph (c)(2), an acquisition includes a transfer of an instrument out of street name into the name of the registered owner (i.e., the payee).

(iii) *Method of providing notice.* A broker must provide the notice required under this paragraph (c)(2) to the payor of the instrument with the transfer instructions for the acquisition. See §31.3406(d)–4(a)(2).

(iv) *Termination of obligation to provide information.* The obligation of a broker to provide notice to payors under this paragraph (c)(2) terminates simultaneously with the termination of the broker's obligation to withhold (in its capacity as payor) due to notified payee underreporting on reportable interest or dividends made with respect to the account.

(3) *Payor identification of accounts of the payee subject to backup withholding due to notified payee underreporting*—(i) *In general*—(A) *Notice from the Internal Revenue Service.* If a payor receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section, the payor must identify, exercising reasonable care, all accounts using the same taxpayer identification number for information reporting purposes as the one provided in the notice. The notice may provide, however, that the payor need only identify the account or accounts corresponding to any account number or designation and related taxpayer identification number used for information reporting purposes as that listed on the notice.

(B) *Notice from a broker.* If a payor receives a notice from a broker under paragraphs (c) (1) and (2) of this section, the payor is not required to identify any account other than the account identified in the notice.

(ii) *Exercise of reasonable care.* If an account identified pursuant to paragraph (c)(3)(i)(A) of this section contains a customer identifier that can be used to retrieve systemically any other accounts that use the same taxpayer identification number for information reporting purposes, the payor must identify all accounts that can be so retrieved. Otherwise, a payor is considered to exercise reasonable care in identifying accounts subject to withholding under section 3406(a)(1)(C) if the payor searches any computer or other recordkeeping system for the region, division, or branch that serves the geographic area in which the payee's mailing address is located and that was established (or is maintained) to reflect reportable interest or dividend payments.

(iii) *Newly opened accounts.* (A) In general, a new account is not subject to withholding under section 3406(a)(1)(C) if the payee provides to the payor a Form W–9 (or other acceptable substitute) on which

the payor may reasonably rely (within the meaning of §31.3406(h)–3(e)(2) without regard to §31.3406(h)–3(e)(2)(v)), unless the payor has actual knowledge (within the meaning of paragraph (c)(3)(iii)(B) of this section) that the statements made on the form are not true.

(B) For purposes of paragraph (c)(3)(iii)(A) of this section, a payor is considered to have actual knowledge that a payee's statement that the payee is not subject to withholding under section 3406(a)(1)(C) is not true if—

(*1*) The employee or individual agent of the payor who receives the payee's certification knows that the statement is not true;

(*2*) In conducting the investigation, if any, required by paragraph (c)(3)(iii)(C) of this section, the payor identifies any other accounts of the payee that are already subject to withholding under section 3406(a)(1)(C); or

(*3*) In the course of processing the certification or in administering an account to which a certification relates, the payor discovers that the payor was previously notified by the Internal Revenue Service that the payee is subject to withholding under section 3406(a)(1)(C) and no notice was received to stop withholding pursuant to section 3406(c)(3) prior to the time of the discovery.

(C) Except as provided in this paragraph (c)(3)(iii)(C), a payor is not required to investigate whether the statements made on the Form W–9 described in paragraph (c)(3)(iii)(A) of this section are true. If, however, in opening a new account, the payor relies on the same Form W–9 (or appropriate substitute) that it relied on previously in opening another account, the payor must investigate whether any such existing account is subject to withholding under section 3406(a)(1)(C). Similarly, if the payor utilizes a universal account system described in the first sentence of paragraph (c)(3)(ii) of this section, and in opening a new account the payor searches its records to determine whether the new account should be identified under an existing identifier (because the payee has existing accounts with the payor), the payor must investigate whether any existing accounts identified with the same identifier are subject to withholding under section 3406(a)(1)(C).

(d) *Notice from payors of backup withholding due to notified payee underreporting*—(1) *In general.* If a payor receives notice from the Internal Revenue Service or a broker under paragraph (c)(1) of this section and is required to identify an account under paragraph (c)(3) of this section as an account of the payee, the payor must notify the payee in accordance with paragraph (d)(2) of this section that withholding due to notified payee underreporting has started.

(2) *Procedures.* The payor must send the notice required by paragraph (d)(1) of this section to the payee no later than 15 days after the date that the payor makes the first payment subject to withholding due to notified payee underreporting. The payor must send the notice by first-class mail to the payee at the payee's last known address. The notice to the payee required by paragraph (d)(1) of this section must state—

(i) That the Internal Revenue Service has given notice that the payee has underreported reportable interest or dividends;

(ii) That, as a result of the underreporting, the payor is required under section 3406(a)(1)(C) of the Internal Revenue Code to withhold 31 percent of reportable interest or dividend payments made to the payee;

(iii) The date that the payor started (or plans to start) withholding due to notified payee underreporting under section 3406(a)(1)(C);

(iv) The account number or numbers that are subject to withholding due to notified payee underreporting;

(v) That the payee must obtain a determination from the Internal Revenue Service in order to stop the withholding due to notified payee underreporting; and

(vi) That while the payee is subject to withholding due to notified payee underreporting, the payee may not certify to a payor making reportable interest or dividend payments (or to a broker acquiring a readily tradable instrument for the payee) that the payee is not subject to withholding due to notified underreporting.

(e) *Period during which backup withholding is required*—(1) *In general.* If a payor receives notice from the Internal Revenue Service or a broker under paragraph (c)(1) of this section, the payor must impose withholding under section 3406(a)(1)(C) on all reportable interest or dividend payments with respect to any account of the payee required to be identified under paragraph (c)(3) of this section made after the close of the 30th business day after the day on which the payor receives that notice and before the stop date (as described in paragraph (e)(2) of this section). A payor may choose to start withholding under this paragraph (e)(1) at any time during the 30-business-day period described in the preceding sentence.

(2) *Stop withholding*—(i) *When no underreporting exists or undue hardship exists*—(A) *Stop date.* In the case of a determination under paragraph (g)(3) (i) or (iii) of this section that no underreporting exists or that an undue hardship exists, the stop date is the day that is 30 days after the earlier of—

(*1*) The date on which the payor receives written notification from the Internal Revenue Service under paragraph (g) of this section that withholding is to stop; or

(*2*) The date on which the payor receives a copy of the written certification provided to the payee by the Internal Revenue Service under paragraph (g) of this section that withholding is to stop.

(B) *Acceleration of stop date.* A payor may choose to stop withholding at any time during the 30-day

period described in paragraph (e)(2)(i)(A) of this section.

(ii) *When underreporting is corrected or bona fide dispute exists.* In the case of a determination under paragraph (g)(3) (ii) or (iv) of this section that the underreporting has been corrected or that a bona fide dispute exists, the stop date occurs on the first day of January (immediately following a period of at least twelve months ending on October 15 of any calendar year in which the determination has been made) or if later, the stop date determined under paragraph (e)(2)(i) of this section.

(3) *Dormant accounts.* The requirement that a payor withhold under this paragraph (e) on reportable interest or dividend payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(i) The date that the most recent reportable interest or dividend payment was made with respect to that account; or

(ii) The date that the payor received notice under paragraph (c)(1) of this section.

(f) *Notice to payees from the Internal Revenue Service*—(1) *Notice period.* After the Internal Revenue Service determines under paragraph (b)(2) of this section that payee underreporting exists, the Internal Revenue Service will mail to the payee at least four notices over a period of at least 120 days (the notice period) before payors will be notified under paragraph (c)(1) of this section that the payee is subject to withholding due to notified payee underreporting. The notices may be accompanied by, or incorporated in, other notices provided to the payee by the Internal Revenue Service.

(2) *Payee subject to backup withholding.* After the Internal Revenue Service provides the notices described in paragraph (f)(1) of this section, the Internal Revenue Service will send notices to payors under paragraph (c)(1) of this section unless—

(i) A payee obtains a determination under paragraph (g) of this section; or

(ii) In the case of a payee who has filed a tax return, the Internal Revenue Service has not assessed the deficiency attributable to the underreporting.

(3) *Disclosure of names of payors and brokers.* Pursuant to section 3406(c)(5) the Internal Revenue Service may require a payee subject to withholding due to notified payee underreporting to disclose the names of all the payee's payors of reportable interest or dividend payments and the names of all of the brokers with whom the payee has accounts which may involve reportable interest or dividend payments. To the extent required in the request from the Internal Revenue Service, the payee must also provide the payee's account numbers and other information necessary to identify the payee's accounts.

(4) *Backup withholding certification.* After a payee receives a final notice from the Internal Revenue

Service under paragraph (f)(1) of this section, the payee is not permitted to certify to any payor or broker, under penalties of perjury, that the payee is not subject to withholding under section 3406(a)(1)(C), until the payee receives the certification from the Internal Revenue Service under paragraph (g) of this section advising the payee that the payee is no longer subject to withholding under section 3406(a)(1)(C). A final notice will contain the information described in this paragraph (f)(4). See sections 6682 and 7205(b) for civil and criminal penalties for making a false certification.

(g) *Determination by the Internal Revenue Service that backup withholding should not start or should be stopped*—(1) *In general.* A payee may prevent withholding due to notified payee underreporting from starting, or stop the withholding once it has started, by requesting and receiving a determination from the Internal Revenue Service under one or more of the provisions of paragraph (g)(3) of this section. Following its review of a request for a determination under paragraph (g)(3) of this section, the Internal Revenue Service will either make the determination or provide the payee with a written report informing the payee that the request for determination is being denied and the reasons for the denial. If a determination is made during the notice period (as defined in paragraph (f)(1) of this section), the payee is not subject to withholding due to notified payee underreporting with respect to any taxable year for which a determination was made. If a determination is made after the notice period, the Internal Revenue Service will, at the time prescribed in paragraph (g)(2) of this section, provide written certification to a payee that withholding is to stop, and will notify payors who were contacted pursuant to paragraph (c)(1) of this section to stop withholding. A broker who (in its capacity as payor) under this paragraph (g)(1) receives a notice from the Internal Revenue Service or a copy of the certification provided to a payee by the Internal Revenue Service is not required to provide a corresponding notice to any payors whom the broker has previously notified under paragraph (c)(2) of this section.

(2) *Date notice to stop backup withholding will be provided*—(i) *Underreporting corrected or bona fide dispute.* If the Internal Revenue Service makes a determination under paragraph (g)(3)(ii) or (iv) of this section during the 12-month period ending on October 15 of any calendar year (as described in paragraph (e)(2)(ii) of this section), the Internal Revenue Service will provide the certification and the notices described in paragraph (g)(1) of this section no later than December 1 of that calendar year.

(ii) *No underreporting or undue hardship.* If the Internal Revenue Service makes a determination under paragraph (g)(3)(i) or (iii) of this section, the Internal Revenue Service will provide the notices described in paragraph (g)(1) of this section no later than the 45th day after the day on which the Internal Revenue Service makes its determination.

(3) *Grounds for determination.* The Internal Revenue Service will make a determination that withholding due to notified payee underreporting should not start or should stop once it has started if the payee—

(i) Shows that there was no payee underreporting (as provided in paragraph (g)(4) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)

(2) of this section that there was payee underreporting;

(ii) Corrects any payee underreporting (as provided in paragraph (g)(5) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)(2) of this section that there was payee underreporting;

(iii) Shows that withholding will cause or is causing an undue hardship (as defined in paragraph (g)(6) of this section) and that it is unlikely that the payee will underreport interest or dividend payments again; or

(iv) Shows that a bona fide dispute exists regarding whether any underreporting has occurred (as provided in paragraph (g)(7) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)(2) of this section that there was payee underreporting.

(4) *No underreporting.* A payee may show that no underreporting of reportable interest or dividends payments exists by presenting—

(i) Receipts or other satisfactory documentation to the Internal Revenue Service showing that all taxes relating to the payments were reported; or

(ii) Evidence showing that the payee did not have to file a return for the taxable year in question (e.g., because the payee did not make enough income) or that the underreporting determination was based upon a factual, clerical, or other error.

(5) *Correcting any payee underreporting*—(i) *Before issuance of a statutory notice of deficiency.* Before a statutory notice of deficiency is issued to a payee pursuant to section 6212, the payee may correct underreporting—

(A) By filing a return if one was not previously filed and including the unreported interest and dividends thereon;

(B) By filing an amended return in the event a return was filed and including the unreported interest and dividends thereon; or

(C) By consenting to the additional assessment according to applicable notices and forms sent to the payee by the Internal Revenue Service with respect to the underreporting, and paying taxes, penalties, and interest due with respect to any underreported interest or dividend payments.

(ii) *After issuance of a statutory notice of deficiency.* After a statutory notice of deficiency is issued to a payee—

(A) The payee may correct underreporting at any time, by filing a return if one was not previously filed and paying the entire deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments; or

(B) The payee may correct underreporting after the mailing of the statutory notice of deficiency but before the expiration of the 90-day or 150-day period described in section 6213(a) or, if a petition is filed with the United States Tax Court, before the decision of the Tax Court is final, by making a remittance to the Internal Revenue Service of the amounts described in paragraph (g)(5)(ii)(A) of this section. The payee must specifically designate in writing that the remittance is a deposit in the nature of a cash bond.

(iii) *Special rules.* For purposes of paragraph (g)(5)(ii) of this section, the payee will not be deemed to have corrected the payee underreporting under paragraph (g)(5)(ii)(B) of this section after the remittance is returned to the payee in the manner described in any applicable administrative procedure. For further guidance on a deposit in the nature of a cash bond, see subparagraph 2 of section 4.01 of Rev. Proc. 84–58 (1984–2 C.B. 501). (See §601.601(d)(2) of this chapter.) Once the remittance is returned to the payee, the rules of this section will apply. If the Internal Revenue Service previously contacted payors of the payee to start withholding with respect to the notified payee underreporting, however, the Internal Revenue Service will recontact those payors to start withholding under paragraph (c)(1) of this section with respect to the payee underreporting without regard to paragraph (f) of this section.

(6) *Undue hardship*—(i) *In general.* A determination of undue hardship will be based on the overall impact to the payee of having reportable interest or dividend payments withheld at a 31 percent rate under section 3406. In addition, a determination of undue hardship will be made only if the Internal Revenue Service concludes that it is unlikely that any payee underreporting will occur again.

(ii) *Factors.* Factors that will be considered in determining whether withholding causes undue hardship include, but are not limited to, the following—

(A) Whether estimated tax payments, and other credits for current tax liabilities, or amounts withheld on employee wages or pensions, in addition to withholding under section 3406, would cause significant overwithholding;

(B) The payee's health, including the payee's ability to pay foreseeable medical expenses;

(C) The extent of the payee's reliance on interest and dividend payments to meet necessary living expenses and the existence, if any, of other sources of income;

(D) Whether other income of the payee is limited or fixed

(e.g., social security, pension, and unearned income);

(E) The payee's ability to sell or liquidate stocks, bonds, bank accounts, trust accounts, or other assets, and the consequences of doing so;

(F) Whether the payee reported and timely paid the most recent year's tax liability, including interest and dividend income; and

(G) Whether the payee has filed a bankruptcy petition with the United States Bankruptcy Court.

(7) *Bona fide dispute.* The Internal Revenue Service may make a determination under this paragraph (g)(7) if there is a dispute between the payee and the Internal Revenue Service on a question of fact or law that is material to a determination under paragraph (g)(3)(i) of this section and, based upon all the facts and circumstances, the Internal Revenue Service finds that the dispute is asserted in good faith by the payee and there is a reasonable basis for the payee's position.

(h) *Payees filing a joint return*—(1) *In general.* For purposes of this section, if payee underreporting is found to exist with respect to a joint return, then the provisions of this section apply to both payees (i. e., the husband and wife). As a result, both payees are subject to withholding on accounts in their individual names as well as accounts in their joint names. Either or both payees may satisfy the criteria for a determination that no payee underreporting exists, that the underreporting has been corrected, or that a bona fide dispute exists (as provided in paragraph (g)(3) (i), (ii), or (iv) of this section). Both payees, however, must satisfy the criteria for a determination that withholding will cause or is causing undue hardship (as provided in paragraph (g)(3)(iii) of this section).

(2) *Exceptions*—(i) *Innocent spouse.* A spouse who files a joint return may obtain a determination that withholding should stop or not start with respect to payments made to his or her individual accounts, if the spouse shows that—

(A) He or she did not underreport income because he or she is a spouse described in section 6013(e), i. e., innocent spouse; or

(B) There is a bona fide dispute regarding whether he or she is an innocent spouse and hence did not underreport income.

(ii) *Divorced or legally separated payee.* A payee who, at the time of the request for a determination under paragraph (g) of this section, is divorced or separated under State law may obtain a determination that undue hardship exists (or would exist) under paragraph (g)(3)(iii) of this section with respect to reportable interest or dividend payments made to his or her individual accounts if the divorced or legally separated payee satisfies the criteria for a determination under paragraph (g)(6) of this section.

(i) [Reserved]

(j) *Penalties.* For the application of penalties related to this section, see sections 6682 and 7205(b).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(d)-1 Manner required for furnishing a taxpayer identification number.

top

(a) *Requirement to backup withhold.* Withholding under section 3406(a)(1)(A) applies to a reportable payment (as defined in section 3406(b)) if the payee does not furnish the payee's taxpayer identification number to the payor in the manner required by this section. The period for which withholding is required is described in §31.3406(e)–1(b). See §31.3406(d)–3(a) and (b) for special rules when an account is established directly with, or an instrument is acquired directly from, the payor by electronic transmission or by mail, or an instrument is sold through a broker by electronic transmission or by mail. See §31.3406(d)–4 for special rules applicable to readily tradable instruments acquired through a broker. See §31.3406(h)–3(e) for the rules on when a payor may rely on a Form W–9. See also §31.3406(g)–3 for rules regarding a payee awaiting receipt of a taxpayer identification number. See the applicable information reporting sections and section 6109 and the regulations thereunder to determine whose taxpayer identification number should be provided.

(b) *Reportable interest or dividend account*—(1) *Manner required for furnishing a taxpayer identification number with respect to a pre-1984 account or instrument.* A payee must furnish the payee's taxpayer identification number to the payor with respect to any obligation, deposit, certificate, share, membership, contract, investment, account, or other relationship or instrument established or acquired on or before December 31, 1983 (a pre-1984 account) and with respect to which the payor makes a reportable interest or dividend payment (as defined in section 3406(b)(2)). The manner of determining whether an account or an instrument is a pre-1984 account is described in paragraph (b)(2) of this section. The payee of a pre-1984 account may furnish the payee's taxpayer identification number to the payor orally or in writing. The payee is not required to certify under penalties of perjury that the taxpayer identification number is correct.

(2) *Determination of pre-1984 account or instrument*—(i) *In general.* An account that is in existence before January 1, 1984, will be considered a pre-1984 account, regardless of whether additional deposits are made to the account on or after January 1, 1984. An account established as an expansion of a credit union prime account in existence prior to January 1, 1984, constitutes a pre-1984 account. If funds taken from one account in existence prior to January 1, 1984, are used to create a new account on or after that date, however, the new account does not constitute a pre-1984 account except as provided in the preceding sentence. An instrument acquired prior to January 1, 1984, is a pre-1984 account. Regardless of when an instrument was acquired, if it is negotiated in a window transaction as defined in §31.3406(b)(2)–3(b), it is treated as an instrument acquired after December 31, 1983. An obligation in bearer form and subject to reporting under section 6045, whenever acquired, is not a pre-

1984 account. Any instrument, whenever acquired, that is held in a brokerage account is considered a pre-1984 account if the brokerage account is not a post-1983 brokerage account (as described in paragraph (c)(1)(ii) of this section). If shares of a corporation are held before January 1, 1984 (or considered held before that date by operation of this paragraph (b)(2)), and additional shares are acquired by the holder, irrespective of whether the shares are received by reason of a stock dividend, investing new cash, or otherwise, the new shares, in the discretion of the payor, may be considered a pre-1984 account. In the case of a qualified employee trust that distributes instruments in kind, any instrument distributed from the trust is considered a pre-1984 account with respect to employees who were participants in the trust before 1984. Similarly, when a payor offers participants in a plan the opportunity to purchase stock of the payor after a specified time, using the money that the payee invested during that period of time, the stock so purchased after December 31, 1983, is considered a pre-1984 account with respect to participants in the plan who either owned shares or invested money in the plan before January 1, 1984.

(ii) *Account or instrument automatically acquired on the maturity or termination of an account.* When an account is opened, or an instrument is acquired, automatically on the maturity or termination of an account that was in existence or an instrument that was held before January 1, 1984 (or considered to have been in existence or held before that date by operation of this paragraph (b)(2)(ii)), without the participation of the payee, the new account or instrument, in the discretion of the payor, may be considered a pre-1984 account. For purposes of the preceding sentence, a payee is not considered to have participated in the acquisition of the new account or instrument solely because the payee failed to exercise a right to withdraw funds at the maturity or termination of the old account or instrument.

(iii) *Insurance policies.* In the case of insurance policies in effect on December 31, 1983, the election of a dividend accumulation option pursuant to which interest is paid (as defined in §1.6049–5(a)(4) of this chapter), or the creation of an account in which proceeds of a policy are held for the policy beneficiary, may, in the payor's discretion, be treated as a pre-1984 account.

(iv) *Acquisitions of accounts and instruments*—(A) *Pre-1984 or post-1983 status known.* If a payor acquires accounts or instruments of another payor (including through a tax-free reorganization under section 368), the acquiring payor must treat the persons specified in this paragraph (b)(2)(iv)(A) as having the same requirement to furnish a taxpayer identification number in the manner required under this paragraph (b) to the acquiring payor for information reporting, withholding, and related tax provisions as existed with respect to the payor whose accounts or instruments were acquired. Persons specified in this paragraph (b)(2)(iv)(A) are persons who held accounts or instruments in the other payor immediately before the acquisition and who receive an account or instrument in the acquiring payor immediately after the acquisition.

(B) *Pre-1984 or post-1983 status unknown.* If the acquiring payor, as described in paragraph (b)(2)(iv)(A) of this section, is unable to identify from the business records of the other payor whether any or all of the accounts or instruments of the persons specified in paragraph (b)(2)(iv)(A) of this section are pre-1984 (or post-1983) accounts or instruments, then the acquiring payor may treat these unidentified accounts or instruments as pre-1984 accounts or instruments.

(C) *Cross reference.* See §31.3406(g)–2(g) for the limited exception from withholding under section 3406(a)(1)(A) on accounts or instruments described in paragraphs (b)(2)(iv) (A) and (B) of this section for which the payor does not have a taxpayer identification number.

(3) *Manner required for furnishing a taxpayer identification number with respect to an account or instrument that is not a pre-1984 account.* A payee who receives reportable interest or dividend payments (as defined in section 3406(b)(2)) from a payor must certify under penalties of perjury that the taxpayer identification number the payee furnishes to the payor is the payee's correct taxpayer identification number. The payee must make the certification only with respect to an account or instrument that is not a pre-1984 account (as described in paragraph (b)(2) of this section). See §31.3406(h)–3 for a description of the certificate on which the certification must be made. See §31.3406(d)–2 for the requirement that the payee must certify under penalties of perjury that the payee is not subject to withholding due to notified payee underreporting. See §31.3406(d)–3(a) with respect to an account established directly with, or an instrument acquired directly from, the payor by electronic transmission or by mail. See §31.3406(d)–4 for the rules applicable to readily tradable instruments acquired through a broker.

(4) *Special rule with respect to the acquisition of a readily tradable instrument in a transaction between certain parties acting without the assistance of a broker.* If a payee, at any time, acquires a readily tradable instrument without the assistance of a broker, and no party to the acquisition is a broker or an agent of the payor, the payee must furnish the payee's taxpayer identification number to the payor prior to the time reportable payments are made on the instrument. The payee is not required to certify under penalties of perjury that the number is correct. See §31.3406(d)–2 for the rule that a payee is not subject to withholding due to notified payee underreporting with respect to a readily tradable instrument acquired in the manner described in this paragraph (b)(4). A broker is considered to provide assistance in the acquisition of an instrument if the person effecting the acquisition would be required to make an information return under section 6045 if such person were to sell the instrument. See §31.3406(d)–4 for rules relating to an acquisition of a readily tradable instrument when a broker is involved.

(c) *Brokerage account*—(1) *Manner required for furnishing a taxpayer identification number with respect to a brokerage relationship that is not a post-1983 brokerage account*—(i) *In general.* With respect to any instrument, investment, or deposit made through a brokerage account that is not a post-1983 brokerage account, a payee must furnish the payee's taxpayer identification number to the broker either orally or in writing. The payee is not required to certify under penalties of perjury that the taxpayer identification number is correct. See paragraph (b)(2)(i) of this section for the rule that any instrument, whenever acquired, that is held in a brokerage account that is not a post-1983 brokerage account, is considered held in an account that is not a post-1983 brokerage account. For example, in 1983 a payee established and acquired a readily tradable instrument from a brokerage account; no activity took place through that account until the payee purchased a readily tradable instrument in 1995. That readily tradable instrument is not held in a post-1983 brokerage account; therefore, the

payee need not certify under penalties of perjury that the payee's taxpayer identification number is correct.

(ii) *Definition of a brokerage account that is not a post-1983 brokerage account.* A brokerage account that was established by a payee before January 1, 1984, through which during 1983 the broker either bought or sold securities for the payee or held securities on behalf of the payee as a nominee (i.e., in street name), is an account that is not a post-1983 brokerage account.

(2) *Manner required for furnishing a taxpayer identification number with respect to a post-1983 brokerage account*—(i) *In general.* With respect to a post-1983 brokerage account, the payee must furnish the payee's taxpayer identification number to the broker and certify under penalties of perjury that the taxpayer identification number furnished is correct, except as provided in §31.3406(d)–3(b).

(ii) *Definition of a post-1983 brokerage account.* A brokerage account established after December 31, 1983 (or before January 1, 1984, through which during 1983 the broker neither bought nor sold securities nor held securities on behalf of the payee as a nominee (i.e., in street name)), is a post-1983 brokerage account.

(d) *Rents, commissions, nonemployee compensation, and certain fishing boat operators, etc.—Manner required for furnishing a taxpayer identification number.* For accounts, contracts, or relationships subject to information reporting under section 6041 (relating to information reporting at source on rents, royalties, salaries, etc.), section 6041A(a) (relating to information reporting of payments for nonemployee services), section 6050A (relating to information reporting by certain fishing boat operators), or section 6050N (relating to information reporting of payments of royalties), the payee must furnish the payee's taxpayer identification number to the payor either orally or in writing. Except as provided in §31.3406(d)–5, the payee is not required to certify under penalties of perjury that the taxpayer identification number is correct regardless of when the account, contract, or relationship is established.

[T.D. 8637, 60 FR 66123, Dec. 21, 1995]

§ 31.3406(d)-2 Payee certification failure.

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(a) *Requirement to backup withhold.* Withholding under section 3406(a)(1)(D) applies to a reportable interest or dividend payment (as defined in section 3406(b)(2)) if, and only if, the payee fails to certify to the payor, under penalties of perjury, that the payee is not subject to withholding due to notified payee underreporting under section 3406(a)(1)(C). The period for which withholding applies is described in §31.3406(e)–1(e). See §31.3406(d)–3(a) for special rules when an account is established directly with, or an instrument is acquired directly from, the payor by electronic transmission or by mail. See §31.3406(c)–1(c)(3)(iv) for rules with respect to a payor's reliance on a payee certification

for a new account following notified payee underreporting. See §31.3406(d)–4 for special rules relating to the acquisition of a readily tradable instrument through a broker. The certificate on which the certification should be made is described in §31.3406(h)–3.

(b) *Exceptions.* Withholding under section 3406(a)(1)(D) and paragraph (a) of this section does not apply to reportable interest or dividend payments (as defined in section 3406(b)(2)) made—

(1) With respect to a pre-1984 account (as defined in §31.3406(d)–1(b)(1));

(2) In a window transaction (as defined in §31.3406(b)(2)–3(b));

(3) With respect to a readily tradable instrument described in §31.3406(d)–1(b)(2)(iv) or §31.3406(d)–4(a)(3); or

(4) During the period and with respect to an account or readily tradable instrument described in §31.3406(d)–3.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995]

§ 31.3406(d)-3 Special 30-day rules for certain reportable payments.

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(a) *Accounts or readily tradable instruments acquired directly from the payor (including a broker who holds an instrument in street name) by electronic transmission or by mail.* In the case of an account established directly with, or a readily tradable instrument acquired directly from, the payor by means of electronic transmission (i.e., telephone or wire instruction) or by mail, the payor may permit the payee to furnish the certifications required in §31.3406(d)–1(b)(3) (relating to certification that the payee's taxpayer identification number is correct) and §31.3406(d)–2 (relating to certification of notified payee underreporting) within 30 days after the establishment or acquisition without subjecting the account to withholding during the 30 days. The preceding sentence applies only if the payee furnishes a taxpayer identification number to the payor at the time of the establishment or acquisition, and the payee does not withdraw more than 69 percent of a reportable interest or dividend payment before the certifications are received within the 30 days. If the payee does not provide the required certifications within 30 days of the establishment or acquisition, the payor must withhold 31 percent of any reportable interest or dividend payments made to the account after its acquisition. For purposes of this section, an account or instrument is considered acquired directly from the payor if the instrument was acquired by the payee without the assistance of a broker or the instrument was acquired directly from a broker who holds the instrument as nominee for the payee (i.e., in street name) and who is considered a payor under §31.3406(a)–2. For payments made after December 31, 1998, see §1.6049–5(d)(2)(ii) of this chapter for the application of a 90-day grace period in lieu of the 30-day grace period described in this paragraph (a) if, at the beginning of the 90-day grace period, certain conditions are

satisfied. If the grace period provisions of §1.6049–5(d)(2)(ii) or §1.1441–1(b)(3)(iv) of this chapter are applied with respect to a new account, the grace period provisions of this paragraph (a) shall not apply to that account.

(b) *Sale of an instrument for a customer by electronic transmission or by mail.* The special rules set forth in paragraph (a) of this section apply comparably with respect to certification of the taxpayer identification number for the sale of an instrument under section 6045 (as described in §31.3406(b)(3)–2) through a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)) for a customer by electronic transmission or by mail. However, the 30-day rules may apply only if the payee furnishes the payee's taxpayer identification number before the sale occurs. For purposes of applying the 30-day rules under this paragraph (b), a payee's reinvestment of the gross proceeds of the sale into other instruments constitutes a withdrawal.

(c) *Application to foreign payees.* The rules of paragraphs (a) and (b) of this section also apply to a payee from whom the payor is required to obtain a Form W–8 (or an acceptable substitute) or other evidence of foreign status (pursuant to relevant regulations under an applicable Internal Revenue Code section without regard to the requirement to furnish a taxpayer identifying number, and the certifications described in §§31.3406(d)–1(b)(3) and 31.3406(d)–2), provided the payee represents orally or otherwise, before or at the time of the acquisition or sale of the instrument or the establishment of the account, that the payee is not a United States citizen or resident. The 30-day rules described in paragraph (a) or (b) of this section may apply only if the payee does not qualify for, or the payor does not apply, the 90-day grace period described in §1.6049–5(d)(2)(ii) or §1.1441–1(b)(3)(iv) of this chapter.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997]

§ 31.3406(d)-4 Special rules for readily tradable instruments acquired through a broker.

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(a) *Readily tradable instruments acquired through post-1983 brokerage accounts with a broker who is not a payor*—(1) *In general.* If a readily tradable instrument is acquired through a post-1983 brokerage account (as defined in §31.3406(d)–1(c)(2)) and the broker is not a broker holding a security (including stock) for a customer in street name, the broker must—

(i) Obtain once with respect to each account the certifications described in §31.3406(d)–2(a) and §31.3406(d)–1(b)(3) and (c)(2) from the payee (relating to certification regarding payee underreporting and taxpayer identification number, respectively);

(ii) Furnish the payee's taxpayer identification number to the payor; and

(iii) Notify the payor to impose withholding if the payee fails to make either of the required

certifications to the broker or if the broker has been notified by the Internal Revenue Service before the acquisition of the instrument that the payee is subject to withholding due to notified payee underreporting under section 3406(a)(1)(C) or that the payee is subject to withholding because the payee's taxpayer identification number is incorrect under section 3406(a)(1)(B) (as described in §31.3406(d)–5).

(2) *Additional requirements.* The broker must give the information required by paragraphs (a)(1) (ii) and (iii) of this section to the payor with the transfer instructions for the acquisition (including account registration instructions transmitted by a broker in the case of acquisitions of shares in a mutual fund). A notice including the information described in paragraph (b)(1) of this section fulfills the broker's requirement to give notice to the payor. Once the broker transmits the transfer instructions containing the information required by this section, the broker has no further responsibility to obtain a missing taxpayer identification number or missing certification or to provide additional notices to the payee or payor with respect to the acquisition of the instrument. Upon receiving the notice from a broker, the payor must impose withholding on the account pursuant to §31.3406(a)–1.

(3) *Transactions entered into through a brokerage account that is not a post-1983 brokerage account.* If a broker acquires readily tradable instruments for a payee through an account (with the broker) that is not a post-1983 brokerage account (as defined in §31.3406(d)–1(c)(1)), and the broker is not the payor of the instruments, the broker must furnish the payee's taxpayer identification number to the payor. In addition, if the broker has been notified by the Internal Revenue Service that the payee is subject to withholding under section 3406 either because of an incorrect taxpayer identification number or due to notified payee underreporting as described in section 3406(a)(1) (B) or (C), respectively, the broker must notify the payor of the instrument to impose withholding with respect to that payee and transmit the information in the manner described in this paragraph (a). After a payor receives a notice from a broker pursuant to section 3406(d)(2)(B) and this paragraph (a), the payor must impose withholding on any accounts of the payee paying reportable interest or dividends as defined in section 3406(b)(2) in accordance with §31.3406(a)–1.

(4) *Payor must notify payee*—(i) *Failure to provide certifications.* If a payor is notified by a broker, as required in paragraph (a)(1) of this section, that a payee is subject to withholding because the payee failed to provide the certifications, as described in §31.3406(d)–2(a) and §31.3406(d)–1(b)(3) and (c)(2), and the payor has not received the certifications from the payee, then the payor must notify the payee that withholding has started (or will start) no later than 15 days after the payor makes the first payment to the payee that is subject to withholding under section 3406. A notice that contains the information described in paragraph (b)(2) of this section satisfies the payor's requirement to give notice to the payee. If the broker notifies the payor that the payee failed to make a required certification and the payor has received the certification from the payee, the payor may disregard the notice from the broker.

(ii) *Notified payee underreporting and incorrect taxpayer identification number.* The payor must notify the payee under this section if the Internal Revenue Service or a broker notifies the payor to withhold either because of an incorrect taxpayer identification number under section 3406(a)(1)(B) (as

described in §31.3406(d)–5) or due to notified payee underreporting under section 3406(a)(1)(C) (as described in §31.3406(c)–1). If a payor is notified by the Internal Revenue Service or a broker with respect to a readily tradable instrument, the payor may not ignore the notice even if the payee previously provided the payee's taxpayer identification number under penalties of perjury to the payor and even if the payee certified to the payor that the payee is not subject to backup withholding due to a notified payee underreporting. See §31.3406(d)–5(c) (1) and (2) and (f)(2) for notice requirements under section 3406(a)(1)(B) due to an incorrect taxpayer identification number. See §31.3406(c)–1(c) (2) for notice requirements under section 3406(a)(1)(C) due to notified payee underreporting.

(b) *Notices*—(1) *Form of notice by broker to payor.* A broker who is required under paragraphs (a)(1) (iii) and (2) of this section to notify the payor with respect to a readily tradable instrument may notify the payor in connection with the transfer instructions by means of magnetic media, machine readable document, or any other medium, provided that the notice includes the following information—

(i) The payee's name, address, and taxpayer identification number (if provided to the broker); and

(ii) A statement that the payee is subject to withholding under section 3406(a)(1) (A), (B), (C), or (D) of the Internal Revenue Code, whichever section applies; and

(iii) When applicable, a statement that the broker was notified by the Internal Revenue Service that the payee is subject to withholding under section 3406(a)(1)(B) or (C).

(2) *Form of notice by payor to payee.* A payor who is required to notify a payee that the payee is subject to withholding must provide notice that is substantially similar to the following—

(i) For a notification concerning a failure to provide a taxpayer identification number in the required manner under section 3406(a)(1)(A) or a failure to make the following certification described in section 3406(a)(1)(D):

Recently, you purchased (identify security acquired). Because of the existence of one or more of the following conditions, payments of interest, dividends, and other reportable amounts that are made to you will be subject to withholding of tax at a 31 percent rate: (specify the condition or conditions, described below, that are applicable)

(1) You failed to provide a taxpayer identification number, or failed to provide this number under penalties of perjury, in connection with the purchase of the acquired security. (An individual's taxpayer identification number is his or her social security number.)

(2) You failed to certify, under penalties of perjury, that you are not subject to withholding due to notified payee underreporting as required under section 3406(a)(1)(D) of the Internal Revenue Code.

If condition (1) applies, you may stop withholding by providing your taxpayer identification number on the

enclosed Form W–9, signing the form, and returning it to us. If you do not have a taxpayer identification number, but have applied (or will soon apply) for one, you may so indicate on the Form W–9. Withholding may apply during the 60-day period you are waiting for your taxpayer identification number. You must provide us with your taxpayer identification number promptly after you receive it in order to avoid withholding after the end of the 60-day period or to stop withholding if it has already begun. Certain persons, described on the enclosed Form W–9, are exempt from withholding. Follow the instructions on that form if applicable to you.

If condition (2) applies, you may stop withholding by certifying on the enclosed Form W–9 that you are not subject to withholding due to notified payee underreporting, signing the form, and returning it to us.

If more than one condition applies, you must remove all applicable conditions to stop withholding.

Please address any questions concerning this notice to: [Insert payor identifying information].

(Do not address questions to the broker who purchased the securities for you.)

(ii) For the form of the notice concerning imposition of withholding due to an incorrect taxpayer identification number, see §31.3406(d)–5 (d)(2) and (g)(2).

(iii) For the form of the notice concerning the imposition of withholding due to notified payee underreporting, see §31.3406(c)–1(d)(2).

(c) *Payor's reliance on information from broker*—(1) *In general.* A payor of an instrument acquired by a payee through a broker may rely on the information that the payor receives from the broker pursuant to paragraphs (a) and (b) of this section.

(2) *Amount subject to backup withholding.* The payor is required to withhold under section 3406 depending on the payor's customary method of making payment on an instrument or instruments owned by a payee. If it is the practice of a payor to combine in one account all readily tradable instruments of the same issue owned by a payee and if only certain of those instruments are subject to withholding, the payor must withhold on the aggregate payment made with respect to all the instruments in the account. Otherwise, the payor must withhold on the payment made on the instrument or instruments with respect to which the payee is subject to withholding.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995; 61 FR 11307, Mar. 20, 1996; 61 FR 12135, Mar. 25, 1996; T.D. 9010, 67 FR 48760, July 26, 2002]

§ 31.3406(d)-5 Backup withholding when the Service or a broker notifies the payor to withhold because the payee's taxpayer identification number is incorrect.

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(a) *Overview.* Backup withholding under section 3406(a)(1)(B) applies to any reportable payment made with respect to an account of a payee if the Internal Revenue Service or a broker notifies a payor under paragraph (c)(1) or (2) of this section that the payee's name and taxpayer identification number combination (name/TIN combination) is incorrect and the payor is required under paragraph (c)(3) of this section to identify that account as having the same name/TIN combination. After receiving a notice from the Internal Revenue Service or a broker under paragraph (c)(1) or (2) of this section and identifying an account as having the incorrect name/TIN combination under paragraph (c)(3) of this section, the payor must notify the payee in accordance with paragraph (d) of this section. In addition, under paragraph (e) of this section, the payor must backup withhold on all reportable payments made to such account after the close of the 30th business day after the date that the payor receives the notice and on or before the close of the 30th calendar day after the date that the payor receives from the payee the certification required under paragraph (f) of this section. Under paragraph (g) of this section, if a payor receives 2 notices from the Internal Revenue Service or broker within 3 calendar years with respect to a payee's account, the payor must notify the payee in accordance with paragraph (g)(2) (rather than paragraph (d)) of this section. In addition, the payor must backup withhold on all reportable payments made with respect to the account after the close of the 30th business day after the date that the payor receives the second notice and on or before the 30th calendar day after the date that the payor receives notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination for the account. Paragraph (h) of this section requires a payor to use a corrected name/TIN combination on subsequent information returns.

(b) *Definitions and special rules.*—(1) *Definition of incorrect name/TIN combination.* An incorrect name/TIN combination is a combination of a name and taxpayer identification number provided on an information return with respect to which the Internal Revenue Service determines that the taxpayer identification number provided is not assigned under section 6109 to the name provided.

(2) *Definition of account.* The term "account" means any account, instrument, or other relationship with the payor.

(3) *Definition of business day.* The term "business day" means any day other than a Saturday, Sunday, or legal holiday (within the meaning of section 7503).

(4) *Certain exceptions*—(i) *In general.* This section does not apply with respect to any notice received under paragraph (c)(1) or (2) of this section with respect to payments that—

(A) Were made to a fiduciary or nominee account; or

(B) Were not reportable payments (for example, because the payments were made to an exempt recipient).

See §301.6724–1(f)(3) of this chapter for certain solicitation rules applicable after receipt of a notice under paragraph (c)(1) or (2) of this section with respect to a fiduciary or nominee account.

(ii) *Definition of fiduciary or nominee account.* A fiduciary or nominee account is an account with respect to which at least one person named in the registration is identified as acting in the capacity as nominee or as administrator, conservator, custodian, receiver, tutor, curator, committee, executor, guardian, trustee, or other fiduciary capacity recognized under governing law.

(c) *Notice regarding an incorrect name/TIN combination*—(1) *In general.* If the Internal Revenue Service notifies a payor that a payee's name/TIN combination is incorrect and that the payor must commence backup withholding as required on reportable payments made with respect to accounts of the payee with the same name/TIN combination, the payor must—

(i) Identify under paragraph (c)(3) of this section any account or accounts of the payee having the same name/TIN combination;

(ii) Except as provided in paragraph (g) of this section, notify the payee and backup withhold on reportable payments made to the account or accounts under the rules of paragraphs (d), (e), and (f) of this section.

This paragraph (c)(1) also applies if the payor receives notice from a broker under paragraph (c)(2) of this section.

(2) *Additional requirements for payors that are also brokers*—(i) *In general.* A broker must notify the payor of an instrument of the information required under paragraph (c)(2)(ii) of this section, if—

(A) The broker (in its capacity as a payor) receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section that a payee's name/TIN combination is incorrect and is required to identify an account of the payee pursuant to paragraph (c)(3) of this section as having the name/TIN combination;

(B) The payee acquires through the same account with the broker a readily tradable instrument with respect to which the broker is not the payor; and

(C) The acquisition of such instrument occurs after the close of the 30th business day after the date that the broker receives that notice (or on any earlier date that the broker chooses to begin applying this paragraph (c)(2)).

For purposes of this paragraph (c)(2)(i), with respect to notices under paragraph (c)(1) of this section received on or after September 1, 1992, an acquisition includes a transfer of an instrument out of street name into the name of the registered owner, *i.e.*, the payee.

(ii) *Required information.* The information required to be provided under this paragraph (c)(2)(ii) is:

(A) The fact that the broker was notified by the Internal Revenue Service that the payee furnished an incorrect name/TIN combination;

(B) The incorrect name/TIN combination; and

(C) The fact that the named payee is subject to backup withholding under section 3406(a)(1)(B).

The broker is required to provide this information to the payor of the instrument in connection with the transfer instructions for the acquisition.

(iii) *Termination of obligation to provide information.* The obligation of a broker to provide information to payors under this paragraph (c)(2) terminates simultaneously with the termination of the broker's obligation to backup withhold (in its capacity as payor) on reportable payments to the account.

(3) *Payor identification of the account or accounts of the payee that have the incorrect taxpayer identification number*—(i) *In general.* If an account number or designation is provided in the notice received under paragraph (c)(1) of this section, the payor need only identify any account or accounts corresponding to that number or designation that has the same name/TIN combination provided in the notice. If no account number or designation is provided in the notice received under paragraph (c)(1) of this section, the payor must identify, using reasonable care, all accounts of the payee having the same name/TIN combination provided in the notice. If a payor receives notice from a broker under paragraph (c)(2) of this section with respect to the acquisition of a readily tradable instrument, the payor is not required to identify any other account of the payee.

(ii) *Reasonable care where no account number or designation is provided.* A payor who satisfies the following two-part facts-and-circumstances test will be considered to have exercised reasonable care for purposes of this paragraph (c)(3).

(A) Part one of the test is satisfied if a payor searches for accounts of the payee on the computer or other recordkeeping system that the payor can reasonably associate with the information return that generated the notice under paragraph (c)(1) of this section. For example, a payor who maintains separate computer or recordkeeping systems for different product lines will have identified and used the appropriate system if the payor searches for accounts of the payee on the computer or recordkeeping system that contains the product line for the type of payments reported on the information return. A payor with the same product line on several nonintegrated computer or record systems will have identified and used the appropriate system if the payor searches for accounts of the payee on any computer or record system that the payor otherwise can reasonably associate with the information return.

(B) Part two of the test is satisfied if the payor inputs the name/TIN combination provided on the notice from the Internal Revenue Service under paragraph (c)(1) of this section into the system that is

described in paragraph (c)(3)(ii)(A) of this section. If the system of a payor cannot utilize the name/TIN combination, the payor must input appropriate data or criteria, as determined by the capability of the payor's computer or recordkeeping system.

(iii) *No identification if error is caused by payor.* A payor may treat an account as not having the incorrect name/TIN combination if the error resulted because the name or taxpayer identification number on such account is not the name or taxpayer identification number that was provided to the payor. This may occur, for example, where a payor transposes numbers in the taxpayer identification number when incorporating it into the payor's business records.

(4) *Special rules for joint accounts*—(i) *In general.* In the case of a joint account, the relevant name/TIN combination for purposes of this section is the name/TIN combination used for information reporting purposes.

(ii) *Transitional rule.* With respect to notices received under paragraph (c) (1) or (2) of this section prior to September 1, 1993, a payor may treat the name/TIN combination of the first person on a joint account as the relevant name/TIN combination, unless that person is an exempt foreign person and the account registration includes names of persons who are not foreign persons.

(iii) *Optional rule where names are switched.* A payor may backup withhold under this section on reportable payments made to a joint account if the order of the names (or taxpayer identification numbers) on the account is merely changed subsequent to receipt of a notice under paragraph (c) (1) or (2) of this section, provided that the name of the person to which the incorrect name/TIN combination originally applies remains on the account.

(5) *Date of receipt.* For purposes of this section, the date set forth on the notice from the Internal Revenue Service or broker under paragraph (c) (1) or (2) of this section is considered to be the date of receipt of the notice by the payor. However, if the payor demonstrates to the satisfaction of the Internal Revenue Service that the date of actual receipt of the notice is later than the date on the notice, the actual date of receipt is controlling.

(d) *Notice from payors of backup withholding due to an incorrect name/TIN combination*—(1) *In general.* Except as provided in paragraph (g) of this section, if a payor receives notice under paragraph (c)(1) or (2) of this section and is required to identify an account as having the incorrect name/TIN combination under paragraph (c)(3) of this section, the payor must send a copy of the notice (or an acceptable substitute notice) to the payee of the account in accordance with the procedures of paragraph (d)(2) of this section.

(2) *Procedures*—(i) *In general.* The notice that a payor must send to a payee under paragraph (d)(1) of this section must comply with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery. A payor must send the notice to the payee within 15 business days after the date that the payor receives the notice from the Internal

Revenue Service or a broker under paragraph (c)(1) or (2) of this section.

(ii) *Two or more notices for an account for the same year or received in the same year.* A payor who receives, under the same payor taxpayer identification number, two or more notices under paragraph (c)(1) or (2) of this section with respect to the same payee's account for the same year, or in the same calendar year, need only send one notice to the payee under this section.

(e) *Period during which backup withholding is required due to notification of an incorrect name/TIN combination*—(1) *In general.* Except as provided in paragraph (g) of this section, if a payor receives a notice under paragraph (c)(1) or (2) of this section and is required to identify an account as having the same name/TIN combination under paragraph (c)(3) of this section, the payor must impose backup withholding on all reportable payments made with respect to the account after the close of the 30th business day after the date the payor receives that notice and on or before the close of the 30th calendar day after the day the payor receives from the payee the certification required under paragraph (f) of this section.

(2) *Grace periods*—(i) *Starting backup withholding.* A payor may, on an account-by-account basis or in general, choose to begin backup withholding under this paragraph (e) at any time during the 30-business-day period described in paragraph (e)(1) of this section.

(ii) *Stopping backup withholding.* A payor may, on an account-by-account basis or in general, choose to stop backup withholding under this paragraph (e) at any time within 30 calendar days after the payor receives from the payee the certification required under paragraph (f) of this section.

(3) *Dormant accounts.* The requirement that a payor backup withhold under this paragraph (e) on reportable payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(i) The date that the last reportable payment was made to that account; or

(ii) The date that the payor received the notice under paragraph (c)(1) or (2) of this section.

(f) *Manner required for payee to furnish certified taxpayer identification number.* (1) Except as provided in paragraph (g) of this section, in order to prevent backup withholding under paragraph (e) of this section from starting, or to stop it once it has begun, a payee with respect to whom the payor has been notified under paragraph (c)(1) or (2) that the payee's name/TIN combination is incorrect is required on Form W–9 (or an acceptable substitute form) to—

(i) Provide the payee's name and taxpayer identification number; and

(ii) Certify, under penalties of perjury, that the taxpayer identification number being provided is correct.

(2) The certification must be made even if the account is a pre-1984 account and even if the payment to the account is a reportable payment other than interest, dividends, patronage dividends, original issue discount, or proceeds of a sale of a security or commodity. In order to prevent backup withholding under paragraph (e) of this section from starting or to stop it once it has begun, a payee is not required to certify, under penalties of perjury, that the payee is not subject to backup withholding due to notified payee underreporting under section 3406(a)(1)(C). With respect to notices received under paragraph (c)(1) or (2) of this section on or after September 1, 1993, the requirements of this paragraph (f) are not satisfied if a payee provides only an awaiting TIN certification. As a result, a payor must not fail to begin backup withholding under paragraph (e) of this section solely because the payee provided an awaiting TIN certification, or stop it once it has begun solely because the payee provided an awaiting TIN certification.

(g) *Receipt of two notices within a 3-year period*—(1) *In general.* If a payor receives notification under paragraph (c)(1) or (2) of this section twice within 3 calendar years, and in each case the payor is required to identify the same account as having the incorrect name/TIN combination, the payor must —

(i) Disregard any future certifications (described in paragraph (f) of this section) furnished by the payee with respect to the account until the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section;

(ii) Send the notice described in paragraph (g)(2) of this section to the payee (and not the notice required under paragraph (d) of this section) within 15 business days after the date that the payor receives the second notice; and

(iii) Impose backup withholding on the account for the period described in paragraph (g)(3) of this section.

The payor must maintain sufficient records to determine whether the payor has received notices under paragraph (c) (1) or (2) of this section twice within 3 calendar years with respect to the same account.

(2) *Notice to payee who has provided two incorrect name/TIN combinations within 3 calendar years.* The notice to the payee required by paragraph (g)(1) of this section must comply with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery.

(3) *Period during which backup withholding is required due to a second notice of an incorrect name/ taxpayer identification combination within 3 calendar years*—(i) *In general.* If paragraph (g)(1) of this section applies, the payor must backup withhold on all reportable payments made with respect to the account of the payee after the close of the 30th business day after the date that the payor receives the

second notice under paragraph (c) (1) or (2) of this section and on or before the close of the 30th calendar day after the date that the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section for the account. However, a payor may choose not to commence backup withholding under this paragraph (g) until January 1, 1992.

(ii) *Grace periods*—(A) *Starting backup withholding.* A payor may, on an account-by-account basis or in general, choose to begin backup withholding under this paragraph (g) at any time during the 30-business-day period described in paragraph (g)(3)(i) of this section.

(B) *Stopping backup withholding.* A payor may, on an account-by-account basis or in general, choose to stop backup withholding under this paragraph (g) at any time within 30 calendar days after the date the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section for the account.

(iii) *Dormant accounts.* The requirement that a payor backup withhold under this paragraph (g) on reportable payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(A) The date that the last reportable payment was made to that account; or

(B) The date that the payor received the second notice under paragraph (c) (1) or (2) of this section.

(4) *Receipt of two notices for the same year or in the same calendar year.* A payor who receives, under the same payor taxpayer identification number, two or more notices under paragraph (c)(1) or (2) of this section with respect to the same payee's account for the same year, or in the same calendar year, must treat such notices as one notice for purposes of this paragraph (g).

(5) *Notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination.* The Social Security Administration (or the Internal Revenue Service) will notify a payor after it validates a name/TIN combination that the payee provides for an account to which paragraph (g)(1) of this section applies. Notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination satisfies the requirements of this paragraph (g)(5) only if it complies with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery. In order to obtain notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination for an account, a payee who receives notice from a payor under paragraph (g)(2) of this section should follow such procedures as the Internal Revenue Service provides in the Internal Revenue Bulletin.

(h) *Payor must use newly provided certified number.* If a payor receives a certification under paragraph (f) of this section or a notification under paragraph (g)(5) of this section for an account, the

payor must use the name/TIN combination provided on such certification or notification on information returns for the account for which the due date (without regard to extensions) is more than 30 calendar days after the date that the payor receives the certification or notification. A payor who uses that name/TIN combination on the first such information return satisfies the requirement of section 3406(h)(9) to provide this information to the Internal Revenue Service. If the payor is not required to file any information returns with respect to the account after the date that the payor receives the certification or notification, a payor is deemed to satisfy the requirements of section 3406 (h)(9).

(i) *Effective date.* Except as otherwise provided in this section, the provisions of this section are effective with respect to notices received on or after September 1, 1990, under paragraph (c) (1) or (2) of this section.

(j) *Examples.* The application of the provisions of this section may be illustrated by the following examples:

Example 1. D opened an account with Bank O prior to 1984 and furnished a taxpayer identification number to O at the time he opened the account. O pays interest on the account at the end of each calendar month, and the account is a pre-1984 account. On October 1, 1990, the Internal Revenue Service notifies Bank O that the name/TIN combination provided by D is incorrect. O timely notifies D as required in paragraph (d)(1) of this section. O does not receive the certification required under paragraph (f) of this section from D. O is required to backup withhold 20 percent of all reportable payments made after November 14, 1990 (which is 30 business days after the date the Internal Revenue Service notified O). Therefore, O is not required to backup withhold on the reportable payment made on October 31, 1990, but is required to backup withhold on the reportable payment made on November 30, 1990. O is required to continue to backup withhold under section 3406(a)(1)(B) until O receives the certification required under paragraph (f) of this section from D (or, if earlier, until backup withholding terminates under paragraph (e)(3) of this section).

Example 2. Assume the same facts as in *Example 1* except that D furnishes a new taxpayer identification number to O on November 1, 1990, but does not certify, under penalties of perjury, that it is his correct taxpayer identification number as required under paragraph (f) of this section. Even though the account is a pre-1984 account, O is required to withhold 20 percent of all reportable payments made after November 14, 1990 (which is 30 business days after the date the Internal Revenue Service notified O), and before the date O receives the certification required under paragraph (f) of this section from D.

Example 3. Assume the same facts as in *Example 2* except that D provides O with the certification required under paragraph (f) of this section on November 10, 1990. D elects pursuant to paragraph (e)(2)(ii) of this section to treat the certification as received on November 20, 1990. Even though D did not provide the certification to O within 30 business days after the Internal Revenue Service notified O that D provided an incorrect taxpayer identification number, O is not required to backup withhold under section 3406(a)(1)(B) because O did not make any reportable payment to D after 30 business days after notification of an incorrect name/TIN combination and before O received D's certification under paragraph (f) of this section (or, if earlier, until backup withholding terminates under paragraph (e)(3) of this section).

Example 4. Individual F has two post-1983 accounts with Bank R that pay reportable interest: a savings account and a money market account. The money market account was opened in 1986, and the savings account was opened on February 1, 1991. R treats each of these accounts as a separate account on its books and records for business purposes. On October 1, 1990, the Internal Revenue Service notified R pursuant to paragraph (c)(1) of this section that F furnished an incorrect name/TIN combination with respect to the money market account. R timely sends F the notice required under paragraph (d) of this section and receives the certification required under paragraph (f) of this section from F on November 1, 1990. On October 1, 1991, the Internal Revenue Service again notifies R that F furnished an incorrect name/TIN combination with respect to the money market account. Further, R determines from its business records that two notifications of an incorrect name/TIN combination have been received with respect to the money market account within 3 calendar years. R must send F the notice required under paragraph (g)(2) of this section and must commence backup withholding on reportable interest paid on the money market account pursuant to paragraph (g)(3) of this section after November 14, 1991, which is 30 business days after R received the second notice. R must continue to backup withhold under paragraph (g) of this section on the money market account until R receives notification from the Social Security Administration as described in paragraph (g)(5) of this section (or, if earlier, until backup withholding terminates under paragraph (g)(3)(iii) of this section). R is not required to backup withhold on the savings account unless and until it receives notice under paragraph (c)(1) or (2) of this section with respect to the savings account.

[T.D. 8409, 57 FR 13031, Apr. 15, 1992, as amended by T.D. 9055, 68 FR 22595, Apr. 29, 2003]

§ 31.3406(e)-1 Period during which backup withholding is required.

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(a) *In general.* A payor must withhold under section 3406 at a rate of 31 percent on any reportable payment (as defined in section 3406(b)) made to a payee during the period described in this section (irrespective of the number of conditions for imposing withholding under section 3406 that exist with respect to the payee). A payor must continue to withhold under section 3406 until no condition for imposing backup withholding exists with respect to the payee.

(b) *Failure to furnish a taxpayer identification number in the manner required*—(1) *Start withholding.* A payor is required to withhold under section 3406(a)(1)(A) at a rate of 31 percent on any reportable payment (as defined in section 3406(b)) at the time the payor pays the reportable payment (as described in §31.3406(a)–4) to a payee if—

(i) The payor has not received the payee's taxpayer identification number in the manner required in §31.3406(d)–1; or

(ii) The payor has received notice from a broker (as required in §31.3406(d)–4(a)(1)(iii)) with respect to a readily tradable instrument that the payee did not furnish a taxpayer identification number to the broker in the manner required in §31.3406(d)–1 and the payor has not received the taxpayer identification number from the payee in this manner.

(2) *Stop withholding.* The payor must stop withholding under section 3406(a)(1)(A) within 30 days after the payor receives—

(i) The payee's taxpayer identification number in the manner required under §31.3406(d)–1; or

(ii) A statement, in such form and containing such information as is required under applicable regulations, that the payee is not a United States person.

(c) *Notification of an incorrect taxpayer identification number.* See §31.3406(d)–5(e) and (g)(3) for the period for which withholding is required in the case of notification of an incorrect taxpayer identification number.

(d) *Notified payee underreporting.* See §31.3406(c)–1(e) for the period for which withholding is required in the case of notified payee underreporting.

(e) *Payee certification failure*—(1) *Start withholding.* A payor is required to withhold under section 3406(a)(1)(D) at a rate of 31 percent on any reportable interest or dividend payment (as defined in section 3406(b)(2)) at the time the payor pays such reportable interest or dividend payment (as described in §31.3406(a)–4) to a payee if—

(i) The payor has not received from the payee the certification required in §31.3406(d)–2; or

(ii) The payor has received notice from a broker (as required in §31.3406(d)–4(a)(1)(iii)) with respect to a readily tradable instrument that the payee did not make the required certification and the payor has not received the required certification from the payee.

(2) *Stop withholding.* The payor must stop withholding under section 3406(a)(1)(D) on any reportable interest or dividend payment within 30 days after the payor receives the certification from the payee in the manner required by §31.3406(d)–2.

(f) *Rule for determining when the payor receives a taxpayer identification number or certificate from a payee.* In determining whether a payee has failed to provide a taxpayer identification number or any certification to a payor (including a Form W–8 or substitute form), a payor is required to process the taxpayer identification number or certification within 30 days after the payor receives the taxpayer identification number or certification from the payee or in certain cases, from a broker. Thus, the payor may take up to 30 days to treat the taxpayer identification number or a certificate as having been received.

[T.D. 8637, 60 FR 66127, Dec. 21, 1995]

§ 31.3406(f)-1 Confidentiality of information.

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(a) *Confidentiality and liability for violation.* Pursuant to section 3406(f) no person may use any information obtained under section 3406 for any purpose except for the purpose of complying with the requirements of section 3406 or for purposes permitted under section 6103 (subject to the safeguards of section 6103). See section 7431 for civil damages for violating the confidential use of the information (subject to an exception for good faith).

(b) *Permissible use of information*—(1) *In general.* A payor or broker may transmit information on a Form W–9, Form W–8, or other acceptable form relating to withholding to the department, institution, or firm (or to any employee therein) responsible for withholding or processing of taxpayer identification numbers, certifications described in §31.3406(h)–3, or other substitute forms. In addition, a broker may notify the payor with respect to a readily tradable instrument of the requirement to withhold and the condition or conditions for imposing withholding (as described in §31.3406(d)–4) that exist with respect to the payee. A payor or broker may, without violating the Internal Revenue Code, close an account of, refuse to open an account for, issue an instrument to, or redeem an instrument for, a person solely because the person fails to furnish the person's taxpayer identification number or documentation of foreign status in the manner required in §31.3406(d)–1 and §31.3406(g)–1, respectively. A payor who closes an account of a payee in the calendar year in which the account was opened and during which no taxpayer identification number or evidence of foreign status was provided for that account will be presumed in the absence of evidence to the contrary to have closed the account without violating section 3406(f) even though the payee is subject to backup withholding under section 3406(a)(1)(A). A payor, except as provided in §§31.3406(d)–3 and 31.3406 (g)–3, may not prohibit a payee who fails to furnish the payee's taxpayer identification number in the manner required in §31.3406(d)–1 from withdrawing any funds in the account.

(2) *Window transactions.* In the case of a window transaction (as defined in §31.3406(b)(2)–3(b)), a payor may, without violating the Internal Revenue Code, refuse to redeem or may refuse to make payment if the payee fails to provide a taxpayer identification number regardless of when the obligation was issued or acquired.

(c) *Specific restrictions on the use of information.* Except as provided in paragraph (b) of this section, a payor or broker is not permitted to—

(1) Close an account (or instrument) of a payee solely because that payee (or the account of a payee) is subject to withholding under section 3406(a)(1) (A), (B), (C), or (D);

(2) Refuse to open an account or to issue an instrument if the person fails to certify, under penalties of perjury, that the person is not subject to withholding under section 3406(a)(1)(C) (relating to notified payee underreporting);

(3) Use information obtained under section 3406 (including a payee's failure or inability to certify that the payee is not subject to withholding due to notified payee underreporting or the fact that the account is subject to withholding), surcharge an account (i.e., charge an account more than the fee charged a similar account that was not subject to withholding under section 3406), or use that information to determine whether to open or close an account, whether to issue or redeem an instrument, or whether to extend credit to the payee.

[T.D. 8637, 60 FR 66127, Dec. 21, 1995]

§ 31.3406(g)-1 Exception for payments to certain payees and certain other payments.

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(a) *Exempt recipients*—(1) *In general.* A payor of any reportable payment (as defined in section 3406 (b)) must not withhold under section 3406 if the payee is—

(i) An organization exempt from taxation under section 501(a) or an individual retirement account;

(ii) The United States or any wholly owned agency or instrumentality thereof;

(iii) A state, the District of Columbia, a possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;

(iv) A foreign government, a political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing (as defined in regulations under section 892); or

(v) An international organization or any wholly owned agency or instrumentality thereof (as defined in section 7701(a)(18)).

(2) *Nonexclusive list.* Paragraph (a)(1) of this section does not prescribe an exclusive list of payees that are exempt from information reporting and also are exempt from withholding under section 3406.

(b) *Determination of whether a person is described in paragraph (a)(1) of this section.* The determination of whether a person is a payee described in paragraph (a)(1) of this section must be made as provided in the applicable provisions of section 6049 and the regulations issued thereunder. A payor, even if permitted to treat a person as an exempt recipient without requiring a certificate under the provisions of section 6049, may require a payee, otherwise not required to file a certificate regarding its exempt status, to file a certificate and may treat a payee who fails to file the certificate as a person who is not an exempt recipient. See §31.3406(h)–3 for a description of the Form W–9 or a substitute form prescribed under section 3406 for claiming exempt status.

(c) *Prepaid or advance premium life-insurance contracts.* A payor of a reportable payment (as defined in section 3406(b)(1)) may, but is not required to, withhold under section 3406 on reportable payments made from January 1, 1984, to December 31, 1996, on prepaid or advance premium life-insurance contracts to a payee who is the owner for tax purposes of the prepaid or advance premium life-insurance contract. For purposes of this exception from backup withholding, a prepaid or advance premium life-insurance contract is one entered into on or before June 30, 1984, by the payee and under which the increment in value of the prepaid or advance premium is used for the payment of premiums during the period in which the exception from backup withholding applies.

(d) *Reportable payments made to Canadian nonresident alien individuals.* A payment of interest made to a Canadian nonresident alien individual under §1.6049–8(a) of this chapter is not subject to withholding under section 3406.

(e) *Certain reportable payments made outside the United States by foreign persons, foreign offices of United States banks and brokers, and others.* For reportable payments made after December 31, 2000, a payor is not required to backup withhold under section 3406 on a reportable payment that qualifies for the documentary evidence rule described in §1.6049–5(c)(1) or (4) of this chapter, whether or not documentary evidence is actually provided to the payor, unless the payor has actual knowledge that the payee is a United States person. Further, no backup withholding is required for payments upon which a 30-percent amount was withheld by another payor in accordance with the withholding provisions under chapter 3 of the Internal Revenue Code and the regulations under that chapter. For rules applicable to notional principal contracts, see §1.6041–1(d)(5) of this chapter.

(f) *Special rule for certain payment card transactions*—(1) *In general.* No withholding under section 3406 is required for a reportable payment made through a payment card organization if the payment is made on or after January 1, 2005, the organization is a Qualified Payment Card Agent (QPCA), and—

(i) The payee is a qualified payee (as defined in paragraph (f)(2)(vi) of this section) with respect to the payment; or

(ii) The cardholder/payor made the purchase to which the payment relates no later than two months after the last date prescribed under paragraph (f)(3) of this section for furnishing the QPCA's first notification to the cardholder/payor that the payee is not a qualified payee.

(2) *Definitions*—(i) *Payment card defined.* For purposes of this section, a *payment card* is a card (or an account) issued by a payment card organization, or one of its members, affiliates, or licensees, to a cardholder/payor which, upon presentation to a merchant/payee, represents an agreement of the cardholder to pay the merchant through the payment card organization.

(ii) *Payment card organization defined.* For purposes of this section, a *payment card organization* is an entity that sets the standards and provides the mechanism, either directly or indirectly through

members, affiliates, or licensees, for effectuating payment between a purchaser and a merchant in a payment card transaction. A payment card organization acting directly or indirectly through its members, affiliates, or licensees generally provides such a payment mechanism by issuing payment cards, enrolling merchants as authorized acceptors of payment cards for payment for goods or services, and ensuring the system conducts the transactions in accordance with prescribed standards for payment card transactions.

(iii) *Payment card transaction defined.* For purposes of this section, a *payment card transaction* is a transaction in which a cardholder/payor uses a payment card to purchase goods or services and a merchant agrees to accept a payment card as a means of obtaining payment.

(iv) *Cardholder/payor defined.* For purposes of this section, a *cardholder/payor* is the person that agrees to make payments through the payment card organization. Thus, in the case of a payment card issued to an employee of a person that agrees to make payments through the payment card organization, the employer rather than the employee is the cardholder/payor.

(v) *Qualified Payment Card Agent (QPCA) defined.* For purposes of this section, a *Qualified Payment Card Agent* (QPCA) is a payment card organization that has a current QPCA determination from the Internal Revenue Service (IRS) under applicable procedures (see §601.601(d)(2) of this chapter).

(vi) *Qualified payee defined.* For purposes of this section, a payee is a *qualified payee* with respect to a reportable payment if—

(A) At the time the QPCA makes the payment, the QPCA has obtained the payee's TIN and the payee's TIN has been validated through the IRS TIN Matching Program; or

(B) The QPCA makes the payment during the six-month period beginning on the date on which the QPCA first makes a payment to the payee.

(3) *Notification of payee status.* In the case of a payment to a payee other than a qualified payee as defined in paragraph (f)(2)(vi) of this section with respect to the payment, the QPCA acting directly or indirectly through its members, affiliates, or licensees must notify the payor that the payee is not a qualified payee. The notification must be furnished during the four-month period beginning on the date on which the QPCA makes the payment. Notification may be provided in a quarterly or other regular report of payee data to the cardholder/payor and may consist of an asterisk, footnote, or other mark next to the payee's name, with the text of the notification at the bottom of the page or at the end of the list of payee data. Notification by the QPCA that a payee is not a qualified payee does not constitute notice by the IRS that the payee's TIN is incorrect for purposes of section 3406(a)(1)(B) and §31.3406(d)–5.

(4) *Time of payment.* A QPCA that makes reports to cardholders on the basis of a calendar quarter or any shorter period (the reporting period) may choose to treat all payments made during the reporting

period as being made on the last day of the period for purposes of paragraphs (f)(2)(vi) and (f)(3) of this section. If the QPCA treats payments as being made on the last day of a reporting period, the six-month period in paragraph (f)(2)(vi) of this section and the four-month period in paragraph (f)(3) of this section are treated as beginning on the first day of the reporting period in which the QPCA makes the payment that would otherwise begin the six-month or four-month period.

(5) *Examples.* The following examples illustrate the rules of this section. For purposes of the examples, assume that Q meets all requirements and fulfills all duties necessary to obtain a QPCA determination from the IRS. The examples are as follows:

Example 1. (i) Q, a QPCA, enrolls Merchant X on January 20, 2005, to accept the Q payment card as a means for obtaining payment. (The results in this example are the same whether the acts attributed to Q are performed by Q itself or by a member, affiliate, or licensee of Q.) At the time of enrollment, Q obtains Merchant X's taxpayer identification number (TIN). Merchant X is a sole proprietor engaged in the trade or business of repairing automobiles and trucks. Q's first payment to Merchant X for purchases through the payment card is made on January 31, 2005.

(ii) On March 1, 2005, Q issues a Q payment card to Customer A to use for the purchase of goods or services in the course of its trade or business from merchants that accept the Q payment card. During 2005, Customer A uses Q payment card to purchase repairs to A's vehicles from Merchant X on April 29, 2005, July 29, 2005, and December 19, 2005. Q makes payments for the repairs on May 2, 2005, August 1, 2005, and December 20, 2005. Q provides reports of payee data to each of its cardholders, including Customer A, on the 15th of April, July, October, and January for the quarter ending on the last day of the preceding month, but does not choose to treat payments as being made on the last day of the quarter for purposes of paragraphs (f)(2)(vi) and (f)(3) of this section.

(iii) On March 15, 2005, Q attempts to validate Merchant X's name/TIN through the IRS TIN Matching Program. On March 20, 2005, the IRS notifies Q that the name/TIN furnished by Merchant X does not match IRS data. On June 15, 2005, and September 15, 2005, Q makes further unsuccessful attempts to validate Merchant X's name/TIN through the IRS TIN Matching Program.

(iv) Under paragraph (f)(2)(vi)(B) of this section, Merchant X is treated as a qualified payee for the six-month period beginning on January 31, 2005 (the date of Q's first payment to Merchant X), and ending on July 30, 2005. Accordingly, the payment on May 2, 2005, is a payment to a qualified payee and, under paragraph (f)(1)(i) of this section, is not subject to backup withholding.

(v) Q has not validated Merchant X's TIN at the time of the payments on August 1, 2005, and December 20, 2005. Accordingly, under paragraph (f)(3) of this section, Q must notify Customer A within four months of each of these payments that Merchant X is not a qualified payee with respect to the payments. In the case of the August 1 payment, the notification must be furnished no later than November 30, 2005. Q may provide the notification in its quarterly report of payee data for the July-September quarter furnished on October 15, 2005.

(vi) Although Merchant X is not a qualified payee with respect to the payments on August 1, 2005, and December 20, 2005, paragraph (f)(1)(ii) of this section provides that backup withholding is not required for

purchases made no later than two months after the last date prescribed for furnishing the first notification that Merchant X is not a qualified payee. The last date for furnishing the first notification is November 30, 2005, and the two-month period expires on January 30, 2006. Because the payments relate to purchases on July 29, 2005, and December 19, 2005, backup withholding is not required with respect to either payment. Backup withholding may be required with respect to any payment Customer A makes through the Q payment card for purchases from Merchant X after January 30, 2006, unless Q has previously succeeded in validating Merchant X's TIN.

Example 2. (i) Assume the same facts as in example (1) except that Q chooses to treat payments as being made on the last day of the quarter for purposes of paragraphs (f)(2)(vi) and (f)(3) of this section.

(ii) The payment Q makes on January 31, 2005, is treated under paragraph (f)(4) of this section as being made on March 31, 2005. Similarly, the payments made on May 2, 2005, August 1, 2005, and December 20, 2005, are treated as being made on June 30, 2005, September 30, 2005, and December 31, 2005.

(iii) Under paragraphs (f)(2)(vi)(B) and (f)(4) of this section, Merchant X is treated as a qualified payee for the six-month period beginning on January 1, 2005 (the beginning of the reporting period during which Q makes the first payment to Merchant X), and ending on June 30, 2005. Accordingly, the payment treated as made on June 30, 2005, is a payment to a qualified payee and, under paragraph (f)(1)(i) of this section, is not subject to backup withholding.

(iv) Q has not validated Merchant X's TIN at the time of the payments that are treated as being made on September 30, 2005, and December 31, 2005. Accordingly, under paragraphs (f)(3) and (f)(4) of this section, Q must notify Customer A within four months of the beginning of each reporting period during which Q makes these payments that Merchant X is not a qualified payee with respect to the payments. In the case of the September 30 payment, the notification must be furnished no later than October 31, 2005. Q may provide the notification in its quarterly report of payee data for the July-September quarter furnished on October 15, 2005.

(v) Although Merchant X is not a qualified payee with respect to the payments that are treated as being made on September 30, 2005, and December 31, 2005, paragraph (f)(1)(ii) of this section provides that backup withholding is not required for purchases made no later than two months after the last date prescribed for furnishing the first notification that Merchant X is not a qualified payee. The last date for furnishing the first notification is October 31, 2005, and the two-month period expires on December 31, 2005. Because the payments relate to purchases on July 29, 2005, and December 19, 2005, backup withholding is not required with respect to either payment. Backup withholding may be required with respect to any payment Customer A makes through the Q payment card for purchases from Merchant X after December 31, 2005, unless Q has previously succeeded in validating Merchant X's TIN.

[T.D. 8637, 60 FR 66128, Dec. 21, 1995, as amended by T.D. 8664, 61 FR 17574, Apr. 22, 1996; T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73412, Dec. 30, 1999; T.D. 9136, 69 FR 41941, July 13, 2004]

§ 31.3406(g)-2 Exception for reportable payment for which withholding is otherwise required.

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(a) *In general.* A payor of a reportable payment (as defined in section 3406(b)) must not withhold under section 3406 if the payment is subject to withholding under any other provision of the Internal Revenue Code.

(b) *Payment of wages.* A payor who is required to make an information return under section 6041 with respect to a payment of wages (as defined in section 3401) because, e.g., the employee makes a certification under section 3402(n) (relating to employees incurring no income tax liability), must not withhold under section 3406 on those wages.

(c) *Distribution from a pension, annuity, or other plan of deferred compensation.* An amount reportable under section 6047, such as a designated distribution under section 3405, is not a reportable payment subject to withholding under section 3406. See section 3406(b). Designated distributions not subject to withholding under section 3406 include—

(1) Distributions from a pension, annuity, profit-sharing, stock bonus plan, or other plan deferring the receipt of compensation;

(2) Distributions from an individual retirement account or annuity;

(3) Distributions from an owner-employee plan; and

(4) Certain surrenders of life insurance contracts.

(d) *Gambling winnings*—(1) *In general.* A payor of a reportable gambling winning must not withhold under section 3406 if tax is required to be withheld from the gambling winning under section 3402(q) (relating to the extension of withholding to certain gambling winnings). If the reportable gambling winning is not required to be withheld upon under section 3402(q), withholding under section 3406 applies to the gambling winning if, and only if, the payee does not furnish a taxpayer identification number to the payor. Section 31.3406(b)(3)–1(b)(3) does not apply to a reportable gambling winning. The payor of a reportable gambling winning is not required to aggregate all such winnings made to a payee during a calendar year, nor is the payor required to determine whether an information return was required to be made with respect to the payee for the preceding year.

(2) *Definition of a reportable gambling winning and determination of amount subject to backup withholding.* For purposes of withholding under section 3406, a reportable gambling winning is any gambling winning subject to information reporting under section 6041. The amount of a reportable gambling winning is—

(i) The amount paid with respect to the amount of the wager reduced, at the option of the payor; by

(ii) The amount of the wager.

(3) *Special rules.* Amounts paid with respect to identical wagers are treated as paid with respect to a single wager. The determination of whether wagers are identical is made under §31.3402(q)–1(c)(1)(ii). In addition, a gambling winning (other than a winning from bingo, keno, or slot machines) is a reportable gambling winning only if the amount paid with respect to the wager is $600 or more and if the proceeds are at least 300 times as large as the amount wagered. See §7.6041–1 of this chapter to determine whether a winning from bingo, keno, or slot machines is a reportable gambling winning and thus subject to withholding under section 3406.

(e) *Certain real estate transactions.* A real estate reporting person (the so-called broker) as defined in section 6045(e)(2) must not withhold under section 3406 on a payment made with respect to a real estate transaction that is subject to reporting under sections 6045 (a) and (e) and §1.6045–4 of this chapter.

(f) *Certain payments after an acquisition of accounts or instruments.* A payor who acquires pre-1984 accounts or instruments described in §31.3406(d)–1(b)(2)(iv) for which the payor does not have a taxpayer identification number or has an obviously incorrect taxpayer identification number as defined in §31.3406(h)–1(b)(2) must start withholding under section 3406(a)(1)(A) and §31.3406(d)–1 on those accounts or instruments no later than sixty days following the date of the payor's acquisition of those accounts or instruments.

(g) *Certain gross proceeds.* No withholding under section 3406 is required with respect to any portion of the original issue discount on an instrument or security that is subject to withholding under section 3406 as reportable gross proceeds of such instrument or security under section 6045.

[T.D. 8637, 60 FR 66128, Dec. 21, 1995]

§ 31.3406(g)-3 Exemption while payee is waiting for a taxpayer identification number.

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(a) *In general*—(1) *Backup withholding not required for 60 days.* If a payor has received an awaiting-TIN certificate from a payee with respect to an account or instrument receiving reportable interest or dividends as described in section 3406(b)(2), the payor must exempt the payee from withholding under section 3406(a)(1)(A) during the 60-day exemption period to the extent and in the manner described in either paragraph (a) (2) or (3) of this section. The 60-day exemption period means the 60-consecutive-day period beginning with the day the payor receives the awaiting-TIN certificate. The payor must withhold under section 3406 beginning after the 60-day exemption period if the payor has not received a taxpayer identification number from the payee in the manner required in §31.3406(d)–1. Regardless of whether the payee provides an awaiting-TIN certificate to a payor, the payor is required to withhold under section 3406(a)(1)(D) and §31.3406(d)–2 on reportable interest or dividend

payments as described in §31.3406(d)–2 if the payee fails to certify, under penalties of perjury, that the payee is not subject to withholding due to notified payee underreporting as required in section 3406 (a)(1)(D) and §31.3406(d)–2.

(2) *Reserve method.* A payor must not withhold under section 3406 during the 60-day exemption period unless the payee (or a joint payee in the case of a joint account) desires to make a withdrawal of more than $500 of either principal or interest from the account in any single transaction during the period. If a payee (or a joint payee) desires to make a withdrawal of more than $500 during the 60-day exemption period, the payor is required under section 3406 to withhold 31 percent of all reportable payments made during the period and at the time of withdrawal unless the payee reserves 31 percent of all reportable payments made to the account during the period.

(3) *Alternative rule; 7-day grace period*—(i) *In general.* A payor who receives an awaiting-TIN certificate may elect, on a payee-by-payee basis or in general, to exempt reportable interest or dividend payments to a payee from withholding under section 3406 applying the rules in paragraph (a)(3) (ii) or (iii) of this section.

(ii) *Withholding on withdrawals.* Under this paragraph (a)(3)(ii), a payor must obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certification. In addition, the payor must withhold under section 3406 on any withdrawals made after the close of 7 business days after the date the awaiting-TIN certification is received and before the earlier of the date that the payor receives a certified taxpayer identification number from the payee, the date the account is closed (in which case the payor must withhold on any reportable payment made at the time the account or relationship is closed), or the date withholding under section 3406 starts on all reportable payments made to the account, instrument, or relationship. All cash withdrawals in an amount up to the reportable payments made from the day after the date of receipt of the awaiting-TIN certification to the date of withdrawal are treated as reportable payments.

(iii) *Withholding regardless of withdrawals.* Under this paragraph (a)(3)(iii), a payor must start withholding under section 3406 on the account not later than 7 business days after the date the payor receives the awaiting-TIN certification on reportable payments thereafter made to the account (whether or not the payee makes a cash withdrawal). The payor must withhold under section 3406 until the earlier of the date the payor receives a certified taxpayer identification number from the payee, the date the account is closed, or the date withholding under section 3406 starts on all reportable payments made to the account, instrument, or relationship. The payor must obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certificate or undertake a mailing each year soliciting the certified taxpayer identification number from the payee until the earlier of the calendar year that the certified taxpayer identification number is received, or the calendar year in which the account is closed. However, if the account is closed in December of a calendar year, the mailing must be made after the account is closed and before January 31 of the subsequent calendar year.

(b) *Special rule for readily tradable instruments.* The 60-day awaiting-TIN exemption described in paragraph (a)(1) of this section applies to payments made with respect to readily tradable instruments only if the payee provides an awaiting-TIN certificate directly to the payor. If a broker acquires a readily tradable instrument through a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)) for a payee who has no taxpayer identification number, the broker must advise the payor as required in §31.3406(d)–4(a)(1) that the payee failed to provide a taxpayer identification number under penalties of perjury, regardless of whether the payee provides an awaiting-TIN certificate to the broker. Once a payor is notified by a broker that a payee failed to provide a taxpayer identification number in the required manner, or that the payee is subject to withholding under section 3406(a)(1)(B) or (C), the payor must impose withholding under section 3406 for the appropriate period described in §31.3406(e)–1.

(c) *Exceptions*—(1) *In general.* The 60-day awaiting-TIN exemption described in paragraph (a) of this section does not apply to—

(i) Window transactions (as defined in §31.3406(b)(2)–3(b));

(ii) Redemptions of bearer obligations that are subject to reporting under section 6045; or

(iii) Other amounts that are subject to reporting under section 6045 (except as described in paragraph (c)(2) of this section).

(2) *Special rule for amounts subject to reporting under section 6045 other than proceeds of redemptions of bearer obligations.* If a broker's customer does not provide a taxpayer identification number to the broker, and the broker effects a sale that is subject to reporting under section 6045 (other than a redemption of a bearer obligation), §31.3406(d)–3(b) applies, whether or not the sale is pursuant to an instruction by electronic transmission, provided the customer furnishes an awaiting-TIN certificate to the broker before the sale. For purposes of this paragraph (c)(2), the 30-day period provided in §31.3406(d)–3(b) is a 60-day period.

(d) *Awaiting-TIN certificate.* A payee qualifies for the 60-day awaiting-TIN exemption provided in paragraph (a) of this section if the payee furnishes a written statement to the payor, signed under penalties of perjury, that the payee has not been issued a taxpayer identification number, that the payee has applied for a taxpayer identification number or intends to apply for a number in the near future, and that the payee understands that if the payee does not provide a number to the payor within 60 days, the payor is required under section 3406 to withhold 31 percent of any reportable payment thereafter made to the payee until the payor receives a number, and 31 percent of a withdrawal to the extent of reportable payments made to the payee during the 60-day period, as described in paragraph (a) of this section. Language that is substantially similar to the awaiting-TIN certification on Form W–9 will satisfy the requirements of this paragraph (d).

(e) *Form for awaiting-TIN certificate.* A payor may use Form W–9 for the awaiting-TIN certificate, or

a payor may include language that is substantially similar to the awaiting-TIN certification on Form W–9 in any other document of the payor. See §31.3406(h)–3, which provides that Form W–9 is the prescribed form but permits use of substitute forms, and specifies the length of time the payor is required to retain the form. If Form W–9 is used, the payee should write "Applied For" in the space reserved for the taxpayer identification number.

[T.D. 8637, 60 FR 66129, Dec. 21, 1995]

§ 31.3406(h)-1 Definitions.

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(a) *In general.* For purposes of section 3406 and the regulations thereunder, the definitions of this section apply.

(b) *Taxpayer identification number*—(1) *In general. Taxpayer identification number* means the identifying number assigned to a person under section 6109 (relating to identifying numbers, generally a nine-digit social security number for an individual and a nine-digit employer identification number for a nonindividual, e.g., a corporation, partnership, trust, or estate). An obviously incorrect number is not considered a taxpayer identification number. See §31.6011(b)–2 and §301.6109–1 of this chapter for provisions relating to obtaining a taxpayer identification number.

(2) *Obviously incorrect number. Obviously incorrect number* means a number that does not contain nine digits or a number that includes an alpha character as one of the nine digits.

(c) *Broker. Broker* is defined in section 6045(c)(1) and §1.6045–1(a)(1) of this chapter. If there could be more than one broker with respect to any acquisition, only the broker having the closest contact (as determined under 1.6045–1(c)(3)(iii) and (iv) of this chapter) with the payee is treated as a broker. In the case of any instrument, the term *broker* does not include any person who is the payor with respect to the instrument as described in §31.3406(a)–2.

(d) *Readily tradable instrument. Readily tradable instrument* means—

(1) Any instrument that is part of an issue any portion of which is traded on an established securities market (within the meaning of section 453(f)(5)); or

(2) Any instrument that is regularly quoted by brokers or dealers making a market.

(e) *Day. Day* means a calendar day unless specified otherwise under any section of the regulations under section 3406. For example, see §§31.3406(d)–5(a) and 31.3406(g)–3(a)(2).

(f) *Business day. Business day* means any day other than a Saturday, Sunday, or legal holiday (within the meaning of section 7503).

[T.D. 8637, 60 FR 66130, Dec. 21, 1995; 61 FR 12135, Mar. 25, 1996, as amended by T.D. 9010, 67 FR 48760, July 26, 2002]

§ 31.3406(h)-2 Special rules.

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(a) *Joint accounts*—(1) *Relevant name and taxpayer identification number combination.* For purposes of identifying the account subject to withholding under sections 3406(a)(1) (B) and (C), the relevant name and taxpayer identification number combination is that which is used for information reporting purposes.

(2) *Optional rule for accounts subject to backup withholding under section 3406(a)(1) (B) or (C) where the names are switched.* See §31.3406(d)–5(c)(4)(iii) under which a payor may withhold under section 3406(a)(1)(B) as required even though the names or taxpayer identification numbers on the account have been switched. The rules under §31.3406(d)–5(c)(4)(iii) may be applied comparably by a payor who is required to withhold under section 3406(a)(1)(C).

(3) *Joint foreign payees*—(i) *In general.* If the relevant payee listed on a jointly owned account or instrument provides a Form W–8 or documentary evidence described in §1.1441–1(e)(1)(ii) regarding its foreign status, withholding under section 3406 applies unless every joint payee provides the statement regarding foreign status (under the provisions of chapters 3 or 61 of the Internal Revenue Code and the regulations under those provisions) or any one of the joint owners who has not established foreign status provides a taxpayer identification number to the payor in the manner required in §§31.3406(d)–1 through 31.3406(d)–5. See §1.6049–5(d)(2)(iii) of this chapter for corresponding joint payees provisions.

(ii) *Information reporting on an account including foreign payees.* If any one of the joint payees who has not established foreign status provides a taxpayer identification number under paragraph (a)(3)(i)(B) of this section, that number is the taxpayer identification number that is required to be furnished for purposes of information reporting and withholding under section 3406.

(b) *Backup withholding from an alternative source*—(1) *In general.* A payor may not withhold under section 3406 from a source maintained by the payor other than the source with respect to which there exists a liability to withhold under section 3406 with respect to the payee. See section 3403 and §31.3403–1, which provide that the payor is liable for the amount required to be withheld regardless of whether the payor withholds.

(2) *Exceptions for payments made in property*—(i) *Backup withholding from alternative source.* In the

case of a payment that is made in property (other than money), the payor must withhold under section 3406, 31 percent of the fair market value of the property determined immediately before or on the date of payment. The payor may withhold under section 3406 from the principal amount being deposited with the payor or from another source maintained by the payee with the payor. The source from which the tax is withheld under section 3406 must be payable to at least one of the persons listed on the account subject to withholding. If the account or source is not payable exclusively to the same person or persons listed on the account subject to withholding under section 3406, then the payor must obtain a written statement from all other persons to whom the account or source is payable authorizing the payor to withhold under section 3406 from the alternative account or source. A payor that elects to withhold under section 3406 from an alternative source may determine the account or source from which the tax is to be withheld, or may allow the payee to designate the alternative source. A payee may not, however, require a payor to withhold under section 3406 from a specific alternative source. See §31.3402(q)–1(d), *Example 5*, for methods of withholding on prizes, awards, and gambling winnings paid in property other than cash.

(ii) *Deferral of withholding.* If the payor cannot locate, using reasonable care (following procedures substantially similar to those set forth in §31.3406(d)–5(c)(3)(ii) (A) and (B)), an alternative source of cash from which the payor may satisfy its withholding obligation pursuant to paragraph (b)(2)(i) of this section, the payor may defer its obligation to withhold under section 3406, except for reportable payments of property made in connection with prizes, awards, or gambling winnings, until the earlier of—

(A) The date the payor makes a cash payment to the account subject to withholding under section 3406 or cash is otherwise deposited in the account in a sufficient amount to satisfy the obligation in full; or

(B) The close of the fourth calendar year after the obligation arose.

(iii) *Barter exchanges.* In the case of a barter exchange that issues scrip to, or credits the account of, a member or client of the exchange in payment for property or services, the barter exchange may withhold under section 3406 from—

(A) The scrip or credit, if converted to cash in order to satisfy the deposit requirements of section 6302 and §31.6302–4; or

(B) Any other source maintained by the exchange for the member or client in the manner described in paragraph (b)(2) of this section.

(c) *Trusts.* Withholding under section 3406 applies to reportable payments made to a trust if any of the conditions for imposing withholding under section 3406 apply to the trust. Generally, a trust is not a payor and will not be required to withhold under section 3406 on reportable payments that it makes to its beneficiary who is subject to withholding under section 3406. The preceding sentence does not

apply, however, to a grantor trustdescribed in §31.3406(a)–2(b)(1) or (2), which is treated as a payor. The trustee of a trust described in this paragraph (c) may certify that the trust's taxpayer identification number is correct and that the trust is not subject to withholding due to notified payee underreporting, without regard to the status of the beneficiaries of the trust.

(d) *Adjustment of prior withholding by middlemen.* A middleman payor (as defined in §31.3406(a)–2 (b) or in the section on information reporting to which the payment relates) who receives a payment from which tax has been erroneously withheld under section 3406 may seek a refund of the tax withheld by the payor from whom the middleman payor received the payment (referred to as the "upstream payor"). Alternatively, the middleman payor may obtain a refund of the tax by claiming a credit for the amount of tax withheld by the upstream payor against the deposit of any tax imposed by this chapter which the middleman payor is required to withhold and deposit (as described in section 6413 and §31.6413(a)–2). In either case, the middleman payor must pay or credit the gross amount of the payment (including the tax withheld) to its payee as though it had received the gross amount of the payment from the upstream payor and must withhold under section 3406 only if one of the conditions for imposing backup withholding exists with respect to its payee. If its payee is not subject to withholding under section 3406, the payor must pay or credit the full amount of the payment to the payee, unless, with respect to payments made after December 31, 2000, the payor chooses to apply prior withholding under section 3406 to an amount required to be withheld under another section of the Internal Revenue Code (such as under section 1441) to the extent permitted under procedures prescribed by the Internal Revenue Service (see §601.601(d)(2) of this chapter). See §31.6413(a)–3 regarding repayment by a payor of tax erroneously collected from a payee.

(e) *Conversion of amounts paid in foreign currency into United States dollars*—(1) *Convertible foreign currency.* If a payment is made in a currency other than the United States dollar, the amount subject to withholding under section 3406 is determined by applying the statutory rate of backup withholding to the foreign currency payment and converting the amount withheld into United States dollars on the date of payment at the spot rate (as defined in §1.988–1(d)(1) of this chapter) or pursuant to a reasonable spot rate convention. For example, a withholding agent may use a month-end spot rate or a monthly average spot rate. A spot rate convention must be used consistently with respect to all non-dollar amounts withheld and from year to year. Such convention cannot be changed without the consent of the Commissioner.

(2) *Nonconvertible foreign currency.* [Reserved]

(f) *Coordination with other sections.* For purposes of section 31, chapter 24 (other than section 3402 (n)) of subtitle C of the Internal Revenue Code (relating to employment taxes and collection of income tax at source) and so much of subtitle F (other than section 7205) of the Internal Revenue Code (relating to procedure and administration) as relates to this chapter, and the regulations thereunder—

(1) An amount required to be withheld under section 3406 must be treated as a tax required to be withheld under section 3402;

(2) An amount withheld under section 3406 must be treated as an amount withheld under section 3402;

(3) An amount withheld under section 3406 must be deposited as required under §31.6302–4;

(4) *Wages* includes the gross amount of any reportable payment (as defined in section 3406(b)) except for purposes of section 6014 (relating to an election by the taxpayer not to compute the tax on his annual return);

(5) *Employee* includes a payee of any reportable payment; and

(6) *Employer* includes a payor who is required to withhold the tax under section 3406 (as defined in §31.3406(a)–2) with respect to any reportable payment (as defined in section 3406(b)).

(g) *Tax liabilities and penalties.* A payor is subject to the same civil and criminal penalties for failing to impose withholding under section 3406 as an employer who fails to withhold on a payment of wages. In addition, a broker may be subject to the penalty under section 6705 (failure of a broker to provide notice to a payor).

(h) *To whom payor is liable for amount withheld.* A payor is not liable to any person for any amount withheld under section 3406. A payor is liable only to the United States for an amount that is required to be withheld as provided in §31.3403–1.

[T.D. 8637, 60 FR 66130, Dec. 21, 1995; 61 FR 11307, Mar. 20, 1996, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73412, Dec. 30, 1999; T.D. 9010, 67 FR 48760, July 26, 2002]

§ 31.3406(h)-3 Certificates.

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(a) *Prescribed form to furnish information under penalties of perjury*—(1) *In general.* Except as provided in paragraph (c) of this section, the Form W–9 is the form prescribed under section 3406 on which a payee that is a U.S. person certifies, under penalties of perjury, that—

(i) The taxpayer identification number furnished to the payor is correct (as required in §31.3406(d)–1 and §31.3406(d)–5);

(ii) The payee is not subject to withholding due to notified payee underreporting (as required in §31.3406(d)–2);

(iii) The payee is an exempt recipient (as described in §31.3406(g)–1); or

(iv) The payee is awaiting receipt of a taxpayer identification number (as described in §31.3406(g)–3).

(2) *Use of a single or multiple Forms W–9 for accounts of the same payee.* A valid Form W–9 must include the name and taxpayer identification number of the payee. Except as provided in paragraph (b) of this section, the payee must sign under penalties of perjury and date the Form W–9 in order to satisfy the requirements of this section. A payor or broker may require a payee to furnish a separate Form W–9 for each obligation, deposit, certificate, share, membership, contract, or other instrument, or one Form W–9 for all the payee's obligations or relationships with the payor or broker. In addition, a payee of a mutual fund that has a common investment advisor or common principal underwriter with other mutual funds (within the same family of funds) may be permitted, in the discretion of the mutual fund, to provide one Form W–9 with respect to shares acquired or owned in any of the funds.

(b) *Prescribed form to furnish a noncertified taxpayer identification number.* With respect to accounts or other relationships where the payee is not required to certify, under penalties of perjury, that the taxpayer identification number being furnished is correct, the payor or broker may obtain the taxpayer identification number orally or may use Form W–9, a substitute form, or any other document, but the payee is not required to sign the form.

(c) *Forms prepared by payors or brokers—(1) Substitute forms; in general.* A payor or broker may prepare and use a form that contains provisions that are substantially similar to those of the official Form W–9. A payor or broker may use any document relating to the transaction, such as the signature card for an account, so long as the certifications are clearly set forth. A payor or broker who uses a substitute form may furnish orally or in writing the instructions for the Form W–9 that relate to the account. A payor or broker may refuse to accept certifications (including the official Form W–9) that are not made on the form or forms provided by the payor or broker. A payor or broker may refuse to accept a certification provided by a payee only if the payor or broker furnishes the payee with an acceptable form immediately upon receipt of an unacceptable form or within 5 business days of receipt of an unacceptable form. An acceptable form for this purpose must contain a notice that the payor or broker has refused to accept the form submitted by the payee and that the payee must submit the acceptable form provided by the payor in order for the payee not to be subject to withholding under section 3406. If the payor or broker requires the payee to furnish a form for each account of the payee, the payor or broker is not required to furnish an acceptable form until the payee furnishes the payor or broker with the payee's account numbers. A payor or broker may use separate substitute forms to have a payee certify under penalties of perjury that—

(i) The payee's taxpayer identification number is correct; and

(ii) The payee is not subject to withholding under section 3406 due to notified payee underreporting.

(2) *Form for exempt recipient.* A payor or broker may use a substitute form for the payee to certify, under penalties of perjury, that the payee is an exempt recipient (described in §31.3406(g)–1 or

described in the respective reporting section), provided the form contains provisions that are substantially similar to those of the official Form W–9 relating to exempt recipients. A certificate must be prepared in accordance with the instructions applicable to exempt recipients on Form W–9, and must set forth fully and clearly the data called for therein. If a payor will treat the payee as an exempt recipient only if the payee files a certificate as to its exempt status, the certificate is valid only if it contains the payee's taxpayer identification number. Thus, a payee must include the payee's taxpayer identification number on a certificate that a payor requires to be made in order to treat the payee as an exempt recipient.

(d) *Special rule for brokers.* A broker may act as the payee's agent for purposes of furnishing a taxpayer identification number or certification to a payor with respect to any readily tradable instrument (as defined in §31.3406(h)–1(d)) provided the payee provides a taxpayer identification number on Form W–9 or other acceptable substitute form to the broker. The payor may rely on a taxpayer identification number provided by the broker unless certification is required (as described in §31.3406(d)–4) and the broker notifies the payor that the number was not certified.

(e) *Reasonable reliance on certificate*—(1) *In general.* A payor is not liable for the tax imposed under section 3406 if the payor's failure to deduct and withhold the tax is due to reasonable reliance, as defined in paragraph (e)(2) of this section, on a Form W–9 (or other acceptable substitute) required by this section.

(2) *Circumstances establishing reasonable reliance.* For purposes of paragraph (e)(1) of this section, a payor can reasonably rely on a Form W–9 (or other acceptable substitute) unless—

(i) The form does not contain the name and taxpayer identification number of the payee (or does not state, in lieu of a taxpayer identification number, that the payee is awaiting receipt of a taxpayer identification number (i.e., an awaiting-TIN certificate));

(ii) The form is not signed and dated by the payee;

(iii) The form does not contain the statement, when required, that the payee is not subject to withholding due to notified payee underreporting;

(iv) The payee has deleted the jurat or other similar provisions by which the payee certifies or affirms the correctness of the statements contained on the form; or

(v) For purposes of section 3406(a)(1)(C), the payor is required to subject the account to which the form relates to withholding under section 3406(a)(1)(C) under the circumstances described in §31.3406 (c)–1(c)(3)(iii).

(f) *Who may sign certificate*—(1) *In general.* A Form W–9 or other acceptable substitute form may be signed by any person who is authorized to sign a declaration under penalties of perjury on behalf of

the payee as provided in section 6061 and the regulations thereunder (relating to who may sign generally for an individual, which includes certain agents who may sign returns and other documents), section 6062 and the regulations thereunder (relating to who may sign corporate returns), and section 6063 and the regulations thereunder (relating to who may sign partnership returns).

(2) *Notified payee underreporting.* A payee who has not been notified that he is subject to withholding under section 3406(a)(1)(C) as a result of notified payee underreporting may make the certification related to notified payee underreporting. In addition, a payee who was subject to withholding under section 3406(a)(1)(C) due to notified payee underreporting may certify that he is not subject to withholding under section 3406(a)(1)(C) due to notified payee underreporting if the Internal Revenue Service has provided the payee with written certification that withholding under section 3406(a)(1)(C) due to notified payee underreporting has terminated.

(g) *Retention of certificates*—(1) *Accounts or instruments that are not pre-1984 accounts and brokerage relationships that are post-1983 brokerage accounts.* With respect to an account or instrument that is not a pre-1984 account (as described in §31.3406(d)–1(b)(3)), or with respect to a brokerage relationship that is a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)), a payor or broker who receives a Form W–9 or other acceptable substitute form related to withholding under section 3406 must retain the form in its records for 3 years from the date the account is opened or the instrument is purchased. The form may be retained on microfilm or microfiche.

(2) *Accounts or instruments that are pre-1984 accounts and brokerage relationships that are not post-1983 brokerage accounts.* With respect to a pre-1984 account (as described in §31.3406(d)–1(b)(1)) or with respect to a brokerage relationship that is not a post-1983 brokerage account (as described in §31.3406(d)–1(c)(1)), a payor or broker is not required to retain any Form W–9 or other acceptable substitute form. If, however, the payor or broker requires the payee to file only one Form W–9 or substitute form for all accounts or instruments of the payee, the payor or broker must retain the single form in the manner and for the period of time described in paragraph (g)(1) of this section if that form relates to any account or instrument that is not a pre-1984 account or relates to a post-1983 brokerage account. If a payee has certified that the payee is an exempt recipient described in §31.3406(g)–1, the payor or broker must retain the form unless the payor or broker can establish the existence of procedures that are reasonably calculated to ensure that a payee who has so certified is accurately identified in the payor's or broker's records.

(h) *Cross references.* For the requirement to file an information return (and furnish the related statement) with respect to a reportable payment, particularly if that payment has been subject to withholding under section 3406, see subtitle F, chapter 61, subparts B and C of the Internal Revenue Code. See §31.6302–4 for the requirement to deposit amounts withheld under section 3406 on either a monthly or semi-weekly basis. See §31.6011(a)–4(b) for the requirement to file Form 945, Annual Return of Withheld Federal Income Tax, to reflect amounts withheld under section 3406. See §31.6071(a)–1 for the time for filing the Form 945.

[T.D. 8637, 60 FR 66131, Dec. 21, 1995, as amended by T.D. 8881, 65 FR 32212, May 22, 2000]

§ 31.3406(i)-1 Effective date.

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Sections 31.3406–0 through 31.3406(i)–1 (except §§31.3406(d)–5 and 31.3406(g)–1(c) and except for international transactions) are effective after December 31, 1996, and, optionally, for reportable payments made and transactions occurring on or after December 21, 1995. For the effective date of §31.3406(d)–5, see §31.3406(d)–5(i). Section 31.3406(g)–1(c) is effective before January 1, 1997. See §§35a.9999–0T through 35a.9999–5 of this chapter for rules that apply to international transactions after December 31, 1996.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.3406(j)-1 Taxpayer Identification Number (TIN) matching program.

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(a) *The matching program.* Under section 3406(i), the Commissioner has the authority to establish Taxpayer Identification Number (TIN) matching programs. The Commissioner may prescribe in a revenue procedure (*see* §601.601(d)(2) of this chapter) or other appropriate guidance the scope and the terms and conditions of participating in any TIN matching program. In general, under a matching program, prior to filing information returns with respect to reportable payments as defined in section 3406(b)(1), a payor of those reportable payments who is entitled to participate in the matching program may contact the Internal Revenue Service (IRS) with respect to the TIN furnished by a payee who has received or is likely to receive a reportable payment. The IRS will inform the payor whether or not a name/TIN combination furnished by the payee matches a name/TIN combination maintained in the data base utilized for the particular matching program. For purposes of this section, the term payor includes an agent designated by the payor to participate in TIN matching on the payor's behalf.

(b) *Notice of incorrect TIN.* No matching details received by a payor through a matching program will constitute a notice regarding an incorrect name/TIN combination under §31.3406(d)–5(c) for purposes of imposing backup withholding under section 3406(a)(1)(B).

(c) *Application of section 3406(f).* The provisions of section 3406(f), relating to confidentiality of information, apply to any matching details received by a payor through the matching program. A payor may not take into account any such matching details in determining whether to open or close an account with a payee.

(d) *Reasonable cause.* The IRS will not use either a payor's decision not to participate in an available TIN matching program or the results received by a payor from participation in a TIN matching

program implemented under the authority of this section as a basis to assert that the payor lacks reasonable cause under section 6724(a) for the failure to file an information return under section 6721 or to furnish a correct payee statement under section 6722. If the establishment of reasonable cause may be relevant to a substantial number of the participants in a TIN matching program implemented under the authority of this section, the extent to which, if any, a payor may establish reasonable cause by participating in the TIN matching program will be set forth in the guidance establishing the program.

(e) *Definition of account. Account* means any account, instrument, or other relationship with a payor and with respect to which a payor has made or is likely to make a reportable payment as defined in section 3406(b)(1).

(f) *Effective date.* The last sentence in paragraph (a) of this section is applicable on January 31, 2003. All other provisions of this section are applicable on and after June 18, 1997.

[T.D. 8721, 62 FR 33009, June 18, 1997, as amended by T.D. 9041, 68 FR 4923, Jan. 31, 2003; T.D. 9136, 69 FR 41942, July 13, 2004]

Subpart F—General Provisions Relating to Employment Taxes (Chapter 25, Internal Revenue Code of 1954)

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§ 31.3501(a)-1T Question and answer relating to the time employers must collect and pay the taxes on noncash fringe benefits (Temporary).

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The following questions and answers relate to the time employers must collect and pay the taxes imposed by subtitle C on noncash fringe benefits:

Q–1: If a noncash fringe benefit constitutes “wages” under section 3121(a), 3306(b), or 3401(a), or constitutes “compensation” under section 3231(e), when must an employer collect and pay the taxes imposed by Subtitle C?

A–1: For purposes of an employer's liability to collect and pay the taxes imposed by Subtitle C, an employer may deem such fringe benefit to be paid at any time on or after the date on which it is provided, as long as such date is on or before the last day of the calendar quarter in which such benefit is provided. An employer may consider the benefit to be provided in two or more parts for purposes of the preceding sentence. For example, if a fringe benefit with a fair market value of $1,000 is provided on January 1, 1985, the employer could deem $500 paid on February 28, 1985 and $500 paid on March 31, 1985.

With respect to noncash fringe benefits provided during the first calendar quarter of 1985, a special rule applies. Such benefits may be deemed paid at any time on or after the date on which they are provided as long as the date they are deemed paid is on or before the last day of the second calendar quarter of 1985.

In addition, for purposes of §31.6302(c)–1(a)(1)(i), the term "tax" does not include the employer tax under section 3111 with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of any calendar quarter. For purposes of the first sentence of §31.6302(c)–2(a)(1), the phrase "employer tax imposed after December 31, 1983, under section 3221 (a) and (b)" will not include any such employer tax with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of the quarter; provided that for purposes of deposits required under §31.6302(c)–1(a)(1)(v), such first sentence applies to such noncash fringe benefits.

Notwithstanding anything in this section to the contrary, if an employer in fact withholds, the amount withheld is subject to the general deposit rules.

The manner in which and the time at which the employer withholds amounts from the wages of an employee to pay the taxes imposed under section 3101, 3201, and/or 3402 will generally be left to be determined by the employer and the employee. Any delay in withholding, however, does not affect the employer's obligation upon the filing of an employment tax return, to pay amounts which would be due under this subtitle if the employer had withheld, with respect to noncash fringe benefits, the amount which would have been required to be withheld if such noncash fringe benefits had been paid in cash on the date the benefits were deemed paid. However, if such amounts are not withheld from the wages of an employee within a reasonable period after payment of the taxes by the employer, payment by the employer may be deemed additional compensation of the employee.

Q–2: Are any fringe benefits excepted from the rules contained in Q/A–1 of this section?

A–2: Yes. The rules contained in Q/A–1 of this section do not apply to the transfer of personal property (both tangible and intangible) of a kind held for investment or to the transfer of real property. Accordingly, an employer is liable for the collection and payment of taxes imposed by this subtitle when such property is transferred. For example, stock transferred in connection with the performance of services is paid, for purposes of this subtitle C, on the date the stock is transferred, i.e., on the date the stock vests pursuant to section 83 (absent a section 83(b) election).

Q–3: What is an example of the application of the rules contained in Q/A–1 of this section with respect to obligations under Chapters 21 and 24 of subtitle C?

A–3: All of employer A's employees received $100 in cash as wages each week from A. In addition, during a calendar quarter, each such employee receives noncash fringe benefits, the fair market value of which is $500. A deems all such noncash fringe beneftis to be paid on the last day of the quarter. As

of the end of the quarter, no amount has been withheld from the employee's wages with respect to such noncash fringe benefits, and A has "undeposited taxes" (within the meaning of §31.6302(c)–1(a)(1)(i)) of more than $3,000 attributable to amounts actually withheld under section 3102 or section 3402 or due under section 3111 with respect to cash wages of A's employees. The amount which A must deposit within 3 banking days after the end of the quarter will be determined without regard to the noncash fringe benefits deemed paid on the last day of the quarter.

During the month following the quarter, A withholds from its employees with respect to the noncash fringe benefits deemed paid on the last day of the quarter. As A withholds amounts, such amounts become "taxes" subject to §31.6302(c)–1(a)(1)(i). If, as of the date of filing of the return for the period which includes the last day of the quarter, A has not deposited all amounts with respect to the quarter which are due under section 3111 or which would have been due had A withheld, under sections 3102 and 3402, with respect to noncash fringe benefits, the amount which would have been required to be withheld had such benefits been paid in cash, A shall pay the balance with its return. A must make such payment regardless of whether, at the time the return is filed, he has actually withheld all amounts which he would have been required to withhold had such benefits been paid in cash.

Q–4: If an employee is provided with a noncash fringe benefit and separates from service before the benefit is deemed paid by the employer, is the employer liable for the taxes imposed by subtitle C?

A–4: Yes. The employer's liability is unaffected by his ability to collect the tax from the former employer.

Q–5: If an entity other than the employer provides a noncash fringe benefit to an employee, is that entity considered the employer of such employee with respect to such noncash fringe benefit for any purposes of subtitle C?

A–5: The provision of noncash fringe benefits by an entity to an employee of another employer does not make such entity the employer of such employee with respect to such noncash fringe benefit for any purpose of subtitle C, so long as such noncash fringe benefits are incidental to the provision of wages by the employer to such employee. For example, if two unrelated airlines, A and B, enter into a reciprocal agreement where by the parents of employees of both airlines are entitled to free flights on both airlines, the fact that A is providing a noncash fringe benefit to the employees of B generally will not make A the employer of such employees for purposes of subtitle C.

Q–6: Do special rules apply to the provision of taxable noncash fringe benefits by a nonemployer under a reciprocal agreement with the employee's employer?

A–6: If the provision of taxable noncash fringe benefits meets the requirements of Q/A–5 of this section, the nonemployer provider of the benefits is not required to withhold. The employer must take the steps necessary to obtain the relevant information from the provider of the benefits in order to enable the employer to satisfy, in a timely manner, its obligations under subtitle C to collect and pay

taxes with respect to the noncash fringe benefits provided by the nonemployer.

Q–7: For purposes of subtitle C, how is the fair market value of an employer-provided automobile or other road vehicle during any time period to be determined?

A–7: The value of the availability of an employer-provided automobile or other road vehicle must be determined under the rules provided in §1.61–2T and §1.132–1T. (For purposes of this section, the terms "automobile" and "road vehicle" have the meaning given those terms in Q/A–11 of §1.61–2T). For example, assume that an employee adopts the special rule provided in §1.61–2T and that the Annual Lease Value, as defined in §1.61–2T, of an automobile or other road vehicle is $2,100. The automobile or other road vehicle is provided to employee A on January 1, 1985. As of March 31, A had driven the automobile or other road vehicle 1,000 personal miles and 3,000 miles in the course of his employer's business. For the quarter, A would have had wages of $131.25 attributable to his personal use of the automobile or other road vehicle computed by subtracting a $393.75 working condition fringe from $525 ($2,100 divided by 4). See section 132(d) and §1.132–1T. During the second quarter of 1985, A drives the automobile or other road vehicle only 1,000 miles, all of which are personal. In order to calculate the value of the wages provided to A in the second quarter in the form of the availability of the employer-provided automobile or other road vehicle, first A's employer calculates the Annual Lease Value attributable to the first six months of 1985 which is $1,050 ($2,100 divided by 2). Second, A's employer calculates the working condition fringe exclusion which is $630 ($1,050 multiplied by a fraction the numerator of which is A's business mileage (3,000 miles) and the denominator of which is A's total mileage (5,000 miles)). The calculations result in a total inclusion of $420 ($1,050—$630). From the total inclusion of $420, the wages provided in the first quarter, $131.25, are subtracted, leaving $288.75 as the wages includible in the second quarter attributable to the availability to A of the employer-provided automobile or other road vehicle.

Q–8: May an employer treat any part of the Annual Lease Value or Daily Lease Value (as defined in §1.61–2T), or the fair market value if the special rule of §1.61–2T is not or cannot be used, of an automobile or other road vehicle made available to an employee as includible in the employee's gross income without regard to whether the employee has used the automobile or other road vehicle in the employer's business?

A–8: No, except as otherwise provided in this Q/A–8, an employer may not include any amount in an employee's income with respect to an employer-provided automobile or other road vehicle unless such inclusion is based on:

(a) Records or a statement submitted by an employee that contain the business and total mileage for the period beginning on January 1, 1985, and ending on the last day of the employer's taxable year that began in 1984, or

(b) Records that satisfy the employer's "adequate contemporaneous record" requirement under section 274(d)(4) and the regulations thereunder for the employer's taxable years beginning after December

31, 1984.

For example, an employer who is subject to (b) of this Q/A–8 may rely on a statement submitted by the employee indicating for the period the number of miles driven by the employee in the employer's business and the total number of miles driven by the employee unless the employer knows or has reason to know the statement submitted is not based on "adequate contemporaneous records". (For purposes of this section, if a road vehicle is available to any person and such availability would be taxable to an employee, miles driven by that person will be considered miles driven by the employee).

Notwithstanding the preceding paragraph of this Q/A–8, an employer may include in an employee's income the value of the availability of an employer-provided road vehicle, calculated without regard to a working condition fringe exclusion based on business mileage if one of the conditions listed in §1.274–6T(f)(1) is satisfied with respect to the relevant period.

In addition, the employer must, before including any amount in an employee's income with respect to an employer-provided road vehicle, take into account other working condition fringe exclusions, such as the security exclusion discussed in §1.132–1T. If proper calculation of an exclusion requires information from the employee and the employee does not respond within a reasonable period of time to a request for that information or produces information which the employer knows or has reason to know is not accurate, the employer may disregard such exclusion in reporting the employee's gross income.

Q–8a: May an employer withhold amounts attributable to noncash fringe benefits on the basis of average wages as permitted under section 3402(h)(1)?

A–8a: In general, yes. In estimating wages under section 3402(h)(1)(A), however, the employer must take into account estimated business use of the benefit (such as an employer-provided road vehicle). In no event, however, may the amount reported by the employer as "wages" for any employee for any quarter be based on an estimation. However, the rules in Q/A–1 of this section regarding permissible delays in actual withholding apply.

Q–9: If an employee purchases any property or service from an employer at a discount and the discount is not excludable under section 132 and any applicable regulations thereunder, when is the noncash fringe benefit provided?

A–9: Such property or service is provided at the time that ownership is transferred, in the case of property, or the time service is rendered, in the case of services. This will be true regardless of when the employee pays for such property or service or the date payment is due or the rate of interest charged prior to payment. The time at which ownership of the property is transferred must be determined under general tax principles.

Q–10: What rules apply with respect to the treatment of the payment of any noncash fringe benefit as

the payment of supplemental wages under section 3402?

A–10: An employer may treat the payment of any noncash fringe benefit as the payment of supplemental wages. Thus, if noncash fringe benefits are provided and tax has been withheld from the employee's regular wages, the employer may determine the tax to be withheld with respect to such noncash fringe benefits by using a flat percentage rate of 20 percent, without allowance for exemptions and without reference to any regular payment of wages. For example, assume that during a calendar quarter A receives from his employer a taxable noncash fringe benefit with a fair market value of $1,000. If the requirements specified above are satisfied, A's employer may determine the tax to be withheld with respect to such benefit by using a flat percentage rate of 20 percent. The employer may also determine the tax to be withheld with respect to such benefit by use of the method described in §31.3402 (g)–1(a)(2).

(Approved by the Office of Management and Budget under control numbers 1545–0074 and 1545–0907)

[T.D. 8004, 50 FR 756, Jan. 7, 1985, as amended by T.D. 8009, 50 FR 7046, Feb. 20, 1985]

§ 31.3502-1 Nondeductibility of taxes in computing taxable income.

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For provisions relating to the nondeductibility, in computing taxable income under subtitle A, of the taxes imposed by sections 3101, 3201, and 3211, and of the tax deducted and withheld under chapter 24, see §§1.164–2 and 1.275–1 of this chapter (Income Tax Regulations). For provisions relating to the credit allowable to the recipient of the income in respect of the tax deducted and withheld under chapter 24, see §1.31–1 of this chapter (Income Tax Regulations).

[T.D. 6780, 29 FR 18148, Dec. 22, 1964]

§ 31.3503-1 Tax under chapter 21 or 22 paid under wrong chapter.

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If, for any period, an amount is paid as tax—

(a) Under chapter 21 or corresponding provisions of prior law by a person who is not liable for tax for such period under such chapter or prior law, but who is liable for tax for such period under chapter 22 or corresponding provisions of prior law, or

(b) Under chapter 22 or corresponding provisions of prior law by a person who is not liable for tax for

such period under such chapter or prior law, but who is liable for tax for such period under chapter 21 or corresponding provisions of prior law,

the amount so paid shall be credited against the tax for which such person is liable and the balance, if any, shall be refunded. Each claim for refund or credit under this section shall be made on Form 843 and in accordance with §31.6402(a)–2 and the applicable provisions of section 6402(a) and the regulations thereunder in Part 301 of this chapter (Regulations on Procedure and Administration).

§ 31.3504-1 Acts to be performed by agents.

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(a) *In general.* In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code of 1954, or compensation as defined in chapter 22 of such Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person, or if such fiduciary, agent, or other person has the control, receipt, custody, or disposal of such wages, or compensation, the district director, or director of a service center, may, subject to such terms and conditions as he deems proper, authorize such fiduciary, agent, or other person to perform such acts as are required of such employer or employers under those provisions of the Internal Revenue Code of 1954 and the regulations thereunder which have application, for purposes of the taxes imposed by such chapter or chapters, in respect of such wages or compensation. If the fiduciary, agent, or other person is authorized by the district director, or director of a service center, to perform such acts, all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to employers in respect of such acts shall be applicable to such fiduciary, agent, or other person. However, each employer for whom such fiduciary, agent, or other person performs such acts shall remain subject to all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to an employer in respect of such acts. Any application for authorization to perform such acts, signed by such fiduciary, agent, or other person, shall be filed with the district director, or director of a service center, with whom the fiduciary, agent, or other person will, upon approval of such application, file returns in accordance with such authorization.

(b) *Prior authorizations continued.* An authorization in effect under section 1632 of the Internal Revenue Code of 1939 on December 31, 1954, continues in effect under section 3504 and is subject to the provisions of paragraph (a) of this section.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D 7012, 34 FR 7693, May 15, 1969]

§ 31.3505-1 Liability of third parties paying or providing for wages.

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(a) *Personal liability in case of direct payment of wages*—(1) *In general.* A lender, surety, or other

person—

(i) Who is not an employer for purposes of section 3102 (relating to deduction of tax from wages under the Federal Insurance Contributions Act), section 3202 (relating to deduction of tax from compensation under the Railroad Retirement Tax Act), or section 3402 (relating to deduction of income tax from wages) with respect to an employee or group of employees, and

(ii) Who pays wages on or after January 1, 1967, directly to such employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes required to be deducted and withheld from those wages by the employer under subtitle C of the Code and interest from the due date of the employer's return relating to such taxes for the period in which the wages are paid.

(2) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. Pursuant to a wage claim of $200, A, a surety company, paid a net amount of $158 to B, an employee of the X Construction Company. This was done in accordance with A's payment bond covering a private construction job on which B was an employee. If X Construction Company fails to make timely payment or deposit of $42.00, the amount of tax required by subtitle C of the Code to be deducted and withheld from, a $200 wage payment to B, A becomes personally liable for $42.00 (*i.e.,* an amount equal to the unpaid taxes), plus interest upon this amount from the due date of X's return.

(b) *Personal liability where funds are supplied*—(1) *In general.* A lender, surety, or other person who —

(i) Advances funds to or for the account of an employer for the specific purpose of paying wages of the employees of that employer, and

(ii) At the time the funds are advanced, has actual notice or knowledge (within the meaning of section 6323(i)(1)) that the employer does not intend to, or will not be able to, make timely payment or deposit of the amounts of tax required by subtitle C of the Code to be deducted and withheld by the employer from those wages,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes which are required by subtitle C of the Code to be deducted and withheld from wages paid on or after January 1, 1967, and which are not paid over to the United States by the employer, and interest from the due date of the employer's return relating to such taxes. However, the liability of the lender, surety, or other person shall not exceed 25 percent of the amount supplied by him for the payment of wages. The preceding sentence and the second sentence of section 3505(b) limit the liability of a lender, surety, or other person arising solely by reason of section 3505, and they do not

limit the liability which the lender, surety or other person may incur to the United States as a third-party beneficiary of an agreement between the lender, surety, or other person and the employer. The liability of a lender, surety, or other person does not include penalties imposed on the taxpayer.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. D, a savings and loan association, advances $10,000 to Y for the specific purpose of paying the net wages of Y's employees. D advances those funds with knowledge that Y will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code, Y uses the $10,000 to pay the net wages of his employees but fails to remit withholding taxes under subtitle C in the amount of $2,600. D's liability, under this section, is limited to $2,500, 25 percent of the amount supplied for the payment of wages to Y's employees.

Example 2. E, a loan company, advances $15,000 to F, a contractor, for the specific purpose of paying $20,000 of net wages due to F's employees. E advances those funds with knowledge that F will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code. F applies $5,000 of its own funds toward payment of these wages. The amount of tax required to be deducted and withheld from the gross wages is $4,500. The limitation applicable to E's liability is $3,750 (25 percent of $15,000). However, because E furnished only a portion of the total net wages, E is liable for $3,375 of the taxes required to be deducted and withheld ($4,500×$15,000/$20,000).

(3) *Ordinary working capital loan.* The provisions of section 3505(b) do not apply in the case of an ordinary working capital loan made to an employer, even though the person supplying the funds knows that part of the funds advanced may be used to make wage payments in the ordinary course of business. Generally, an ordinary working capital loan is a loan which is made to enable the borrower to meet current obligations as they arise. The person supplying the funds is not obligated to determine the specific use of an ordinary working capital loan or the ability of the employer to pay the amounts of tax required by subtitle C of the Code to be deducted and withheld. However, section 3505(b) is applicable where the person supplying the funds has actual notice or knowledge (within the meaning of section 6323(i)(1)) at the time of the advance that the funds, or a portion thereof, are to be used specifically to pay net wages, whether or not the written agreement under which the funds are advanced states a different purpose. Whether or not a lender has actual notice or knowledge that the funds are to be used to pay net wages, or merely that the funds may be so used, depends upon the facts and circumstances of each case. For example, a lender, who has actual notice or knowledge that the withheld taxes will not be paid, will be deemed to have actual notice or knowledge that the funds are to be used specifically to pay net wages where substantially all of the employer's ordinary operating expenses consist of salaries and wages even though fund for other incidental operating expenses may be supplied pursuant to an agreement described as a working capital loan agreement.

(c) *Definition of other person*—(1) *In general.* As used in this section, the term “other person” means any person who directly pays the wages or supplies funds for the specific purpose of paying the wages of an employee or group of employees of another employer. It does not include a person acting only as agent of the employer or as agent of the employees.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Pursuant to an agreement between L, a labor union, and M, an employer, M makes monthly vacation payments (of a sum equal to a certain percentage of the remuneration paid to each union member employed by M during the previous month) to a union administered pool plan under which each employee's rights are fully vested and nonforfeitable from the time the money is paid by M. Vacation allowances are accumulated by the plan and distributed to eligible employees during their vacations. L, acting merely as a conduit with respect to these payments, would incur no liability under section 3505.

Example 2. N, a construction company, maintains a payroll account with the O Bank in which N deposits its own funds. Pursuant to an automated payroll service agreement between N and O, O prepares payroll checks and earnings statements for each of N's employees reflecting the net pay due each such employee. These checks are delivered to N for signature. After the checks are signed, O distributes them directly to N's employees on the regularly scheduled pay day. O, acting only in the capacity of a disbursing agent of N's funds, would incur no liability under section 3505 with respect to these payroll distributions. However, O may incur liability under section 3505 in the capacity of a lender if it supplies the funds for the payment of wages.

(d) *Payment of taxes and interest*—(1) *Procedure for payment.* A lender, surety, or other person may satisfy the personal liability imposed upon him by section 3505 by executing Form 4219 and filing it, accompanied by payment of the amount of tax and interest due the United States, in accordance with the instructions for the form. In the event that the lender, surety, or other person does not satisfy the liability imposed by section 3505, the United States may collect the liability by appropriate civil proceedings commenced within 10 years after assessment of the tax against the employer.

(2) *Effect of payment*—(i) *In general.* A person paying the amounts of tax required to be deducted and withheld by subtitle C of the Code as a result of section 3505 and this section is not required to pay the employer's portion of the payroll taxes upon those wages, or file an employer's tax return with respect to those wages, or furnish annual wage and tax statements to the employees.

(ii) *Amounts paid by a lender, surety, or other person.* Any amounts paid by the lender, surety, or other person to the United States pursuant to this section shall be credited against the liability of the employer on whose behalf those payments are made and shall also reduce the total liability imposed upon the lender, surety, or other person under section 3505 and this section.

(iii) *Amounts paid by the employer.* Any amounts paid to the United States by an employer and applied to his liability under subtitle C of the Code shall reduce the total liability imposed upon that employer by subtitle C. Such payments will also reduce the liability imposed upon a lender, surety, or other person under section 3505 except that such liability shall not be reduced by any portion of an employer's payment applied against the employer's liability under subtitle C which is in excess of the total liability imposed upon the lender, surety, or other person under section 3505. For example, if a lender supplies $1,000 to an employer for the payment of net wages, upon which $300 withholding tax liability is imposed, a part-payment of $25 by the employer which is applied to this liability would reduce the employer's total liability under subtitle C of the Code by that amount, but the liability

imposed upon the lender by section 3505(b) in an amount equal to the withholding tax liability of the employer, which is limited to 25 percent of the amount supplied by him, would remain $250. However, if the employer makes another payment of $200 which is applied to his liability for the withholding taxes, the lender's liability under section 3505 attributable to the withholding taxes is reduced by $175 ($225 less $50 (the amount by which the employer's liability exceeds the lender's liability after application of the limitation)). Thus, after the second payment by the employer, the lender's liability under section 3505(b) is $75 ($250 less $175), plus interest due on the underpayment for the period of underpayment, to a maximum of $250, 25 percent of the funds supplied.

(3) *Extensions of the period for collection.* Prior to the expiration of the 10-year period for collection after assessment against the employer, the lender, surety, or other third party may agree in writing with the district director, service center director, or compliance center director to extend the 10-year period for collection. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If any timely proceeding in court for the collection of the tax and any applicable interest is commenced, the period during which such tax and interest may be collected shall be extended and shall not expire until the liability for the tax (or a judgment against the lender, surety, or other third party arising from such liability) is satisfied or becomes unenforceable.

(e) *Returns required by employers and statements for employees.* This section does not relieve the employer of the responsibilities imposed upon him to file the returns and supply the receipts and statements required under subchapter A, Chapter 61 of the Code (relating to returns and records).

(f) *Time when liability arises.* The liability under section 3505 and this section of a lender, surety, or other person paying or supplying funds for the payment of wages is incurred on the last day prescribed for the filing of the employer's Federal employment tax return (determined without regard to any extension of time) in respect of such wages.

(g) *Effective date.* These regulations are effective on August 1, 1995.

[T.D. 7430, 41 FR 35175, Aug. 20, 1976, as amended by T.D. 8604, 60 FR 39110, Aug. 1, 1995]

§ 31.3506-1 Companion sitting placement services.

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(a) *Definitions*—(1) *Companion sitting placement service.* For purposes of this section, the term “companion sitting placement service” means a person (whether or not an individual) engaged in the trade or business of placing sitters with individuals who wish to avail themselves of the sitters' services.

(2) *Sitters.* For purposes of this section, the term “sitters” means individuals who furnish personal

attendance, companionship, or household care services to children or to individuals who are elderly or disabled.

(b) *General rule.* For purposes of subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes), a companion sitting placement service shall not be treated as the employer of its sitters, and the sitters shall not be treated as the employees of the placement service. However, the rule of the preceding sentence shall apply only if the companion sitting placement service neither pays nor receives (directly or through an agent) the salary or wages of the sitters, but is compensated, if at all, on a fee basis by the sitters or the individuals for whom the sitting is performed.

(c) *Individuals deemed self-employed.* Any individual who, by reason of this section, is deemed not to be the employee of a companion sitting placement service shall be deemed to be self-employed for purposes of the tax on self-employment income (see sections 1401–1403 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations)).

(d) *Scope of rules.* The rules of this section operate only to remove sitters and companion sitting placement services from the employee-employer relationship when, under §§31.3121(d)–1 and 31.3121(d)–2, that relationship would otherwise exist. Thus, if, under §§31.3121(d)–1 and 31.3121(d)–2, a sitter is considered to be the employee of the individual for whom the sitting is performed rather than the employee of the companion sitting placement service, this section has no effect upon that employee-employer relationship.

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. X is an agency that places babysitters with individuals who desire babysitting services. X furnishes all the sitters with an instruction manual regarding their conduct and appearance, requires them to file semimonthly reports, and determines the total fee to be charged the individual for whom the sitting is performed. Individuals who need a babysitter contact the agency, are informed of the charges, and, if agreement is reached, a sitter is sent to perform the services. The sitter collects the entire amount of the charges and remits a percentage to X as a fee for the placement. X is a companion sitting placement service within the meaning of paragraph (a)(1) of this section. Therefore, since the agency does not actually pay or receive the wages of the sitters, X is not treated as the employer of the sitters for purposes of this subtitle. The sitters are deemed to be self-employed for the purpose of the tax imposed by section 1401.

Example 2. Assume the same facts as in example 1, except that the individual for whom the sitting is performed pays to X the entire amount of the charges. X retains a percentage and pays the difference to the sitter. Since X actually receives and pays the wages of the sitters, X is the employer of the sitters.

Example 3. As a service to the community a neighborhood association maintains a list of individuals who are available to babysit. Parents in need of a sitter contact the association and are provided with a list of names and telephone numbers. The association charges no fee for the service and takes no action other than compiling the list of sitters and making it available to members of the community. Issues such as hours of work, amount of payment, and the method by which the services are performed are all resolved between the sitter and parent. A, a parent, used the list to hire B to sit for A's child. B performs the services four days a week in A's home and

follows specific instructions given by A. Under §31.3121(d)–1, B is the employee of A rather than the employee of the neighborhood association. Consequently, this section does not apply and B remains the employee of A.

(f) *Effective date.* This section shall apply to remuneration received after December 31, 1974.

(Secs. 3506 and 7805 of the Internal Revenue Code of 1954; 91 Stat. 1356 (26 U.S.C. 3506); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7691, 45 FR 24129, Apr. 9, 1980]

§ 31.3507-1 Advance payments of earned income credit.

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(a) *General rule*—(1) *In general.* Every employer paying wages after June 30, 1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the advance earned income credit amount of that employee. For the purposes of applying this section and §31.3507–2—

(i) In the case of an individual who receives wages which are subject to income tax withholding, the term "employee" has the same meaning as set forth in section 3401(c) and the regulations thereunder, and the term "wages" has the same meaning as set forth in sections 3401(a) and 3402(e) and the regulations under those sections; and

(ii) In the case of an individual who does not receive wages which are subject to income tax withholding, but who receives wages which are subject to employee FICA taxes, the term "employee" has the same meaning as set forth in section 3121(d) and the regulations thereunder and the term "wages" has the same meaning as set forth in section 3121(a) and the regulations thereunder.

An individual not having wages subject to either income tax withholding or employee FICA taxes is not entitled to advance payments of the earned income credit. Moreover, notwithstanding paragraph (a)(1)(i) and (ii) of this section, employers are not required to pay advance earned income credit amounts to agricultural workers paid on a daily basis. For this purpose an "agricultural worker" is an employee who performs "agricultural labor", as that term is defined in section 3121(g) and the regulations thereunder.

(2) *Cross references.* For determination of the advance earned income credit amount of an employee, see paragraph (b) of this section. For rules relating to the treatment of the payment of an employee's advance earned income credit amount as equivalent to payment by the employer of withholding and FICA taxes, see paragraph (c) of this section. For rules describing the earned income credit advance payment certificate, see §31.3507–2 (a) and (b). For rules relating to the employee's furnishing of the

earned income credit advance payment certificate and the payroll periods for which the certificate is effective, see §31.3507–2 (c) and (d).

(b) *Advance earned income credit amount.* The advance earned income credit amount of an employee is determined, with respect to any payroll period, on the basis of the employee's wages from the employer for the period and in accordance with the advance amount tables prescribed by the Commissioner of Internal Revenue and then in effect for the payroll period. See, however, paragraph (c)(2) of this section. The advance amount paid is reflected on the employee's W-2 form as a separate item (and neither as a reduction of withholding nor an increase in compensation). For purposes of applying this section and §31.3507–2, the term "payroll period" has the meaning set forth in section 3401(b) and the regulations thereunder. As required by section 3507(c)(2)(A), these advance amount tables must be similar in form to, and coordinated with, the tables prescribed under section 3402 (relating to income tax collected at the source). Sections 3507(c)(2)(B) and 3507(c)(2)(C) provide, respectively, separate rules for the treatment in the advance amount tables of the advance earned income credit of the following two separate classes of employees:

(1) Employees who are not married (within the meaning of section 143), or employees whose spouses do not have an earned income credit advance payment certificate in effect; and

(2) Employees whose spouses have an earned income credit advance payment certificate in effect.

If during the calendar year an employer has paid an employee amounts of earned income, within the meaning of section 43(c)(2)(A)(i), which in the aggregate equal or exceed $10,000, the employer need not make further payments of advance earned income credit to the employee during that calendar year.

(c) *Payment of advance earned income credit amount as payment of withholding and FICA taxes*—(1) *In general.* (i) The provisions of this paragraph (c) apply for all purposes of the Internal Revenue Code of 1954. Payments of advance earned income credit amounts pursuant to paragraph (a)(1) of this section do not constitute the payment of compensation. These payments by the employer are treated as made—

(A) First, from the aggregate amount, with respect to all employees, required to be deducted and withheld for the payroll period under section 3401 (relating to income tax withholding);

(B) Second, from the aggregate amount, with respect to all employees, required to be deducted for the payroll period under section 3102 (relating to employee FICA taxes); and

(C) Third, from the aggregate amount of the taxes imposed for the payroll period under section 3111 (relating to employer FICA taxes).

For purposes of the requirements of sections 3401, 3102, and 3111, as the case may be, and 6302, amounts equal to the advance earned income credit amounts paid to employees are treated as if paid to

the Treasury Department on the day on which the wages (and advance amounts) are paid to the employees. The employer must report the payment and treatment of the advance amounts on the employer's Form 941, 941E, 942, or 943, as the case may be, in accordance with the applicable instructions.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following example:

Example. Employer X has ten employees, each of whom is entitled to advance earned income credit payment of $10. The total of advance amounts paid by the employer to the ten employees for the payroll period is $100. The total of income tax withholding for the payroll period is $90. The total of employee FICA taxes for the payroll period is $61.30, and the total of employer FICA taxes for the payroll period is also $61.30. Under the rules of paragraph (c)(1)(i) of this section, the total of advance amounts paid to employees is treated as if X had paid the Treasury Department on the day X paid the employees' wages: first, the $90 aggregate amount of income tax withholding; and second, $10 of the aggregate amount of employee FICA tax. X remains liable only for $112.60 of the aggregate FICA tax [$51.30+$61.30=$112.60].

(2) *Advance payments exceeding taxes due.* (i) if, for any payroll period, the aggregate amount of advance earned income credit amounts required to be paid by an employer under paragraph (a)(1) of this section exceeds the sum of the amounts for the payroll period referred to in paragraphs (c)(1)(i)(A) through (C) of this section, the employer reduces each advance amount paid for the payroll period by an amount which bears the same ratio to the excess of the advance amounts as the subject advance amount bears to the aggregate of advance amounts for the payroll period. However, this paragraph (c)(2) does not apply if the employer makes the election provided by paragraph (c)(3) of this section.

(ii) The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

Example. Assume the same facts as the example in paragraph (c)(1)(ii) of this section, except that the employer is a state government which does not pay FICA taxes. Under these facts, the advance amounts would be $10 greater than the $90 total of income tax withholding for the payroll period. Assume 10 employees each receiving $10 in advance payments. Under the rule of this paragraph (c)(2), the employer X reduces the amount of the advance amount paid to each employer by 1/10, computed as follows: $10/$100= 1/10. This is the same result as would be obtained by reducing the advance payment of $10 for each of the ten employees by one-tenth 10/100 of the $10 excess or $1.00.

(3) *Election to treat excess amounts as advance tax payment.* In lieu of reducing advance payments under paragraph (c)(2) of this section, an employer may elect under this paragraph (c)(3) to pay in full all advance earned income credit amounts. However, if no election is made, the employer is required to reduce advance amounts paid in accordance with paragraph (c)(2) of this section. The election, if made, applies to all advance earned income credit amounts required to be paid for the payroll period. The employer reflects the election on the employer's Form 941, 941E, 942, or 943 as the case may be, and must specify (with supporting computations) the amount of the excess of advance amounts paid and the payroll period to which the excess relates. Separate elections may be made for separate payroll periods. The excess of advance amounts paid is treated as an advance payment by the employer of

employment taxes described in paragraph (c)(3)(i) through (iii) of this section and due for the period reported on the Form 941, 941E, 942, or 943 which includes the payroll period during which the excess amounts were paid. The amount of the excess advance payment is applied to the amounts of the employer's liability—

(i) First, for income tax withholding due under section 3401 for the reporting period in which the payment is made;

(ii) Second, for employee FICA taxes due under section 3102 for the reporting period in which the payment is made; and

(iii) Third, for employer FICA taxes due under section 3111 for the reporting period in which the payment is made.

If the amount of the employment taxes (as described) for which the employer remains liable for the reporting period in which the excess payment is made is less than the excess payment, the employer may claim a refund of that portion of the excess amount paid which exceeds the employer's remaining liability for these taxes for the reporting period. This refund may be claimed, in the same manner as a refund of wage withholding taxes paid by the employer under section 3401, on the employer's Form 941, 941E, 942, or 943, as the case may be, for the reporting period. In the absence of a claim for refund, that portion of the excess amount will be applied by the Internal Revenue Service against the employer's liability for employment taxes reported on the employer's Form 941, 941E, 942, or 943, as the case may be, filed for the next reporting period.

(4) *Failure to make advance payments.* The failure to pay an employee, at the time required by paragraph (a)(1) of this section, all or any part of an advance earned income credit amount as required by this section is treated, for all purposes including penalties, as a failure by the employer as of that time to deduct and withhold under chapter 24 of the Internal Revenue Code of 1954 an amount equal to the advance amount (or part thereof) not paid. This treatment applies to the failure to pay an advance amount to an eligible employee without regard to whether the employee is ultimately not entitled to claim the earned income credit (in full or in part) on a return for the year, so long as the employee has a valid earned income credit advance payment certificate in effect with the employer at the time when the wages were paid. If an employer fails to pay an advance earned income credit amount as required under this section, the advance amount will not be collected by the Internal Revenue Service from the employer if the employer has properly withheld and deposited all income taxes and FICA taxes applicable with respect to the employee. However, such amount may be collected if the employer has not properly withheld and deposited these taxes.

[T.D. 7766, 46 FR 10151, Feb. 2, 1981]

§ 31.3507-2 Earned income credit advance payment certificates.

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(a) *Definition.* For the purposes of this section and §31.3507–1, an earned income credit advance payment certificate is a statement furnished by an employee to the employer which—

(1) Certifies that the employee reasonably expects to be eligible to receive the earned income credit provided by section 43 for the employee's last taxable year under subtitle A of the Internal Revenue Code of 1954 which begins in the calendar year in which the wages are paid:

(2) Certifies that the employee does not have an earned income credit advance payment certificate in effect for the calendar year (in which the wages are paid) with respect to the payment of wages by another employer, and

(3) States if the employee's spouse has an earned income credit advance payment certificate in effect with any employer. For the rule for determining if an employee's spouse has a certificate in effect, see paragraph (c)(3) of this section.

(b) *Form and content of earned income credit advance payment certificate*—(1) *In general.* Form W–5 (Earned Income Credit Advance Payment Certificate) is the prescribed form for the earned income credit advance payment certificate. The Form W–5 must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In lieu of the prescribed form, a form the provisions of which are identical with those of the prescribed form may be used.

(2) *Invalid certificates.* A Form W–5 does not meet the requirements of section 3507 or this section and is invalid if it is not completed or signed or contains an alteration or unauthorized addition (as defined in §31.3402(f)(5)–1(b) (1) and (2)). Any earned income credit advance payment certificate which the employee clearly indicates to be false by oral statement or written statement to the employer must be treated by the employer as a certificate which is invalid as of the date of the employee's statement. For purposes of the preceding sentence, the term “employer” includes any individual authorized by the employer to receive earned income credit advance payment certificates or to make payroll distributions. If an employer receives from an employee an invalid certificate, the employer must consider it a nullity with respect to all payments of wages thereafter to the employee and must inform the employee of the certificate's invalidity. The employer is not required to ascertain whether any completed and signed earned income credit advance payment certificate is correct. However, the employer should inform the district director if the employer has reason to believe that the certificate contains any incorrect statement.

(c) *When earned income credit advance payment certificate takes effect*—(1) *No previous certificate.* An earned income credit advance payment certificate furnished the employer where no previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect with—

(i) The date of the beginning of the first payroll period ending on or after the date on which the certificate is received by the employer;

(ii) The date of the first payment of wages made without regard to a payroll period on or after the date on which the certificate is received by the employer; or

(iii) The first day of the calendar year for which the certificate is furnished, if that day is later than the otherwise applicable effective date specified in paragraph (c)(1)(i) or (ii) of this section.

(2) *Previous certificate.* Except as otherwise provided in this paragraph (c)(2), an earned income credit advance payment certificate furnished the employer where a previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect on the date of the first payment of wages made on or after the first status determination date (as defined in paragraph (c)(4) of this section) occurring at least thirty days after the date on which the certificate is received by the employer. However, if the employer so chooses, the employer may treat the certificate as effective on the date of any payment of wages made on or after the date on which the certificate is received by the employer (without regard to any status determination date).

(3) *Certificate of spouse.* For the sole purpose of applying paragraph (a)(3) of this section, in determining if a certificate is in effect with respect to an employee's spouse, the spouse's certificate is treated as then in effect if the spouse's certificate will be or is reasonably expected to be in effect on the first status determination date following the date on which the employer receives the employee's certificate.

(4) *Status determination date.* For the purposes of this section, the term “status determination date” means January 1, May 1, July 1, and October 1 of each year.

(d) *Period during which certificate remains in effect; change of status*—(1) *Period certificate remains in effect.* An earned income credit advance payment certificate which takes effect during a calendar year continues in effect with respect to the employee only during that calendar year and until revoked by the employee or until another certificate takes effect. See paragraphs (d)(2) and (c)(2) of this section.

(2) *Change of status*—(i) *Revocation of certificate.* If, after an employee has furnished an earned income credit advance payment certificate—

(A) The employee no longer wishes to receive advance earned income credit payments; or

(B) There has been a change of circumstances which has the effect of either making the employee ineligible for the earned income credit for the taxable year or causing a certificate to be in effect for the employee's spouse, then the employee must revoke the certificate previously furnished by

furnishing the employer a new certificate (Form W–5 or identical form) in revocation of the earlier certificate. Depending upon the nature of the change of circumstances, the employer may be required, pursuant to the new certificate, to pay further advance earned income credit amounts to the employee (but in different amounts than previously paid to the employee). The Form W–5 (or identical form) must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In the case of revocation due to change of circumstances, the new certificate in revocation must be delivered to the employer within ten days after the employee first learns of the change of circumstances. The new certificate is effective under the rules provided in paragraph (c)(2) of this section for later certificates. A new certificate furnished by an employee which is invalid within the meaning of paragraph (b)(2) of this section is considered a nullity with respect to all payments of wages thereafter to the employee. The prior certificate of the employee remains in effect, unless the employee clearly indicates by an oral or written statement to the employer that the prior certificate is invalid. See paragraph (b)(2) of this section.

The employer is not required to ascertain whether any employee has experienced a change of circumstances described in subdivision (i)(B) of this paragraph which necessitates the employee's furnishing a new certificate. However, the employer should inform the district director if the employer has reason to believe than an employee has experienced a change of circumstances as described if the employee does not deliver a new certificate to the employer within the ten day period.

(ii) *Change in spouse's certificate.* If, after an employee has furnished an earned income credit advance payment certificate stating that a certificate is in effect for the spouse of the employee, the certificate of the spouse is no longer in effect, the employee may furnish the employer with a new certificate which reflects this change of circumstances.

[T.D. 7766, 46 FR 10152, Feb. 2, 1981]

Subpart G—Administrative Provisions of Special Application to Employment Taxes (Selected Provisions of Subtitle F, Internal Revenue Code of 1954)

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§ 31.6001-1 Records in general.

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(a) *Form of records.* The records required by the regulations in this part shall be kept accurately, but no particular form is required for keeping the records. Such forms and systems of accounting shall be used as will enable the district director to ascertain whether liability for tax is incurred and, if so, the amount thereof.

(b) *Copies of returns, schedules, and statements.* Every person who is required, by the regulations in

this part or by instructions applicable to any form prescribed thereunder, to keep any copy of any return, schedule, statement, or other document, shall keep such copy as a part of his records.

(c) *Records of claimants.* Any person (including an employee) who, pursuant to the regulations in this part, claims a refund, credit or abatement, shall keep a complete and detailed record with respect to the tax, interest, addition to the tax, additional amount, or assessable penalty to which the claim relates. Such record shall include any records required of the claimant by paragraph (b) of this section and by §§31.6001–2 to 31.6001–5, inclusive, which relate to the claim.

(d) *Records of employees.* While not mandatory (except in the case of claims), it is advisable for each employee to keep permanent, accurate records showing the name and address of each employer for whom he performs services as an employee, the dates of beginning and termination of such services, the information with respect to himself which is required by the regulations in this subpart to be kept by employers, and the statements furnished in accordance with the provisions of §31.6051–1.

(e) *Place and period for keeping records.* (1) All records required by the regulations in this part shall be kept, by the person required to keep them, at one or more convenient and safe locations accessible to internal revenue officers, and shall at all times be available for inspection by such officers.

(2) Except as otherwise provided in the following sentence, every person required by the regulations in this part to keep records in respect of a tax (whether or not such person incurs liability for such tax) shall maintain such records for at least four years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is the later. The records of claimants required by paragraph (c) of this section shall be maintained for a period of at least four years after the date the claim is filed.

(f) *Cross reference.* See §§31.6001–2 to 31.6001–5, inclusive, for additional records required with respect to the Federal Insurance Contributions Act, the Railroad Retirement Tax Act, the Federal Unemployment Tax act, and the collection of income tax at source on wages, respectively.

§ 31.6001-2 Additional records under Federal Insurance Contributions Act.

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(a) *In general.* (1) Every employer liable for tax under the Federal Insurance Contributions Act shall keep records of all remuneration, whether in cash or in a medium other than cash, paid to his employees after 1954 for services (other than agricultural labor which constitutes or is deemed to constitute employment, domestic service in a private home of the employer, or service not in the course of the employer's trade or business) performed for him after 1936. Such records shall show with respect to each employee receiving such remuneration—

(i) The name, address, and account number of the employee and such additional information with

respect to the employee as is required by paragraph (c) of §31.6011(b)–2 when the employee does not advise the employer what his account number and name are as shown on an account number card issued to the employee by the Social Security Administration.

(ii) The total amount and date of each payment of remuneration (including any sum withheld therefrom as tax or for any other reason) and the period of services covered by such payment.

(iii) The amount of each such remuneration payment which constitutes wages subject to tax. See §§31.3121(a)–1 to 31.3121(a)(12)–1, inclusive.

(iv) The amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected. See paragraph (b) of §31.3102–1 for provisions relating to collection of amounts equivalent to employee tax.

(v) If the total remuneration payment (paragraph (a)(1)(ii) of this section) and the amount thereof which is taxable (paragraph (a)(1)(iii) of this section) are not equal, the reason therefor.

(2) Every employer shall keep records of the details of each adjustment or settlement of taxes under the Federal Insurance Contributions Act made pursuant to the regulations in this part. The employer shall keep as a part of his records a copy of each statement furnished pursuant to paragraph (c) of §31.6011(a)–1.

(3) Every employer shall keep records of all remuneration in the form of tips received by his employees after 1965 in the course of their employment and reported to him pursuant to section 6053 (a). The employer shall keep as part of his records employee statements of tips furnished him pursuant to section 6053(a) (unless the information disclosed by such statements is recorded on another document retained by the employer pursuant to paragraph (a)(1) of this section) and copies of employer statements furnished employees pursuant to section 6053(b).

(b) *Agricultural labor, domestic service, and service not in the course of employer's trade or business.* (1) Every employer who pays cash remuneration after 1954 for the performance for him after 1950 of agricultural labor which constitutes or is deemed to constitute employment, of domestic service in a private home of the employer not on a farm operated for profit, or of service not in the course of his trade or business shall keep records of all such cash remuneration with respect to which he incurs, or expects to incur, liability for the taxes imposed by the Federal Insurance Contributions Act, or with respect to which amounts equivalent to employee tax are deducted pursuant to section 3102(a). See §§31.3101–3, 31.3111–3, and 31.3121(a)–2 for provisions relating, respectively, to the liability for employee tax which is incurred when wages are received, the liability for employer tax which is incurred when wages are paid, and the time when wages are paid and received. Such records shall show with respect to each employee receiving such cash remuneration—

(i) The name of the employee.

(ii) The account number of each employee to whom wages for such services are paid within the meaning of §31.3121(a)–2, and such additional information as is required by paragraph (c) of §31.6011 (b)–2 when the employee does not advise the employer what his account number and name are as shown on an account number card issued to the employee by the Social Security Administration.

(iii) The amount of such cash remuneration paid to the employee (including any sum withheld therefrom as tax or for any other reason) for agricultural labor which constitutes or is deemed to constitute employment, for domestic service in a private home of the employer not on a farm operated for profit, or for service not in the course of the employer's trade or business; the calendar month in which such cash remuneration was paid; and the character of the services for which such cash remuneration was paid. When the employer incurs liability for the taxes imposed by the Federal Insurance Contributions Act with respect to any such cash remuneration which he did not previously expect would be subject to the taxes, the amount of any such cash remuneration not previously made a matter of record shall be determined by the employer to the best of his knowledge and belief.

(iv) The amount of employee tax, or any amount equivalent to employee tax, collected with respect to such cash remuneration and the calendar month in which collected. See paragraph (b) of §31.3102–1 for provisions relating to collection of amounts equivalent to employee tax.

(v) To the extent material to a determination of tax liability, the number of days during each calendar year after 1956 on which agricultural labor which constitutes or is deemed to constitute employment is performed by the employee for cash remuneration computed on a time basis.

(2) Every person to whom a “crew leader”, as that term is defined in section 3121(i), furnishes individuals for the performance of agricultural labor after December 31, 1958, shall keep records of the name; permanent mailing address, or if none, present address; and identification number, if any, of such “crew leader”.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1003, Jan. 23, 1969]

§ 31.6001-3 Additional records under Railroad Retirement Tax Act.

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(a) *Records of employers.* (1) Every employer liable for tax under the Railroad Retirement Tax Act shall keep records of all remuneration (whether in money or in something which may be used in lieu of money), other than tips, paid to his employees after 1954 for services rendered to him (including “time lost”) after 1954. Such records shall show with respect to each employee—

(i) The name and address of the employee.

(ii) The total amount and date of each payment of remuneration to the employee (including any sum withheld therefrom as tax or for any other reason) and the period of service (including any period of absence from active service) covered by such payment.

(iii) The amount of such remuneration payment with respect to which the tax is imposed.

(iv) The amount of employee tax collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected.

(v) If the total payment of remuneration (paragraph (a)(1)(ii) of this section) and the amount thereof with respect to which the tax is imposed (paragraph (a)(1)(iii) of this section) are not equal, the reason therefor.

(2) The employer shall keep records of the details of each adjustment or settlement of taxes under the Railroad Retirement Tax Act made pursuant to the regulations in this part.

(b) *Records of employee representatives.* Every individual liable for employee representative tax under the Railroad Retirement Tax Act shall keep records of all remuneration (whether in money or in something which may be used in lieu of money) paid to him after 1954 for services rendered (including "time lost") by him as an employee representative after 1954. Such records shall show—

(1) The name and address of each employee organization employing him.

(2) The total amount and date of each payment of remuneration for services rendered as an employee representative (including any sum withheld therefrom as tax or for any other reason) and the period of service (including any period of absence from active service) covered by such payment.

(3) The amount of such remuneration payment with respect to which the employee representative tax is imposed.

(4) If the total payment of remuneration (paragraph (a)(2) of this section) and the amount thereof with respect to which the employee representative tax is imposed (paragraph (a)(3) of this section) are not equal, the reason therefor.

§ 31.6001-4 Additional records under Federal Unemployment Tax Act.

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(a) *Records of employers.* Every employer liable for tax under the Federal Unemployment Tax Act for any calendar year shall, with respect to each such year, keep such records as are necessary to establish

—

(1) The total amount of remuneration (including any sum withheld therefrom as tax or for any other reason) paid to his employees during the calendar year for services performed after 1938.

(2) The amount of such remuneration which constitutes wages subject to the tax. See §31.3306(b)–1 through §31.3306(b)(8)–1.

(3) The amount of contributions paid by him into each State unemployment fund, with respect to services subject to the law of such State, showing separately (i) payments made and neither deducted nor to be deducted from the remuneration of his employees, and (ii) payments made and deducted or to be deducted from the remuneration of his employees.

(4) The information required to be shown on the prescribed return and the extent to which the employer is liable for the tax.

(5) If the total remuneration paid (paragraph (a)(1) of this section) and the amount thereof which is subject to the tax (paragraph (a)(2) of this section) are not equal, the reason therefor.

(6) To the extent material to a determination of tax liability, the dates, in each calendar quarter, on which each employee performed services not in the course of the employer's trade or business, and the amount of cash remuneration paid at any time for such services performed within such quarter See §31.3306(c)(3)–1.

The term "remuneration," as used in this paragraph, includes all payments whether in cash or in a medium other than cash, except that the term does not include payments in a medium other than cash for services not in the course of the employer's trade or business. See §31.3306(b)(7)–1.

(b) *Records of persons who are not employers.* Any person who employs individuals in employment (see §§31.3306(c)–1 to 31.3306(c)–3, inclusive) during any calendar year but who considers that he is not an employer subject to the tax (see §31.3306(a)–1) shall, with respect to each such year, be prepared to establish by proper records (including, where necessary, records of the number of employees employed each day) that he is not an employer subject to the tax.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6642, June 27, 1963]

§ 31.6001-5 Additional records in connection with collection of income tax at source on wages.

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(a) Every employer required under section 3402 to deduct and withhold income tax upon the wages of

employees shall keep records of all remuneration paid to (including tips reported by) such employees. Such records shall show with respect to each employee—

(1) The name and address of the employee, and after December 31, 1962, the account number of the employee.

(2) The total amount and date of each payment of remuneration (including any sum withheld therefrom as tax or for any other reason) and the period of services covered by such payment.

(3) The amount of such remuneration payment which constitutes wages subject to withholding.

(4) The amount of tax collected with respect to such remuneration payment, and, if collected at a time other than the time such payment was made, the date collected.

(5) If the total remuneration payment (paragraph (a)(2) of this section) and the amount thereof which is taxable (paragraph (a)(3) of this section) are not equal, the reason therefor.

(6) Copies of any statements furnished by the employee pursuant to paragraph (b)(12) of §31.3401(a)–1 (relating to permanent residents of the Virgin Islands).

(7) Copies of any statements furnished by the employee pursuant to §§31.3401(a)(6)–1 and 31.3401(a)(7)–1, relating to nonresident alien individuals.

(8) Copies of any statements furnished by the employee pursuant to §31.3401(a)(8)(A)–1 (relating to residence or physical presence in a foreign country).

(9) Copies of any statements furnished by the employee pursuant to §31.3401(a)(8)(C)–1 (relating to citizens resident in Puerto Rico).

(10) The fair market value and date of each payment of noncash remuneration, made to an employee after August 9, 1955, for services performed as a retail commission salesman, with respect to which no income tax is withheld by reason of §31.3402(j)–1.

(11) [Reserved]

(12) In the case of the employer for whom services are performed, with respect to payments made directly by him after December 31, 1955, under an accident or health plan (as defined in section 105 and the regulations thereunder)—

(i) The beginning and ending dates of each period of absence from work for which any such payment was made; and

(ii) Sufficient information to establish the amount and weekly rate of each such payment.

(13) The withholding exemption certificates (Forms W–4 and W–4E) filed with the employer by the employee.

(14) The agreement, if any, between the employer and the employee for the withholding of additional amounts of tax pursuant to §31.3402(i)–1.

(15) To the extent material to a determination of tax liability, the dates, in each calendar quarter, on which the employee performed services not in the course of the employer's trade or business, and the amount of cash remuneration paid at any time for such services performed within such quarter. (See §31.3401(a)(4)–1.)

(16) In the case of tips received by an employee after 1965 in the course of his employment, copies of any statements furnished by the employee pursuant to section 6053(a) unless the information disclosed by such statements is recorded on another document retained by the employer pursuant to the provisions of this paragraph.

(17) Any request of an employee under section 3402(h)(3) and §31.3402 (h)(3)–1 to have the amount of tax to be withheld from his wages computed on the basis of his cumulative wages, and any notice of revocation thereof.

The term “remuneration,” as used in this paragraph, includes all payments whether in cash or in a medium other than cash, except that the term does not include payments in a medium other than cash for services not in the course of the employer's trade or business, and does not include tips received by an employee in any medium other than cash or in cash if such tips amount to less than $20 for any calendar month. See §§31.3401(a)(11)–1 and 31.3401(a)(16)–1, respectively.

(b) The employer shall keep records of the details of each adjustment or settlement of income tax withheld under section 3402 made pursuant to the regulations in this part.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6908, 31 FR 16776, Dec. 31, 1966; T.D. 7001, 34 FR 1003, Jan. 23, 1969; T.D. 7048, 35 FR 10292, June 24, 1970; T.D. 7053, 35 FR 11628, July 21, 1970; T.D. 7888, 48 FR 17588, Apr. 25, 1983]

§ 31.6001-6 Notice by district director requiring returns, statements, or the keeping of records.

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The district director may require any person, by notice served upon him, to make such returns, render such statements, or keep such specific records as will enable the district director to determine whether

or not such person is liable for any of the taxes to which the regulations in this part have application.

§ 31.6011-4 Requirement of statement disclosing participation in certain transactions by taxpayers.

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(a) *In general.* If a transaction is identified as a *listed transaction* as defined in §1.6011–4 of this chapter by the Commissioner in published guidance (see §601.601(d)(2) of this chapter), and the listed transaction involves an employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code, the transaction must be disclosed in the manner stated in such published guidance.

(b) *Effective date.* This section applies to transactions entered into on or after January 1, 2003.

[T.D. 9046, 68 FR 10169, Mar. 4, 2003]

§ 31.6011(a)-1 Returns under Federal Insurance Contributions Act.

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(a) *Requirement*—(1) *In general.* Except as otherwise provided in §31.6011 (a)–5, every employer required to make a return under the Federal Insurance Contributions Act, as in effect prior to 1955, for the calendar quarter ended December 31, 1954, in respect of wages other than wages for agricultural labor, shall make a return for each subsequent calendar quarter (whether or not wages are paid in such quarter) until he has filed a final return in accordance with §31.6011(a)–6. Except as otherwise provided in §31.6011(a)–5, every employer not required to make a return for the calendar quarter ended December 31, 1954, shall make a return for the first calendar quarter thereafter in which he pays wages, other than wages for agricultural labor, subject to the tax imposed by the Federal Insurance Contributions Act as in effect after 1954, and shall make a return for each subsequent calendar quarter (whether or not wages are paid therein) until he has filed a final return in accordance with §31.6011(a)–6. Except as otherwise provided in §31.6011 (a)–8 and in subparagraphs (3) and (4) of this paragraph, Form 941 is the form prescribed for making the return required by this subparagraph. Such return shall not include wages for agricultural labor required to be reported on any return prescribed by subparagraph (2) of this paragraph. The return shall include wages received by an employee in the form of tips only to the extent of the tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a).

(2) *Employers of agricultural workers*—(i) *Quarterly returns for 1955.* Every employer who, at any time before October 1 of the calendar year 1955, incurs liability of $100 or more for the taxes imposed by the Federal Insurance Contributions Act with respect to wages paid in such year for agricultural labor shall make a return—

(*a*) For the first calendar quarter of such year if the liability for such taxes incurred in such quarter is

$100 or more,

(*b*) For the period consisting of the first and second calendar quarters of such year if the liability for such taxes incurred in those quarters totals $100 or more, except that such return shall be made only for the second calendar quarter if a return was required under (*a*) of this subdivision and if the liability for such taxes incurred in the second calendar quarter is $100 or more, and

(*c*) For the period consisting of the first, second, and third calendar quarters of such year if the liability for such taxes incurred in those quarters totals $100 or more, except that such return shall be made (*1*) only for the period consisting of the second and third calendar quarters if a return was required under (*a*) of this subdivision but not under (*b*) of this subdivision, and if the total liability for such taxes incurred in the second and third calendar quarters totals $100 or more; or (*2*) only for the third calendar quarter if a return was required under (*b*) of this subdivision, and if the liability for such taxes incurred in the third calendar quarter is $100 or more.

Form 943A is the form prescribed for making the return required by this subdivision, except that, if the return is required to be filed with the office of the United States Internal Revenue Service in Puerto Rico, the return shall be made on Form 943A-PR if the Internal Revenue Service furnishes Form 943A-PR to the employer for use in lieu of Form 943A (see §31.6091–1).

(ii) *Annual returns for 1955 and subsequent years.* Every employer who pays wages after 1954 for agricultural labor with respect to which taxes are imposed by the Federal Insurance Contributions Act shall make a return for the first calendar year in which he pays such wages and for each calendar year thereafter (whether or not wages are paid therein) until he has filed a final return in accordance with §31.6011(a)–6. Form 943 is the form prescribed for making the annual return required by this subdivision, except that, if the return is required to be filed with the office of the United States Internal Revenue Service in Puerto Rico, the return shall be made on Form 943PR if the Internal Revenue Service furnishes Form 943PR to the employer for use in lieu of Form 943 (see §31.6091–1).

(3) *Employers of domestic workers.* Form 942 is the form prescribed for use by every employer in making a return as required under paragraph (a)(1) of this section in respect of wages, as defined in the Federal Insurance Contributions Act, paid by him in any calendar quarter for domestic service in a private home of the employer not on a farm operated for profit. If, however, the employer is required under paragraph (a)(1) of this section to make a return on Form 941 for such calendar quarter, such employer, at his election may—

(i) Report all wages on Form 941, or

(ii) Report on Form 942 the wages for domestic service in a private home of the employer not on a farm operated for profit and omit such wages from the return on Form 941.

An employer entitled to make the election referred to in the preceding sentence who has chosen one

method shall not change to the other method without first notifying the internal revenue office with which he is required to file his returns that he will thereafter use such other method. See, however, §31.6011(a)–6 relating to final returns on Form 941. An employer who makes a return of tax on form 942 pursuant to this section shall submit as part of such return for a period ending December 31, or for any period for which such return is made as a final return, the Internal Revenue Service copy of a Form W-2 for each employee with respect to whose wages tax is reported thereon. The provisions of this subparagraph shall not apply to any employer filing a return on Forms 941PR or 942PR (see §31.6091–1).

(4) *Employers in Puerto Rico or the Virgin Islands.* Form 941PR is the form prescribed for use in making the return required under paragraph (a)(1) of this section in the case of every employer who is required to file such return with the office of the United States Internal Revenue Service in Puerto Rico, except that the return shall be made on Form 941VI if the Internal Revenue Service furnishes Form 941VI to the employer for use in lieu of Form 941PR. However, Form 941 is the form prescribed for making such return in the case of every such employer who is required pursuant to §31.6011(a)–4 to make a return of income tax withheld from wages.

(5) [Reserved] For further guidance, see §31.6011(a)–1T(a)(5).

(b) *When to report wages.* Wages with respect to which taxes are imposed by the Federal Insurance contributions Act shall be reported in the return of such taxes required under this section or §31.6011 (a)–5 for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period. However, if such wages are deemed to be paid in a later return period, they shall be reported only in the return for such later period. See §31.3121(a)–2 relating to the time when wages are paid or deemed to be paid.

(c) *Correction of returns or schedules.* If in a return required under this section or §31.6011(a)–5, or in any other manner, the employer fails to report, or incorrectly reports, the name, account number, or wages of an employee, the employer shall furnish to the internal revenue office with which he is required to file his returns a written statement fully explaining the omission or error; except that such statement is not required by this paragraph if correction of the omission or error is made in connection with a supplemental return, adjustment, credit, refund, or abatement. The employer shall include in such statement his identification number (except that an identification number need not be included if the omission or error is with respect to information required to be reported on a return on Form 942), each return period for which the data were omitted or for which the incorrect data were furnished, the data incorrectly reported for each period, and the data which should have been reported. A copy of such statement shall be retained by the employer as a part of his records under §31.6001–2. No particular form is prescribed for making such statement, but if printed forms are desired, any internal revenue office will supply copies of Form 941c or Form 941cPR, whichever is appropriate, upon request.

(d) *Returns by employees in respect of tips.* If—

(1) An employee, during a calendar year, is paid wages in the form of tips which are subject to the tax under section 3101, and

(2) Any portion of the tax under section 3101 in respect of such wages cannot be collected by the employer from wages (exclusive of tips) of such employee or from funds turned over by the employee to the employer,

the employee shall make a return for the calendar year in respect of the employee tax not collected by the employer. Except as otherwise provided in this subparagraph, the return shall be made on Form 1040. The form to be used by residents of the Virgin Islands, Guam, or American Samoa is Form 1040SS. In the case of a resident of Puerto Rico who is not required to make a return of income under section 6012(a), the form to be used is Form 1040SS, except that Form 1040PR shall be used if it is furnished by the Internal Revenue Service to such resident for use in lieu of Form 1040SS.

(e) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

(f) *Wages paid in nonconvertible foreign currency.* For provisions relating to returns filed by certain employers who pay wages in nonconvertible foreign currency, see §301.6316–7 of this chapter (Regulations on Procedure and Administration).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1004, Jan. 23, 1969; T.D. 7001, 34 FR 1826, Feb. 7, 1969; T.D. 7200, 37 FR 16544, Aug. 16, 1972; T.D. 7351, 40 FR 17144, Apr. 17, 1975; T.D. 7396, 41 FR 1903, Jan. 13, 1976; T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6011(a)-1T Returns under Federal Insurance Contributions Act (temporary).

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(a)(1) through (a)(4) [Reserved] For further guidance, see §31.6011(a)–1(a)(1) through (a)(4).

(5) *Employers in the Employers' Annual Federal Tax Program (Form 944)*—(i) *In general.* For taxable years beginning on or after January 1, 2006, employers notified of their qualification for the Employers' Annual Federal Tax Program (Form 944) are required to file Form 944, “Employer's Annual Federal Tax Return.” The Internal Revenue Service (IRS) will notify employers in writing of their qualification for the Employers' Annual Federal Tax Program (Form 944). For provisions relating to the time and place for filing returns, see §§31.6071(a)–1 and 31.6091–1, respectively.

(ii) *Qualification for the Employers' Annual Federal Tax Program (Form 944).* The IRS will send notifications of qualification for the Employers' Annual Federal Tax Program (Form 944) to

employers with an estimated annual employment tax liability of $1,000 or less. New employers who timely notify the IRS that they anticipate their estimated annual employment tax liability to be $1,000 or less will be notified of their qualification for the Employers' Annual Federal Tax Program (Form 944). If an employer in the Employers' Annual Federal Tax Program (Form 944) reports an annual employment tax liability of more than $1,000, the IRS will notify the employer that the employer's filing status has changed and the employer will be required to file the quarterly Form 941 for succeeding tax years.

(iii) *Exception to qualification for the Employers' Annual Federal Tax Program (Form 944).* Notwithstanding notification by the IRS of qualification for the Employers' Annual Federal Tax Program (Form 944), an employer may file Form 941 if—

(A) One of the following conditions applies—

(*1*) The employer anticipates that its annual employment tax liability will exceed $1,000, or

(*2*) The employer prefers to electronically file Forms 941 quarterly in lieu of filing Form 944 annually;

(B) The employer contacts the IRS, pursuant to the instructions in the IRS' written notification, to request to file Form 941; and

(C) The IRS sends the employer a written notification that the employer's filing requirement has been changed to Form 941.

(b) through (f) [Reserved] For further guidance, see §31.6011(a)–1(b) through (f).

[T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6011(a)-2 Returns under Railroad Retirement Tax Act.

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(a) *Requirement*—(1) *Employers.* Every employer shall make a return for the first return period after 1954 within which compensation taxable under the Railroad Retirement Tax Act is paid to his employee or employees for services rendered after 1954, and for each subsequent return period (whether or not taxable compensation is paid therein) until he has filed a final return in accordance with §31.6011(a)–6. For calendar years after 1975, the return period shall be the calendar year; for calendar years prior to 1976, the return period shall be the calendar quarter. Form CT–1 is the form prescribed for making the return required under this paragraph. One original and a duplicate of each return on Form CT–1 shall be filed with the director of the service center.

(2) *Employee representatives.* Every employee representative shall make a return for the first calendar quarter after 1954 within which he is paid taxable compensation for services rendered after 1954 as an employee representative, and for each subsequent calendar quarter (whether or not he is paid taxable compensation therein) until he has filed a final return in accordance with §31.6011(a)–6. Form CT–2 is the form prescribed for making the return required under this subparagraph. One original and a duplicate of each return on Form CT–2 shall be filed with the director of the service center.

(b) *When to report compensation*—(1) *In general.* Except as otherwise provided in subparagraph (2) of this paragraph, compensation taxable under the Railroad Retirement Tax Act shall be reported in the return required under this section for the period in which it is deemed, under paragraph (d) of §31.3231(e)–1 to be paid, unless under such section the compensation may be deemed to be paid in more than one return period, in which case it shall be reported only in the return for the first return period in which it is deemed to be paid.

(2) *Pre-1976 returns of employers required by State law to pay compensation on weekly basis*—(i) *In general.* If any employer is required by the laws of any State to pay compensation weekly in any calendar year prior to 1976, the return of tax with respect to such compensation may, at the election of such employer, cover all payroll weeks which, or the major part of which, fall within the period for which a return of tax is required by paragraph (a)(1) of this section. This provision shall not apply, however, to any payroll week which falls in two calendar years. Any employer who elects to file a return as provided in this subparagraph shall notify the district director in writing of such election and shall include therein a statement setting forth the facts which entitle him to make the election. Such notice shall be in duplicate and shall be attached to the original and duplicate of the return for the first period to which such election applies. Any election so made shall be binding upon the employer with respect to all returns subsequently made by him until the director of the service center authorizes or directs the employer to make a return on a different basis. For the purpose of determining the time when compensation is deemed to be paid in accordance with paragraph (d) of §31.3231(e)–1 and of determining the due date of a return in accordance with paragraph (b) of §31.6071(a)–1, the calendar month following the period covered by the return of an employer making such election is the same calendar month which would be determinative for such purposes if the employer had not made the election.

(ii) *Prior elections.* An election made by an employer, pursuant to the provisions of 26 CFR (1939) 410.501(b) (Regulations 100) or of 26 CFR (1939) 411.601 (b) (Regulations 114), which is in force and effect at the time the employer makes his first return under this section shall satisfy the requirements of paragraph (b)(2)(i) of this section with respect to the making of an election and shall be binding upon the employer with respect to all returns made by him under this section until the director of the service center authorizes or directs the employer to make a return on a different basis.

(iii) *Example.* Employer X is required by State law to pay his employees within 6 days after the compensation is earned. In compliance with the State law, employer X, for services rendered to him for the payroll week of June 27 to July 2, 1955, pays his employees on the last-named date. June 1955 is the last month of a period for which a return of tax is required by paragraph (a)(1) of this section.

Employer X may elect to include in the return required by paragraph (a)(1) of this section for the period April 1 to June 30, 1955, the compensation paid to his employees for the payroll week of June 27 to July 2, 1955, inclusive, although the compensation for July 1 and 2 falls within another period for which a return is required by paragraph (a)(1) of this section. If, in this example, the payroll week ended on July 5, 1955, the compensation paid for the payroll week of June 29 to July 5 would be included in the return period in which July falls although the compensation earned for June 29 and 30 fell in a prior return period under the general rule.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7396, 41 FR 1903, Jan. 13, 1976]

§ 31.6011(a)-3 Returns under Federal Unemployment Tax Act.

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(a) *Requirement.* Every person shall make a return of tax under the Federal Unemployment Tax Act for each calendar year with respect to which he is an employer as defined in §31.3306(a)–1. Except as otherwise provided in §31.6011 (a)–8, Form 940 is the form prescribed for use in making the return.

(b) *When to report wages.* Wages taxable under the Federal Unemployment Tax Act shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(c) *Time and place for filing returns.* For provisons relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7200, 37 FR 16544, Aug. 16, 1972]

§ 31.6011(a)-3A Returns of the railroad unemployment repayment tax.

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(a) *Requirement*—(1) *Employers.* Every rail employer (as defined in section 3323(a) and section 1 of the Railroad Unemployment Insurance Act) shall make a return of the tax imposed by section 3321(a) (relating to the railroad unemployment repayment tax) for each taxable period (as defined in section 3322(a)) with respect to the total rail wages (as defined in section 3323(b)) paid by the rail employer during the taxable period. Form CT–1 is the form prescribed for use in making the return. One original

and a duplicate of each return on Form CT–1 shall be filed with the director of the service center as designated in the instructions to Form CT–1. Rail wages taxable under section 3321(a) shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(2) *Employee representatives.* Each employee representative (as defined in section 3323(d)(2) and section 1 of the Railroad Unemployment Insurance Act) shall make a return of the tax imposed by section 3321(b) on the rail wages paid to him (as determined under section 3321(b)(2)) during each calendar quarter within a taxable period. Form CT–2 is the form prescribed for use in making the return. One original and a duplicate of each return on Form CT–2 shall be filed with the director of the service center as designated in the instructions to Form CT–2. Rail wages taxable under section 3321 (b) shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(b) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §31.6071(a)–1A and §31.6091–1, respectively.

[T.D. 8105, 51 FR 40168, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§ 31.6011(a)-4 Returns of income tax withheld.

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(a) *Withheld from wages*—(1) *In general.* Except as otherwise provided in paragraphs (a)(3) and (b) of this section, and in §31.6011(a)–5, every person required to make a return of income tax withheld from wages pursuant to section 3402 shall make a return for the first calendar quarter in which the person is required to deduct and withhold such tax and for each subsequent calendar quarter, whether or not wages are paid therein, until the person has filed a final return in accordance with §31.6011(a)–6. Except as otherwise provided in paragraphs (a) (2) and (3) and (b) of this section, and in §31.6011 (a)–8, Form 941 is the form prescribed for making the return required under this paragraph.

(2) *Wages paid for domestic service.* Form 942 is the form prescribed for making the return required under subparagraph (1) of this paragraph with respect to income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for domestic service in a private home of the employer not on a farm operated for profit. The preceding sentence shall not apply in the case of an employer who has elected under paragraph (a)(3) of §31.6011(a)–1 to use Form 941 as his return with respect to such payments for purposes of the Federal Insurance Contributions Act. For the requirements relating to Form 942 with respect to qualified State individual income taxes, see paragraph (d)(3)(iv) of §301.6361–1.

(3) *Wages paid for agricultural labor.* Every person shall make a return of income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for agricultural labor for the first calendar year in which he is required (by reason of such agreement) to deduct and withhold such tax and for each subsequent calendar year (whether or not wages for agricultural labor are paid therein) until he has filed a final return in accordance with §31.6011 (a)–6. Form 943 is the form prescribed for making the return required under this subparagraph. For the requirements relating to Form 943 with respect to qualified State individual income taxes, see paragraph (d)(3)(iv) of §301.6361–1.

(4) [Reserved] For further guidance, see §31.6011(a)–4T(a)(4).

(b) *Withheld from nonpayroll payments.* Every person required to withhold tax from nonpayroll payments for calendar year 1994 must make a return for calendar year 1994 and for any subsequent calendar year in which the person is required to withhold such tax until the person makes a final return in accordance with §31.6011(a)–6. Every person not required to withhold tax from nonpayroll payments for calendar year 1994 must make a return for the first calendar year after 1994 in which the person is required to withhold such tax and for any subsequent calendar year in which the person is required to withhold such tax until the person makes a final return in accordance with §31.6011(a)–6. Form 945, Annual Return of Withheld Federal Income Tax, is the form prescribed for making the return required under this paragraph (b). Nonpayroll payments are—

(1) Certain gambling winnings subject to withholding under section 3402(q);

(2) Retirement pay for services in the Armed Forces of the United States subject to withholding under section 3402;

(3) Certain annuities as described in section 3402(o)(1)(B);

(4) Pensions, annuities, IRAs, and certain other deferred income subject to withholding under section 3405; and

(5) Reportable payments subject to backup withholding under section 3406.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805; 68A Stat. 747, 26 U.S.C. 6051)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7096, 36 FR 5217, Mar. 18, 1971; T.D. 7200, 37 FR 16544, Aug. 16, 1972; T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7580, 43 FR 60159, Dec 26, 1978; T.D. 8504, 58 FR 68035, Dec. 23, 1993; T.D. 8624, 60 FR 53510, Oct. 16, 1995; T.D. 8672, 61 FR 27008, May 30, 1996; T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6011(a)-4T Returns of income tax withheld (temporary).

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(a)(1) through (a)(3) [Reserved] For further guidance, see §31.6011(a)–4(a)(1) through (a)(3).

(4) *Employers in the Employers' Annual Federal Tax Program (Form 944)*—(i) *In general.* For taxable years beginning on or after January 1, 2006, employers notified of their qualification for the Employers' Annual Federal Tax Program (Form 944) are required to file a Form 944, "Employer's Annual Federal Tax Return." The Internal Revenue Service (IRS) will notify employers in writing of their qualification for the Employers' Annual Federal Tax Program (Form 944). For provisions relating to the time and place for filing returns, see §§31.6071(a)–1 and 31.6091–1, respectively.

(ii) *Qualification for the Employers' Annual Federal Tax Program (Form 944).* The IRS will send notifications of qualification for the Employers' Annual Federal Tax Program (Form 944) to employers with an estimated annual employment tax liability of $1,000 or less. New employers who timely notify the IRS that they anticipate their estimated annual employment tax liability to be $1,000 or less will be notified of their qualification for the Employers' Annual Federal Tax Program (Form 944). If an employer in the Employers' Annual Federal Tax Program (Form 944) reports an annual employment tax liability of more than $1,000, the IRS will notify the employer that the employer's filing status has changed and that the employer will be required to file the quarterly Form 941 for succeeding tax years.

(iii) *Exception to qualification for the Employers' Annual Federal Tax Program (Form 944).* Notwithstanding notification by the IRS of qualification for the Employers' Annual Federal Tax Program (Form 944), an employer may file Form 941 if—

(A) One of the following conditions applies—

(*1*) The employer anticipates that its annual employment tax liability will exceed $1,000, or

(*2*) The employer prefers to electronically file Forms 941 quarterly in lieu of filing Form 944 annually;

(B) The employer contacts the IRS, pursuant to the instructions in the IRS' written notification, to request to file Form 941; and

(C) The IRS sends the employer a written notification that the employer's filing requirement has been changed to Form 941.

(b) through (c) [Reserved] For further guidance, see §31.6011(a)–4(b) through (c).

[T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6011(a)-5 Monthly returns.

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(a) *In general*—(1) *Requirement.* The provisions of this section are applicable in respect of the taxes reportable on Form 941, Form 941PR, Form 941VI, or Form 945 pursuant to §31.6011(a)–1 or §31.6011 (a)–4. An employer (or other person) who is required by §31.6011(a)–1 or §31.6011(a)–4 to make quarterly returns on any such form shall, in lieu of making such quarterly returns, make returns of such taxes in accordance with the provisions of this section if he is so notified in writing by the district director. The district director may so notify any employer (or other person) (i) who, by reason of notification as provided in §301.7512–1 of this chapter (Regulations on Procedure and Administration), is required to comply with the provisions of such §301.7512–1, or (ii) who has failed to (*a*) make any such return on Form 941, Form 941PR, Form 941VI, or Form 945 (*b*) pay tax reportable on any such form, or (*c*) deposit any such tax as required under the provisions of §31.6302 (c)–1. Every employer (or other person) notified by the district director shall make a return for the calendar month in which the notice is received and for each calendar month thereafter (whether or not wages are paid in any such month) until he has filed a final return or is required to make quarterly returns pursuant to notification as provided in subparagraph (2) of this paragraph. However, if the notice provided for in this subparagraph is received after the close of the first calendar month of a calendar quarter, the first return under this section shall be made for the period beginning with the first day of such quarter and ending with the last day of the month in which the notice is received. Each return required under this section shall be made on the form prescribed for making the return which would otherwise be required of the employer (or other person) under the provisions of §31.6011 (a)–1 or §31.6011(a)–4, except that, if some other form is furnished by the district director for use in lieu of such prescribed form, the return shall be made on such other form.

(2) *Termination of requirement.* The district director, in his discretion, may notify the employer in writing that he shall discontinue the filing of monthly returns under this section. If the employer is so notified, the last month for which a return shall be made under this section is the last month of the calendar quarter in which such notice of discontinuance is received. Thereafter, the employer shall make quarterly returns in accordance with the provisions of §31.6011(a)–1 or §31.6011(a)–4.

(b) *Information returns on Form W-3 and Social Security Administration copies of Form W-2.* See §31.6051–2 for requirements with respect to information returns on Form W-3 and Social Security Administration copies of Form W-2.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7351, 40

FR 17145, Apr. 17, 1975; T.D. 7580, 43 FR 60154, Dec. 26, 1978; T.D. 8637, 60 FR 66133, Dec. 21, 1995; T.D. 9061, 68 FR 34799, June 11, 2003]

§ 31.6011(a)-6 Final returns.

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(a) *In general*—(1) *Federal Insurance Contributions Act; income tax withheld from wages and nonpayroll payments.* An employer (or other person) who is required to make a return on a particular form pursuant to §31.6011(a)–1, §31.6011(a)–4, or §31.6011(a)–5, and who in any return period ceases to pay wages or nonpayroll payments in respect of which he is required to make a return on that form, must make the return for the period as a final return. Each return made as a final return shall be marked "Final return" by the person filing the return. Every such person filing a final return (other than a final return on Form 942 or Form 943) must furnish information showing the date of the last payment of wages (as defined in section 3121(a) or section 3401(a)), and, if appropriate, the date of the last payment of nonpayroll payments defined in §31.6011(a)–4(b). An employer (other than an employer making returns on Form 942) who has only temporarily ceased to pay wages, because of seasonal activities or for other reasons, shall not make a final return but shall continue to file returns. If (i) for any return period an employer makes a final return on a particular form, and (ii) after the close of such period the employer pays wages, as defined in section 3121(a) or section 3401(a), in respect of which the same or a different return form is prescribed, such employer shall make returns on the appropriate return form. For example, if an employer who has filed a final return on Form 941 pays wages only for domestic service in his private home not on a farm operated for profit, the employer is required to make returns on Form 942 in respect of such wages.

(2) *Railroad Retirement Tax Act*—(i) *Form CT–1.* An employer required to make returns on Form CT–1 who in any return period ceases to pay taxable compensation shall make the return on Form CT–1 for such period as a final return. Such return shall be marked "Final return" by the person filing the return, and such person shall furnish information showing the date of the last payment of taxable compensation. An employer who has only temporarily ceased to pay taxable compensation shall continue to file returns on Form CT–1.

(ii) *Form CT–2.* An employee representative required to make returns on Form CT–2 who in any calendar quarter ceases to be paid taxable compensation for services as an employee representative shall make the return on Form CT–2 for such quarter as a final return. Such return shall be marked "Final return" by the person filing the return, and such person shall furnish information showing the date of the last payment of taxable compensation. An employee representative who only temporarily ceases to be paid taxable compensation for services as an employee representative shall continue to file returns on Form CT–2.

(3) *Federal Unemployment Tax Act.* An employer required to make a return on Form 940 for a calendar year in which he ceases to be an employer, as defined in §31.3306(a)–1, because of the

discontinuance, sale, or other transfer of his business, shall make such return as a final return. Such return shall be marked "Final return" by the person filing the return.

(b) *Statement to accompany final return.* There shall be executed as a part of each final return, except in the case of a final return on Form 942, a statement showing the address at which the records required by the regulations in this part will be kept, the name of the person keeping such records, and, if the business of an employer has been sold or otherwise transferred to another person, the name and address of such person and the date on which such sale or other transfer took place. If no such sale or transfer occurred or the employer does not know the name of the person to whom the business was sold or transferred, that fact should be included in the statement. Such statement shall include any information required by this section as to the date of the last payment of wages or compensation. If the statement is executed as a part of a final return on Form CT–1 or Form CT–2, such statement shall be furnished in duplicate.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7396, 41 FR 1904, Jan. 14, 1976; T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.6011(a)-7 Execution of returns.

top

(a) *In general.* Each return required under the regulations in this part, together with any prescribed copies or supporting data, shall be filled in and disposed of in accordance with the forms, instructions, and regulations applicable thereto. The return shall be carefully prepared so as fully and accurately to set forth the data required to be furnished therein. Returns which have not been so prepared will not be accepted as meeting the requirements of the regulations in this part. The return may be made by an agent in the name of the person required to make the return if an acceptable power of attorney is filed with the internal revenue office with which such person is required to file his returns and if such return includes all taxes required to be reported by such person on such return for the period covered by the return. Only one return on any one prescribed form for a return period shall be filed by or for a taxpayer. Any supplemental return made on such form in accordance with §31.6205–1 shall constitute a part of the return which it supplements. Except as may be provided under procedures authorized by the Commissioner with respect ot taxes imposed by the Railroad Retirement Tax Act, consolidated returns of two or more employers are not permitted, as for example, returns of a parent and a subsidiary corporation. For provisions relating to the filing of returns of the taxes imposed by the Federal Insurance Contributions Act and of income tax withheld under section 3402 in the case of governmental employers see §§31.3122 and 31.3404–1.

(b) *Use of prescribed forms*—(1) *In general.* Copies of the prescribed return forms will so far as

possible be regularly furnished taxpayers by the Internal Revenue Service. A taxpayer will not be excused from making a return, however, by the fact that no return form has been furnished to him. Taxpayers not supplied with the proper forms should make application therefor to an internal revenue office in ample time to have their returns prepared, verified, and filed on or before the due date with the internal revenue office with which they are required to file their returns. See §§31.6071 (a)–1 and 31.6091–1, relating, respectively, to the time and place for filing returns. In the absence of a prescribed return form, a statement made by a taxpayer disclosing the aggregate amount of wages or compensation reportable on such form for the period in respect of which a return is required and the amount of taxes due may be accepted as a tentative return. If filed within the prescribed time, the statement so made will relieve the taxpayer from liability for the addition to tax imposed for the delinquent filing of the return, provided that without unnecessary delay such tentative return is supplemented by a return made on the proper form. For additions to the tax in case of failure to file a return within the prescribed time, see the provisions of §301.6651–1 of this chapter (Regulations on Procedure and Administration).

In any case where the use of Form W-2 is required from the purpose of making a return or reporting information, such requirement may be satisfied by submitting the information required by such form on magnetic tape or by other media, provided that the prior consent of the Commissioner of Social Security (or other authorized officer or employee thereof has been obtained.

(c) *Signing and verification.* For provisions relating to the signing of returns, see §31.6061–1. For provisions relating to the verifying of returns, see §31.6065(a)–1.

(d) *Reporting of identifying numbers.* For provisions relating to the reporting of identifying number on returns required under the regulations in this part, see §31.6109–1.

(68A Stat. 747, 26 U.S.C. 6051; and 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6883, 31 FR 6590, May 3, 1966; T.D. 7276, 38 FR 11345, May 7, 1973; T.D. 7396, 41 FR 1904, Jan. 13, 1976; T.D. 7580, 43 FR 60159, Dec. 26, 1978]

§ 31.6011(a)-8 Composite return in lieu of specified form.

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The Commissioner may authorize the use, at the option of the employer, of a composite return in lieu of any form specified in this part for use by an employer, subject to such conditions, limitations, and special rules governing the preparation, execution, filing, and correction thereof as the Commissioner may deem appropriate. Such composite return shall consist of a form prescribed ty the Commissioner and an attachment or attachments of magnetic tape or other approved media. Notwithstanding any provisions in this part to the contrary, a single form and attachment may comprise the returns of more

than one employer. To the extent that the use of a compsoite return has been authorized by the Commissioner, references in this part to a specific form for use by the employer shall be deemed to refer also to a composite return under this section.

[T.D. 7200, 37 FR 16544, Aug. 16, 1972]

§ 31.6011(a)-9 Instructions to forms control as to which form is to be used.

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Notwithstanding provisions in this part which specify the use of a particular form for a return or other document required by this part, the use of a different form may be required by the latter form's instructions. In such case, the latter form shall be completed in accordance with its instructions.

[T.D. 7351, 40 FR 17145, Apr. 17, 1975]

§ 31.6011 (a)-10 Instructions to forms may waive filing requirement in case of no liability tax returns.

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Notwithstanding provisions in this part which require that a tax return be filed, the instructions to the form on which a return of tax is otherwise required by this part to be made may waive such requirement with respect to a particular class or classes of no liability tax returns. Returns in a class for which such requirement has been so waived need not be made.

This Treasury decision is not adverse to any taxpayer. For this reason, it is found unnecessary to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

[T.D. 8229, 53 FR 35811, Sept. 15, 1988]

§ 31.6011(b)-1 Employers' identification numbers.

top

(a) *Requirement of application*—(1) *In general*—(i) *Before October 1, 1962.* Except as provided in paragraph (b) of this section, every employer who on any day after December 31, 1954, and before October 1, 1962, has in his employ one or more individuals in employment for wages subject to the taxes imposed by the Federal Insurance Contributions Act, but who prior to such day neither has been assigned an identification number nor has applied therefor, shall make an application on Form SS–4 for an identification number.

(ii) *On or after October 1, 1962.* Except as provided in paragraph (b) of this section, every employer who on any day after September 30, 1962, has in his employ one or more individuals in employment for wages which are subject to the taxes imposed by the Federal Insurance Contributions act or which are subject to the withholding of income tax from wages under section 3402, but who prior to such day neither has been assigned an identification number nor has applied therefor, shall make an application on Form SS–4 for an identification number.

(iii) *Method of application.* The application, together with any supplementary statement, shall be prepared in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. Form SS–4 may be obtained from any district director or director of a service center or any district office of the Social Security Administration. The application shall be filed with the internal revenue officer designated in the instructions applicable to Form SS-4, or with the nearest district office of the Social Security Administration. The application shall be signed by (*a*) the individual, if the employer is an individual; (*b*) the president, vice president, or other principal officer, if the employer is a corporation; (*c*) a responsible and duly authorized member or officer having knowledge of its affairs, if the employer is a partnership or other unincorporated organization; or (*d*) the fiduciary, if the employer is a trust or estate. An identification number will be assigned to the employer in due course upon the basis of the information reported on the application required under this section.

(2) *Time for filing Form SS–4.* The application for an identification number shall be filed on or before the seventh day after the first payment of wages to which reference is made in paragraph (a)(1) of this section. For provisions relating to the time when wages are paid, see §31.3121(a)–2 and paragraph (b) of §31.3402(a)–1.

(b) *Employers who are assigned identification numbers without application.* An identification number may be assigned, without application by the employer, in the case of an employer who has in his employ only employees who are engaged exclusively in the performance of domestic service in his private home not on a farm operated for profit (see §31.3121(a)(7)–1. If an identification number is so assigned, the employer is not required to make an application on Form SS–4 for the number.

(c) *Crew leaders.* Any person who, as a crew leader within the meaning of section 3121(o), furnishes individuals to perform agricultural labor for another person shall, on or before the first date on which he furnishes such individuals to perform such labor for such other person, advise such other person of his name; permanent mailing address, or if none, present address; and identification number, if any.

(d) *Use of identification number.* The identification number assigned to an employer (other than a household employer referred to in paragraph (b) of this section) shall be shown in the employer's records, and shall be shown in his claims to the extent required by the applicable forms, regulations, and instructions. For provisions relating to the inclusion of identification numbers in returns, statements on Form W-2, and depositary receipts, see §31.6109–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8517, Aug. 25, 1962; T.D. 7012, 34 FR 7693, May 15, 1969]

§ 31.6011(b)-2 Employees' account numbers.

top

(a) *Requirement of application*—(1) *In general*—(i) *Before November 1, 1962.* Every employee who on any day after December 31, 1954, and before November 1, 1962, is in employment for wages subject to the taxes imposed by the Federal Insurance Contributions Act, but who prior to such day has neither secured an account number nor made application therefor, shall make an application on Form SS–5 for an account number.

(ii) *On or after November 1, 1962.* Every employee who on any day after October 31, 1962, is in employment for wages which are subject to the taxes imposed by the Federal Insurance Contributions Act or which are subject to the withholding of income tax from wages under section 3402 but who prior to such day has neither secured an account number nor made application therefore, shall make an application on Form SS–5 for an account number.

(iii) *Method of application.* The application shall be prepared in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. The employee shall file the applicaiton with any district office of the Social Security Administration or, if the employee is not working within the United States, with the district office of the Social Security Administration at Baltimore, Maryland. Form SS–5 may be obtained from any district office of the Social Security Administration or from any district director. An account number will be assigned to the employee by the Social Security Administration in due course upon the basis of information reported on the application required under this section. A card showing the name and account number of the employee to whom an account number has been assigned will be furnished to the employee by the Social Security administration.

(2) *Time for filing Form SS–5.* The application shall be filed on or before the seventh day after the occurrence of the first day of employment to which reference is made in paragraph (a)(1) of this section, unless the employee leaves the employ of his employer before such seventh day, in which case the application shall be filed on or before the date on which the employee leaves the employ of his employer.

(3) *Changes and corrections.* Any employee may have his account number changed at any time by applying to a district office of the Social Security Administration and showing good reasons for a change. With that exception, only one account number will be assigned to an employee. Any employee whose name is changed by marriage or otherwise, or who has stated incorrect information on Form SS–5, should report such change or correction to a district office of the Social Security Administration Copies of the form for making such reports may be obtained from any district office of

the administration.

(b) *Duties of employee with respect to his account number*—(1) *Information to be furnished to employer.* An employee shall, on the day on which he enters the employ of any employer for wages, comply with the provisions of paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, except that, if the employee's services for the employer consist solely of agricultural labor, domestic service in a private home of the employer not on a farm operated for profit, or service not in the course of the employer's trade or business, the employee shall comply with such provisions on the first day on which wages are paid to him by such employer, within the meaning of §31.3121(a)–2.

(i) *Employee who has account number card.* If the employee has been issued an account number card by the Social Security Administration and has the card available, the employee shall show it to the employer.

(ii) *Employee who has number but card not available.* If the employee does not have available the account number card issued to him by the Social Security Administration but knows what his account number is, and what his name is, exactly as shown on such card, the employee shall advise the employer of such number and name. Care must be exercised that the employer is correctly advised of such number and name.

(iii) *Employee who has receipt acknowledging application.* If the employee does not have an account number card but has available a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received, the employee shall show such receipt to the employer.

(iv) *Employee who is unable to furnish number or receipt.* If an employee is unable to comply with the requirement of paragraph (b)(1)(i), (ii), or (iii) of this section, the employee shall furnish to the employer a statement in writing, signed by the employee, setting forth the date of the statement, the employee's full name, present address, date and place of birth, father's full name, mother's full name before marriage, and the employee's sex, including a statement as to whether the employee has previously filed an application on Form SS–5 and, if so, the date and place of such filing. The information required by this subdivision shall be furnished on Form SS–5, if a copy of Form SS–5 is available. The furnishing of such a Form SS–5 or other statement by the employee to the employer does not relieve the employee of his obligation to make an application on Form SS–5 and file it with a district office of the Social Security Administration as required by paragraph (a) of this section. The foregoing provisions of this subdivision are not applicable to an employee engaged exclusively in the performance of domestic service in a private home of his employer not on a farm operated for profit, or in the performance of agricultural labor, if the services are performed for an employer other than an employer required to file returns of the taxes imposed by the Federal Insurance Contributions Act with the office of the United States Internal Revenue Service in Puerto Rico. However, such employee shall advise the employer of his full name and present address.

For provisions relating to the duties of an employer when furnished the information required by paragraph (b)(1) (i), (ii), (iii), or (iv) of this section, see paragraph (c) of this section.

(2) *Additional information to be furnished by employee to employer.* Every employee who, on the day on which he is required to comply with paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, has an account number card but for any reason does not show such card to the employer on such day shall promptly thereafter show the card to the employer. An employee who does not have an account number card on such day shall, upon receipt of an account number card from the Social Security Administration, promptly show such card to the employer, if he is still in the employ of that employer. If the employee has left the employ of the employer when the employee receives an account number card from the Social Security Administration, he shall promptly advise the employer of his account number and name exactly as shown on such card. The account number originally assigned to an employee (or the number as changed in accordance with paragraph (a)(3) of this section) shall be used by the employee as required by this paragraph even though he enters the employ of other employers.

(3) *Furnishing of account number by employee to employer.* See §31.6109–1 for additional provisions relating to the furnishing of an account number by the employee to his employer.

(c) *Duties of employer with respect to employees' account numbers*—(1) *Employee who shows account number.* Upon being shown the account number card issued to an employee by the Social Security administration, the employer shall enter the account number and name, exactly as shown on the card, in the employer's records, returns, statements for employees, and claims to the extent required by the applicable forms, regulations, and instructions.

(2) *Employee who does not show account number card.* With respect to an employee who, on the day on which he is required to comply with paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, does not show the employer an account number card issued to the employee by the Social Security Administration, the employer shall request such employee to show him such card. If the card is not shown, the employer shall comply with the applicable provisions of paragraph (c)(1)(i), (ii), (iii), (iv), or (v) of this section:

(i) *Employee who has not applied for account number.* If the employee has not been assigned an account number and has not made application therefor with a district office of the Social Security Administration, the employer shall inform the employee of his duties under this section.

(ii) *Employee who has account number.* If the employee advises the employer of his number and name as shown on his account number card, as provided in paragraph (b)(1)(ii) of this section, the employer shall enter such number and name in his records.

(iii) *Employee who has receipt for application.* If the employee shows the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the

employee, the employer shall enter in his records with respect to such employee the name and address of the employee exactly as shown on the receipt, the expiration date of the receipt, and the address of the issuing office. The receipt shall be retained by the employee.

(iv) *Employee who furnishes Form SS–5 or statement.* If the employee furnishes information to the employer as provided in paragraph (b)(1)(iv) of this section, the employer shall retain such information for use as provided in paragraph (c)(3)(ii) of this section.

(v) *Household or agricultural employees.* If the employee advises the employer of his full name and present address in accordance with those provisions of paragraph (b)(1)(iv) of this section which are applicable in the case of employees engaged exclusively in the performance of domestic service in a private home of the employer not on a farm operated for profit, or agricultural labor, the employer shall enter such name and address in his records.

(3) *Account number unknown when return is filed.* In any case in which the employee's account number is for any reason unknown to the employer at the time the employer's return is filed for any return period with respect to which the employer is required to report the wages paid to such employee —

(i) *If employee has shown receipt for application.* If the employee has shown to the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the employee, the employer shall enter on the return, with the entry with respect to the employee, the name and address of the employee exactly as shown on the receipt, the expiration date of the receipt, and the address of the issuing office.

(ii) *If employee furnished Form SS–5 or statement.* If the employee has furnished information to the employer as provided in paragraph (b)(1)(iv) of this section, the employer shall prepare a copy of the Form SS–5 or statement furnished by the employee and attach the copy to the return.

(iii) *If employee did not furnish receipt, Form SS–5, or statement.* If neither paragraph (c)(3)(i) nor (ii) of this section is applicable, the employer shall, except as provided in paragraph (c)(4) of this section, attach to the return a Form SS–5 or statement, signed by the employer, setting forth as fully and clearly as practicable the employee's full name, his present or last known address, date and place of birth, father's full name, mother's full name before marriage, the employee's sex, and a statement as to whether an application for an account number has previously been filed by the employee and, if so, the date and place of such filing. The employer shall also insert in such Form SS–5 or statement an explanation of why he has not secured from the employee the information referred to in paragraph (b)(1)(iv) of this section and shall insert the word “Employer” as part of his signature.

(4) *Household or agricultural employees.* The provisions of paragraph (c)(3)(iii) of this section are not applicable with respect to an employee engaged exclusively in the performance of domestic service in

a private home of his employer not on a farm operated for profit, or in the performance of agricultural labor, if the services are performed for an employer other than an employer required to file returns of the taxes imposed by the Federal Insurance Contributions Act with the office of the United States Internal Revenue Service in Puerto Rico. If any such employee has not furnished to the employer the information required by paragraph (b) (1) (i), (ii), or (iii) of this section prior to the time the employer's return is filed for any return period with respect to which the employer is required to report wages paid to such employee, the employer shall enter the word “Unknown” in the account number column of the return and (i) file with the return a statement showing the employee's full name and present or last known address, or (ii) enter such address on the return form immediately below the name of the employee.

(5) *Where to obtain Form SS–5.* Employers may obtain copies of Form SS–5 from any district office of the Social Security Administration or from any district director.

(6) *Prospective employees.* While not mandatory, it is suggested that the employer advise any prospective employee who does not have an account number of the requirements of paragraphs (a) and (b) of this section.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8517, Aug. 25, 1962]

§ 31.6051-1 Statements for employees.

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(a) *Requirement if wages are subject to withholding of income tax*—(1) *General rule.* (i) Every employer, as defined in section 3401(d), required to deduct and withhold from an employee a tax under section 3402, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to section 3402(n)) if the employee had claimed no more than one withholding exemption, shall furnish to each such employee, in respect of the remuneration paid by such employer to such employee during the calendar year, the tax return copy and the employee's copy of a statement on Form W-2. For example, if the wage bracket method of withholding provided in section 3402(c)(1) is used, a statement on Form W-2 must be furnished to each employee whose wages during any payroll period are equal to or in excess of the smallest wage from which tax must be withheld in the case of an employee claiming one exemption. If the percentage method is used, a statement on Form W-2 must be furnished to each employee whose wages during any payroll period, reduced by the amount of one withholding exemption, are equal to or in excess of the smallest amount of wages from which tax must be withheld. See section 3402 (a) and (b) and the regulations thereunder. Each statement on Form W-2 shall show the following:

(*a*) The name, address, and identification number of the employer.

(*b*) The name and address of the employee, and his social security account number if wages as defined

in section 3121(a) have been paid or if the Form W-2 is required to be furnished to the employee for a period commencing after December 31, 1962.

(*c*) The total amount of wages as defined in section 3401(a),

(*d*) The total amount deducted and withheld as tax under section 3402,

(*e*) The total amount of wages as defined in section 3121(a),

(*f*) The total amount of employee tax under section 3101 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of wages as defined in section 3121(a), or as a percentage of the total amount of employee tax under section 3101) withheld as tax under section 3101 (b) for financing the cost of hospital insurance benefits,

See paragraph (d) of this section for provisions relating to the time for furnishing the statement required by this subparagraph. See paragraph (f) of this section for an exception for employers filing composite returns from the requirement that statements for employees be on Form W-2. For the requirements relating to Form W-2 with respect to qualified State individual income taxes, see paragraphs (d)(3)(ii) of §301.6361–1 of this chapter (regulations on Procedure and Administration).

(*g*) Such information relating to coverage the employee has earned under the Federal Insurance Contributions act, as may be required by Form W-2 or its instructions, and

(*h*) The total amount paid to the employee under section 3507 (relating to advance payment of earned income credit).

(ii) Payments made in 1955 under a wage continuation plan shall be reported on Form W-2 to the extent, and in the manner, provided in paragraph (b)(8)(i) of §31.3401(a)–1.

(iii) In the case of statements furnished by the employer for whom services are performed, with respect to wages paid after December 31, 1955, “the total amount of wages as defined in section 3401 (a)”, as used in section 6051(a)(3), shall include all payments made directly by such employer under a wage continuation plan which constitute wages in accordance with paragraph (b)(8)(ii)(*a*) of §31.3401 (a)–1, without regard to whether tax has been withheld on such amounts.

(iv) Form W-2 is not required in respect of any wage continuation payment made to an employee by or on behalf of a person who is not the employer for whom the employee performs services but who is regarded as an employer under section 340(d)(1). See paragraph (b)(8) of §31.3401(a)–1.

(v) In the case of remuneration paid for service described in section 3121(m), relating to service in the

uniformed services, performed after 1956, "wages as defined in section 3121(a)", as used in section 6051(a) (2) and (5), shall be determined in accordance with section 3121(i)(2) and section 3122.

(vi) In the case of remuneration in the form of tips received by an employee in the course of his employment, the amounts required to be shown by paragraphs (3) and (5) of section 6051(a) (see paragraph (a)(1)(i) (*c*) and (*e*) of this section) shall include only such tips as are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a).

(2) *Statements for members of the Armed Forces of the United States.* Section 6051(b) contains certain special provisions which are applicable in the case of members of the Armed Forces of the United States in active service. In such case, Form W-2 shall be furnished to each such member of the Armed Forces if any tax has been withheld under section 3402 during the calendar year from the remuneration of such member or if any of the remuneration paid during the calendar year for such active service is includible under chapter 1 of the Code in the gross income of such member. Form W-2, in the case of such member, shall show, as "the total amount of wages as defined in section 3401 (a)" as used in section 6051(a)(3), the amount of the remuneration paid during the calendar year which is not excluded under chapter 1 from the gross income of such member, whether or not such remuneration constitutes wages as defined in section 3401(a) and whether or not paid for such active service.

(3) *Undelivered statements for employees.* The Internal Revenue Service copy and the employee's copy of each withholding statement for the calendar year which the employer is required to furnish to the employee and which after reasonable effort he is unable to deliver to the employee shall be retained by the employer for the 4-year period prescribed in paragraph (e)(2) of §31.6001–1.

(b) *Requirement if wages are not subject to withholding of income tax*—(1) *General rule.* If during the calendar year an employer pays to an employee wages subject to the employee tax imposed by section 3101, but not subject to income tax withholding under section 3402, the employer shall furnish to such employee the tax return copy and the employee's copy of a statement on Form W-2 for such calendar year. Such statement shall show the following:

(i) The name and address of the employer,

(ii) The name, address, and social security account number of the employee,

(iii) The total amount of wages as defined in section 3121(a),

(iv) The total amount of employee tax deducted and withheld from such wages (increased by any adjustment in such year for overcollection, or decreased by any adjustment in such year for undercollection, of employee tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of wages as defined in section 3121(a), or as a percentage of the total amount of employee tax under section 3101) withheld as tax under section 3101

(b) for financing the cost of hospital insurance benefits, and

(v) Such information relating to coverage the employee has earned under the Federal Insurance Contributions Act, as may be required by Form W-2 or its instructions, and

(vi) The total amount paid to the employee under section 3507 (relating to advance payment of earned income credit).

See paragraph (d) of this section for provisions relating to the time for furnishing the statement required by this paragraph.

(2) *Uniformed services.* In the case of remuneration paid for service described in section 3121(m), relating to service in the uniformed services, performed after 1956, "wages as defined in section 3121 (a)", as used in section 6051(a)(5), shall be determined in accordance with section 3121(i)(2) and section 3122.

(c) *Correction of statements*—(1) *Federal Insurance Contributions Act.* If (i) the amount of employee tax under section 3101 deducted and withheld in the calendar year from the wages, as defined in section 3121(a), paid during such year was less or greater than the tax imposed by section 3101 on such wages by reason of the adjustment in such year of an overcollection or undercollection of the tax in any prior year, or (ii) regardless of the reason for the error or the method of its correction, the amount of wages as defined in section 3121(a), or tax under section 3101, entered on a statement furnished pursuant to this section to an employee for a prior year was incorrect, a corrected statement for such prior year reflecting the adjustment or the correct data shall be furnished to the employee. Such statement shall be marked "Corrected by Employer".

(2) *Income tax withholding.* A corrected statement shall be furnished to the employee with respect to a prior calendar year (i) to show the correct amount of wages, as defined in section 3401(a), paid during the prior calendar year if the amount of such wages entered on a statement furnished to the employee for such prior year is incorrect, or (ii) to show the amount actually deducted and withheld as tax under section 3402 if such amount is less or greater than the amount entered as tax withheld on the statement furnished the employee for such prior year. Such statement shall be indicated as corrected.

(3) *Cross reference.* For provisions relating to the disposition of the Internal Revenue Service copy of a corrected statement, see paragraph (b)(2) of §31.6011(a)–4 and paragraph (b) of §31.6051–2.

(d) *Time for furnishing statements*—(1)(i) *In general.* Each statement required by this section for a calendar year and each corrected statement required for the year shall be furnished to the employee on or before January 31 of the year succeeding such calendar year. If an employee's employment is terminated before the close of such calendar year, the employer, at his option, shall furnish the statement to the employee at any time after the termination but no later than January 31 of the year succeeding such calendar year. However, if an employee whose employment is terminated before the

close of such calendar year requests the employer to furnish him the statement at an earlier time, and if there is no reasonable expectation on the part of both employer and employee of further employment during the calendar year, then the employer shall furnish the statement to the employee on or before the later of the 30th day after the day of the request or the 30th day after the day on which the last payment of wages is made. For provisions relating to the filing of the Internal Revenue Service copies of the statement, see §31.6051–2.

(ii) *Expedited furnishing*—(A) *General rule.* If an employer is required to make a final return under §31.6011(a)–6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages) on Form 941, or a variation thereof, the employer must furnish the statement required by this section on or before the date required for filing the final return. See §31.6071(a)–1(a)(1). However, if the final return under §31.6011(a)–6(a)(1) is a monthly return, as described in §31.6011(a)–5, the employer must furnish the statement required by this section on or before the last day of the month in which the final return is required to be filed. See §31.6071(a)–1(a)(2). Except as provided in paragraph (d)(2)(i) of this section, in no event may an employer furnish the statement required by this section later than January 31 of the year succeeding the calendar year to which it relates. The requirements set forth in this paragraph (d)(1)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See §31.6011(a)–1(a)(3).

(B) *Requests by employees.* An employer is not permitted to furnish a statement pursuant to the provisions of the third sentence of paragraph (d)(1)(i) of this section (relating to written requests by terminated employees for Form W-2) at a time later than that required by the provisions of paragraph (d)(1)(ii)(A) of this section.

(C) *Effective date.* This paragraph (d)(1)(ii) is effective January 1, 1997.

(2) *Extensions of time*—(i) *In general* (*a*) The Director, Martinsburg Computing Center, may grant an extension of time in which to furnish to employees the statements required by this section. A request may be made by a letter to the Director, Martinsburg Computing Center. The request must contain:

(*1*) The employer's name and address;

(*2*) The employer's taxpayer identification number;

(*3*) The type of return (i.e., Form W-2); and

(*4*) A concise statement of the reasons for requesting the extension.

(*b*) The application must be mailed or delivered on or before the applicable due date prescribed in paragraph (d)(1) of this section for furnishing the statements required by this section.

(*c*) In any case in which an employer is unable, by reason of illness, absence, or other good cause, to sign a request for an extension, any person standing in close personal or business relationship to the employer may sign the request on his behalf, and shall be considered as a duly authorized agent for this purpose, provided the request sets forth a reason for a signature other than the employer's and the relationship existing between the employer and the signer. For provisions relating to extensions of time for filing the Social Security Administration copies of the statement, see §31.6081(a)–1(a)(2).

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to furnish Forms W-2 where the employer is required to furnish the Form W-2 on an expedited basis.

(e) *Reporting of reimbursements of or payments of expenses of moving from one residence to another residence after July 23, 1971.* Every employer who after July 23, 1971, makes reimbursement to, or payment to (other than direct cash reimbursement), an employee for his expenses of moving from one residence to another residence which is includable in gross income under section 82 shall furnish to the best of his ability to such employee information sufficient to assist the employee in the computation of any deduction allowable under section 217 with respect to such reimbursement or payment. The information required under this paragraph may be furnished on Form 4782 provided by the Internal Revenue Service or may be furnished on forms provided by the employer so long as the employee receives the same information he would have received had he been furnished with a completed Form 4782. The information shall include the amount of the reimbursement or payment and whether the reimbursement or payment was made directly to a third party for the benefit of an employee or furnished in kind to the employee. In addition, information shall be furnished as to whether the reimbursement or payment represents and expense described in subparagraphs (A) through (E) of section 217(b)(1), and if so, the amount and nature of the expenses described in each such subparagraph. The information described in this paragraph shall be furnished at the same time or before the written statement required by section 6051(a) is furnished in respect of the calendar year for which the information provided under this paragraph is required. The information required under this paragraph shall be provided for the taxable year in which the payment or reimbursement is received by the employee. For determining the taxable year in which a payment or reimbursement is received, see section 82 and §1.82–1.

(f) *Statements with respect to compensation, as defined in the Railroad Retirement Tax Act, paid after December 31, 1967*—(1) *Required information relating to excess medicare tax on compensation paid after December 31, 1971*—(i) *Notification of possible credit or refund.* With respect to compensation (as defined in section 3231(e)) paid after December 31, 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold from an employee (as defined in section 3231(b)) a tax under section 3201, shall include on or with the statement required to be furnished such employee under section 6051(a), a notice concerning the provisions of this title with respect to the allowance of a credit or refund of the tax on wages imposed by section 3101(b) and the tax on compensation imposed by section 3201 or 3211 which is treated as a tax on wages imposed by section 3101(b). Such notice shall inform such employee of the eligibility of persons having a second employment, in addition to railroad employment, for a credit or refund of any excess hospital insurance tax which such

persons have paid because of employment under both social security (including employee and self-employment coverage) and railroad retirement. See section 6413(c)(3) and paragraph (c) of §31.6413 (c)–1, relating to special refunds with respect to compensation as defined in the Railroad Retirement Tax Act.

(ii) *Information to be supplied to employees upon request.* With respect to compensation (as defined in section 3231(e)) paid after December 31, 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold tax under section 3201 from an employee (as defined in section 3231 (b)) who has also received wages during such year subject to the tax imposed by section 3101(b), shall upon request of such employee furnish to him a written statement showing—

(*a*) The total amount of compensation with respect to which the tax imposed by section 3101(b) was deducted.

(*b*) The total amount of employee tax under section 3201 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year), and

(*c*) The proportion thereof (expressed either as a dollar amount, or a percentage of the total amount of compensation as defined in section 3231(e), or as a percentage of the total amount of employee tax under section 3201) withheld as tax under section 3201 for financing the cost of hospital insurance benefits.

(2) *Statements on Form W-2 (RR)*—(i) *Compensation paid during 1970 or 1971.* With respect to compensation (as defined in section 3231(e)) paid during 1970 or 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold from an employee (as defined in section 3231 (b)) a tax under section 3402 with respect to compensation, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to section 3402(n)) if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of such compensation the tax return copy and the employee's copy of a statement on Form W-2 (RR) instead of Form W-2, unless such employers are permitted by the Internal Revenue Service to continue to use Form W-2 in lieu of Form W-2 (RR). If the wage bracket method of withholding provided in section 3402(c)(1) is used in respect of such compensation, a statement on Form W-2 (RR) must be furnished to each employee whose wages during any payroll period are equal to or in excess of the smallest wage from which tax must be withheld in the case of an employee claiming one exemption. If the percentage method is used, a statement on Form W-2 (RR) must be furnished to each employee whose wages during any payroll period are in excess of one withholding exemption for such payroll period as shown in the percentage method withholding table contained in section 3402(b) (1). Each statement on Form W-2 (RR) shall show the following:

(*a*) The name, address, and identification number of the employer,

(*b*) The name and address of the employee and his social security account number,

(*c*) The total amount of wages as defined in section 3401(a),

(*d*) The total amount deducted and withheld as tax under section 3402,

(*e*) The total amount of compensation as defined in section 3231(e), and

(*f*) The total amount of employee tax under section 3201 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of compensation as defined in section 3231(e), or as a percentage of the total amount of employee tax under section 3201) withheld as tax under section 3201 for financing the cost of hospital insurance benefits.

The provisions of this chapter applicable to Form W-2, other than those relating solely to the Federal Insurance Contributions Act, are hereby made applicable to Form W-2 (RR). See paragraph (d) of this section for provisions relating to the time and place for furnishing the statement required by this subparagraph.

(ii) *Compensation paid during 1968 or 1969.* At the option of the employer, the provisions of paragraph (f)(1)(i) of this section may apply with respect to compensation paid during 1968 or 1969.

(iii) Every employer who, pursuant to paragraph (i) or (ii) of this section, does not provide Form W-2 (RR) with respect to compensation must furnish the additional information required by Form W-2 (RR) upon request by the employee.

(g) *Employers filing composite returns.* Every employer who files a composite return pursuant to §31.6011(a)–8 shall furnish to his employees the statements required under this section, except that in lieu of Form W-2 the statements may be in any form which is suitable for retention by the employee and which contains all information required to be shown on Form W-2.

(h) *Statements with respect to the refundable earned income credit*—(1) *In general.* In respect of remuneration paid in any calendar year beginning after December 31, 1986, for services performed after December 31, 1986, every employer shall furnish Notice 797 (You May be Eligible for a Refund on Your Federal Income Tax Return Because of the Earned Income Credit (EIC)), or a written statement that contains an exact reproduction of the wording contained in Notice 797, to each employee with respect to whom the employer paid wages (within the meaning of section 3401(a)) during the calendar year and who did not have any income tax withheld by the employer during the calendar year. Notwithstanding the preceding sentence, no such statement need be furnished to an employee who claimed exemption from withholding pursuant to section 3402(n) for the calendar year.

(2) *Time for furnishing statement*—(i) *General rule.* Except as otherwise provided in paragraph (h)(2)(ii) of this section, the statement required by this paragraph (h) for a calendar year shall be furnished—

(A) In the case of an employee who is required to be furnished a Form W-2, Wage and Tax Statement, for the calendar year, within one week of (before or after) the date that the employee is furnished a timely Form W-2 for the calendar year (or, if a Form W-2 is not so furnished, on or before the date by which it is required to be furnished), and

(B) In the case of an employee who is not required to be furnished a Form W-2 for the calendar year, on or before February 7 of the year succeeding the calendar year.

(ii) *Special rule with respect to certain Forms W-2 for 1987 and 1988.* With respect to an employee who is not furnished a Form W-2 for calendar year 1987 before October 24, 1988, or who was furnished such form on or before June 11, 1987, the statement required by this paragraph (h) shall be furnished on or before October 24, 1988. With respect to an employee who is furnished a Form W-2 after June 11, 1987, and before October 24, 1988, the statement required by this paragraph (h) shall be furnished within one week of (before or after) the date the employee is furnished the Form W-2. With respect to an employee who is required to be furnished a Form W-2 for calendar year 1988 before October 24, 1988, but is not so furnished, the statement required by this paragraph (h) shall be furnished on or before that date.

(3) *Manner of furnishing statement.* If an employee is furnished a Form W-2 in a timely manner, the statement required by this paragraph (h) may be furnished with the employee's Form W-2. Any statement not so furnished shall be furnished by direct, personal delivery to the employee or by first class mail addressed to the employee at his or her current or last known address. For purposes of the preceding sentence, direct, personal delivery means hand delivery to the employee. Thus, for example, an employer does not meet the requirements of this paragraph (h) if the statement is sent through inter-office mail or is posted on a bulletin board.

(i) *Cross references.* For provisions relating to the penalties provided for the willful furnishing of a false or fraudulent statement, or for the willful failure to furnish a statement, see §31.6674–1 and section 7204. For additional provisions relating to the inclusion of identification numbers and account numbers in statements on Form W-2, see §31.6109–1. For provisions relating to the penalty for failure to report an identification number or an account number, as required by §31.6109–1, see §301.6676–1 of this chapter (Regulations on Procedure and Administration). For the penalties applicable to information returns and payee statements the due date for which (determined without regard to extensions) is after December 31, 1989, see sections 6721–6724 as amended by section 7711 of the Omnibus Budget Reconciliation Act of 1989. See section 6723 (prior to its amendment by section 7711 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239, 103 Stat. 2106 (1989)) and §31.6723–1A of this chapter (as issued thereunder) for provisions relating to the penalty for failure to include correct information on an information return or a payee statement and for the exceptions to the penalty, particularly the exception for timely correction, with respect to information

returns and payee statements the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990.

(j) *Electronic furnishing of statements*—(1) *In general.* A person required by section 6051 to furnish a written statement on Form W-2 (furnisher) to the individual to whom it is required to be furnished (recipient) may furnish the Form W-2 in an electronic format in lieu of a paper format. A furnisher who meets the requirements of paragraphs (j)(2) through (6) of this section is treated as furnishing the Form W-2 in a timely manner.

(2) *Consent*—(i) *In general.* The recipient must have affirmatively consented to receive the Form W-2 in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the Form W-2 in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) *Withdrawal of consent.* The consent requirement of this paragraph (j)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before the statement is furnished. The furnisher may provide that a withdrawal of consent takes effect either on the date it is received by the furnisher or on a subsequent date. The furnisher may also provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) *Change in hardware or software requirements.* If a change in hardware or software required to access the Form W-2 creates a material risk that the recipient will not be able to access the Form W-2, the furnisher must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the Form W-2 and inform the recipient that a new consent to receive the Form W-2 in the revised electronic format must be provided to the furnisher. After implementing the revised hardware and software, the furnisher must obtain from the recipient, in the manner described in paragraph (j)(2)(i) of this section, a new consent or confirmation of consent to receive the Form W-2 electronically.

(iv) *Examples.* The following examples illustrate the rules of this paragraph (j)(2):

Example 1. Furnisher F sends Recipient R a letter stating that R may consent to receive Form W-2 electronically on a Web site instead of in a paper format. The letter contains instructions explaining how to consent to receive Form W-2 electronically by accessing the Web site, downloading the consent document, completing the consent document and e-mailing the completed consent back to F. The consent document posted on the Web site uses the same electronic format that F will use for the electronically furnished Form W-2. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (j)(2)(i) of this section.

Example 2. Furnisher F sends Recipient R an e-mail stating that R may consent to receive Form W-2 electronically instead of in a paper format. The e-mail contains an attachment instructing R how to consent to receive Form W-2 electronically. The e-mail attachment uses the same electronic format that F will use for the

electronically furnished Form W-2. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive Form W-2 electronically in the manner described in paragraph (j)(2)(i) of this section.

Example 3. Furnisher F posts a notice on its Web site stating that Recipient R may receive Form W-2 electronically instead of in a paper format. The Web site contains instructions on how R may access a secure Web page and consent to receive the statements electronically. By accessing the secure Web page and giving consent, R has consented to receive Form W-2 electronically in the manner described in paragraph (j)(2)(i) of this section.

(3) *Required disclosures*—(i) *In general.* Prior to, or at the time of, a recipient's consent, the furnisher must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (j)(3)(ii) through (viii) of this section.

(ii) *Paper statement.* The recipient must be informed that the Form W-2 will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) *Scope and duration of consent.* The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to each Form W-2 required to be furnished after the consent is given until it is withdrawn in the manner described in paragraph (j)(3)(v)(A) of this section or only to the first Form W-2 required to be furnished following the date on which the consent is given.

(iv) *Post-consent request for a paper statement.* The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent described in paragraph (j)(2)(i) of this section and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) *Withdrawal of consent.* The recipient must be informed that—

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, telephone number, and e-mail address is provided in the disclosure statement;

(B) The furnisher will confirm the withdrawal and the date on which it takes effect in writing (either electronically or on paper); and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (j) before the date on which the withdrawal of consent takes effect.

(vi) *Notice of termination.* The recipient must be informed of the conditions under which a furnisher will cease furnishing statements electronically to the recipient (for example, termination of the

recipient's employment with furnisher-employer).

(vii) *Updating information.* The recipient must be informed of the procedures for updating the information needed by the furnisher to contact the recipient. The furnisher must inform the recipient of any change in the furnisher's contact information.

(viii) *Hardware and software requirements.* The recipient must be provided with a description of the hardware and software required to access, print, and retain the Form W-2, and the date when the Form W-2 will no longer be available on the Web site. The recipient must be informed that the Form W-2 may be required to be printed and attached to a Federal, State, or local income tax return.

(4) *Format.* The electronic version of the Form W-2 must contain all required information and comply with applicable revenue procedures relating to substitute statements to recipients.

(5) *Notice*—(i) *In general.* If the statement is furnished on a Web site, the furnisher must notify the recipient that the statement is posted on a Web site. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be on the subject line of the electronic mail.

(ii) *Undeliverable electronic address.* If an electronic notice described in paragraph (j)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the furnisher's records or from the recipient, then the furnisher must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) *Corrected Form W-2.* If the furnisher has corrected a recipient's Form W-2 that was furnished electronically, the furnisher must furnish the corrected Form W-2 to the recipient electronically. If the recipient's Form W-2 was furnished through a Web site posting and the furnisher has corrected the Form W-2, the furnisher must notify the recipient that it has posted the corrected Form W-2 on the Web site within 30 days of such posting in the manner described in paragraph (j)(5)(i) of this section. The corrected Form W-2 or the notice must be furnished by mail or in person if—

(A) An electronic notice of the Web site posting of an original Form W-2 or the corrected Form W-2 was returned as undeliverable; and

(B) The recipient has not provided a new e-mail address.

(6) *Access period.* Forms W-2 furnished on a Web site must be retained on the Web site through October 15 of the year following the calendar year to which the Forms W-2 relate (or the first business day after October 15, if October 15 falls on a Saturday, Sunday, or legal holiday). The furnisher must maintain access to corrected Forms W-2 that are posted on the Web site through October 15 of the

year following the calendar year to which the Forms W-2 relate (or the first business day after such October 15, if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected forms are posted, whichever is later.

(7) *Paper statements after withdrawal of consent.* If a recipient withdraws consent to receive a statement electronically and the withdrawal takes effect before the statement is furnished electronically, a paper statement must be furnished. A paper statement furnished after the statement due date under this paragraph (j)(7) will be considered timely if furnished within 30 days after the date the withdrawal of consent is received by the furnisher.

(8) *Effective date.* This paragraph (j) applies to Forms W-2 required to be furnished after February 13, 2004. Paragraph (j)(6) of this section also applies to Forms W-2 required to be furnished after December 31, 2003.

(86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 917, 26 U.S.C. 7805; 68A Stat. 747, 26 U.S.C. 6051(c))

[T.D. 6516, 25 FR 13032, Dec. 20, 1960]

Editorial Note: For Federal Register citations to §31.6051–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 31.6051-2 Information returns on Form W-3 and Internal Revenue Service copies of Forms W-2.

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(a) *In general.* Every employer who is required to make a return of tax under §31.6011(a)–1 (relating to returns under the Federal Insurance Contributions Act), §31.6011(a)–4 (relating to returns of income tax withheld from wages), or §31.6011(a)–5 (relating to monthly returns) for a calendar year or any period therein shall file the Social Security Administration copy of each Form W-2 required under §31.6051–1 to be furnished by the employer with respect to wages paid during the calendar year. Each Form W-2 and the transmittal Form W-3 shall together constitute an information return to be filed with the Social Security Administration office indicated on the instructions to such forms. However, in the case of an employer who elects to file a composite return pursuant to §31.6011(a)–8, the information return required by this section shall consist of magnetic tape (or other approved media) containing all information required to be on the employee statement, together with transmittal Form 4804.

(b) *Corrected returns.* The Social Security Administration copies of corrected Forms W-2 (or magnetic tape or other approved media) for employees for the calendar year shall be submitted with Form W-3 (or Form 4804), on or before the date on which information returns for the period in which the correction is made would be due under paragraph (a)(3)(ii) of §31.6071(a)–1, to the Social Security Administration office with which Forms W-2 are required to be filed.

(c) *Cross references.* For provisions relating to the time for filing the information returns required by this section and to extensions of the time for filing, see §§31.6071(a)–1(a)(3) and 31.6081(a)–1(a)(2), respectively. For the penalty provided in case of each failure to file, see paragraph (a) of §301.6652–1 of this chapter (Regulations on Procedure and Administration). For the penalties applicable to information returns and payee statements the due date for which (determined without regard to extensions) is after December 31, 1989, see sections 6721–6724 as amended by section 7711 of the Omnibus Budget Reconciliation Act of 1989 (Publ. L. 101–239, 103 Stat. 2106 (1989). See section 6723 (prior to its amendment by section 7211 of the Omnibus Reconciliation Act of 1989) and §301.6723–1A of this chapter for provisions relating to the penalty for failure to include correct information on an information return or a payee statement and for the exceptions to the penalty, particularly the exception for timely correction, with respect to information returns and payee statements the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990.

(68A Stat. 747, 26 U.S.C. 6051; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7351, 40 FR 17145, Apr. 17, 1975, as amended by T.D. 7580, 43 FR 60160, Dec. 26, 1978; T.D. 8155, 52 FR 34357, Sept. 10, 1987; T.D. 8344, 56 FR 15042, Apr. 15, 1991; T.D. 8636, 60 FR 66141, Dec. 21, 1995; T.D. 9061, 68 FR 34799, June 11, 2003]

§ 31.6051-3 Statements required in case of sick pay paid by third parties.

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(a) *Statements required from payor.* (1) Every payor of sick pay shall furnish to the employer of the payee of the sick pay a written statement. The written statement must contain the following information:

(i) The name and, if there is withholding from sick pay under section 3402(o) and the regulations thereunder, the social security account number of the payee,

(ii) The total amount of sick pay paid to the payee during the calendar year, and

(iii) The total amount (if any) deducted and withheld from sick pay under section 3402(o) and the regulations thereunder.

The statement must be furnished to the employer on or before January 15 of the year following the calendar year in which any sick pay was paid.

(2) These reporting requirements are in lieu of the requirements of sections 6051(a) (relating to written statements for employees) and 6041 (relating to information returns). Statements required to be

furnished by this paragraph shall be treated as statements required under section 6051 to be furnished to employees for purposes of sections 6674 (relating to fraudulent statement or failure to furnish statement to employee) and 7204 (relating to fraudulent statement or failure to make statement to employees).

(3) A multiemployer plan paying sick pay pursuant to a collectively bargained agreement may furnish the statement required to be furnished by this paragraph, which shall include the total amount of sick pay paid to the employee under the plan regardless of the identity or number of employers for whom the employee worked during the calendar year under the plan, to one of the following:

(i) The employer for whom the employee worked the most hours during the calendar year for which the statement is to be furnished,

(ii) The employer for whom the employee first worked during such year,

(iii) The employer for whom the employee last worked during such year,

(iv) The employer for whom the employee worked immediately preceding his absence for which sick pay was paid,

(v) The employer for whom the employee worked immediately following his absence for which sick pay was paid,

(vi) The employer designated through the operation of a specific clause of the collective bargaining agreement, or

(vii) The employer designated through the operation of a specific system of designation chosen by the payor.

(b) *Information required to be furnished by employer*. Every employer of a payee of sick pay who receives a statement under paragraph (a) from a payor of sick pay shall furnish to each payee of sick pay a written statement, which must be furnished on Form W-2. The written statement must contain the following information:

(1) All of the information required to be furnished under paragraph (a),

(2) The name, the address, and the Employer Identification Number (EIN) of the employer,

(3) The words “sick pay”, which shall be written in the box labelled “Employer's use”, and

(4) If any portion of the sick pay is excludable from gross income under section 104(a)(3), the amount

of the portion which is not so excludable and of the portion which is so excludable. Only sick pay payments includable in gross income shall be reported in the box labelled “Wages, tips, other compensation” on Form W-2. Any amount excludable from gross income under section 104(a)(3) shall be reported in the box labelled “Employer's use” on Form W-2 and any amount so reported shall be described as “Nontaxable”. The information required to be furnished by this paragraph may be furnished either on the same Form W-2 that is required to be furnished under section 6051(a) or on a separate Form W-2. To the extent practicable, this statement should be furnished to the payee along with the statement (if any) required under section 6051(a) (relating to written statements for employees). The statement must be furnished to the payee on or before January 31 of the year following the calendar year in which any sick pay was paid. The employer shall file copy A of Form W-2 and Form W-3 with the Social Security Administration in accordance with section 6051(d) (relating to statements to constitute information returns) and the regulations thereunder.

(c) *Optional rule.* The payor and the employer may at their option enter into an agency agreement valid under local law whereby the employer designates the payor to be the employer's agent for purposes of fulfilling the requirements of this section. This agreement must specify what portion, if any, of the sick pay is excludable from gross income under section 104(a)(3). If they enter into such an agreement, the payor shall not provide the statement required by paragraph (a) but shall instead furnish statements that meet all of the requirements of paragraph (b), except that the agreement must provide that the payor will furnish the statements with the payor's, rather than the employer's name, address, and Employer Identification Number (EIN) if “Sick Pay Statement Furnished under an Agency Agreement with Your Employer” appears in the box labelled “Employer's Use” on Form W-2. Paragraph (a)(2) remains applicable to statements furnished under this paragraph. In the case of sick pay paid under a multiemployer plan pursuant to a collectively bargained agreement, an amendment to either the multiemployer plan or the collectively bargained agreement designating the payor to be the employers' agent for purposes of fulfilling the requirements of this section shall be deemed an agency agreement that fulfills the requirements of the first sentence of this paragraph.

(d) *Definitions.* For purposes of this section, the terms “payor”, “payee”, and “sick pay” shall have the same meaning as ascribed thereto in section 3402(o) and the regulations thereunder. For purposes of this section, the term “employer” shall have the same meaning as ascribed thereto in section 3401(d) and the regulations thereunder, except that the term “employer” shall not include the payor for purposes of this section.

(e) *Additional requirements.* (1) Statements furnished to payees under this section must also comply with all requirements of section 6051 (c) and (d) and the regulations thereunder.

(2) The provisions of §1.9101–1 (relating to permission to submit information required by certain returns and statements on magnetic tape) shall be applicable to the information required by this section to be furnished on Form W-2 if the employer properly complies with those provisions.

(3) The provisions of section 6109 (relating to identifying numbers) and the regulations thereunder

shall be applicable to Form W-2 and to any payee of sick pay to whom a statement on Form W-2 is required by this section to be furnished. Thus the employer must include the social security account number of the payee on all Forms W-2.

(f) *Effective date.* The provisions of this section shall apply to payments of sick pay made on or after May 1, 1981.

(g) *Transitional rule.* Payors may report all sick pay paid to a payee after December 31, 1980, and before May 1, 1981, on the same statement required to be furnished under paragraph (a) as is used to report sick pay paid to a payee on or after May 1, 1981. If the payor reports on the statement required to be furnished under paragraph (a), he shall not report sick pay paid after December 31, 1980, and before May 1, 1981, on Form 1099, if otherwise required to do so. If no sick pay is paid on or after May 1, 1981, the payor may report all sick pay paid to a payee after December 31, 1980, and before May 1, 1981, on the statement required to be furnished under paragraph (a). If he reports on the statement required to be furnished under paragraph (a), he shall not report sick pay paid on Form 1099, if otherwise required to do so.

(Secs. 3402(o), 7805, Internal Revenue Code of 1954 (94 Stat. 3495, (26 U.S.C. 3402(o)); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7814, 47 FR 11277, Mar. 16, 1982]

§ 31.6051-4 Statement required in case of backup withholding.

top

(a) *Statements required from payor.* Every payor of any reportable payment (as defined in section 3406 (b)(1)) who is required to deduct and withhold tax under section 3406 must furnish to the payee a written statement containing the information required by paragraph (c) of this section.

(b) *Prescribed form.* The prescribed form for the statement required by this section is Form 1099. In the case of any reportable interest or dividend payment as defined in section 3406(b)(2), the prescribed form is the Form 1099 required in §1.6042–4 of this chapter (relating to payments of dividends), §1.6044–5 of this chapter (relating to payments of patronage dividends), or §1.6049–6(e) of this chapter (relating to payments of interest or original issue discount). Statements required to be furnished by this section will be treated as statements required by the respective sections with respect to any reportable payment, except that the statement required under this section must include the amount of tax withheld under section 3406. In no event will a statement be required under this section if a statement with the same information is required to be furnished to the recipient under another section.

(c) *Information required.* Each statement on Form 1099 must show the following:

(1) The name, address, and taxpayer identification number of the person receiving any reportable payment;

(2) The amount subject to reporting under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, or 6050N whether or not the amount of the reportable payment is less than the amount for which an information return is required. If tax is withheld under section 3406, the statement must show the amount of the payment withheld upon;

(3) The amount of tax deducted and withheld under section 3406;

(4) The name and address of the person filing the form;

(5) A legend stating that such amount is being reported to the Internal Revenue Service; and

(6) Such other information as is required by the form.

(d) *Time for furnishing statements.* The statement must be furnished to the payee no later than January 31 of the year following the calendar year in which the payment was made.

(e) *Aggregation.* The payor or broker may combine the information required to be shown under this section with information required to be shown under another section even if they do not relate to the same type of reportable payment.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.6053-1 Report of tips by employee to employer.

top

(a) *Requirement that tips be reported*—(1) *In general.* An employee who receives, in the course of employment by an employer, tips that constitute wages as defined in section 3121(a) or section 3401, or compensation as defined in section 3231(e), must furnish to the employer a statement, or statements, disclosing the total amount of the tips received by the employee in the course of employment by the employer. Tips received by an employee in a calendar month in the course of employment by an employer that are required to be reported to the employer must be reported on or before the 10th day of the following month. For example, tips received by an employee in January 2000 are required to be reported by the employee to the employer on or before February 10, 2000.

(2) *Cross references.* For provisions relating to the treatment of tips as wages for purposes of the Federal Insurance Contributions Act (FICA) tax under sections 3101 and 3111, see sections 3102(c),

3121(a)(12), and 3121(q) and §§31.3102–3 and 31.3121(a)(12)–1. For provisions relating to the treatment of tips as wages for purposes of the tax under section 3402 (income tax withholding), see sections 3401(a)(16), 3401(f), and 3402(k) and §§31.3401(a)(16)–1, 31.3401(f)–1, and 31.3402(k)–1. For provisions relating to the treatment of tips as compensation for purposes of the Railroad Retirement Tax Act (RRTA) tax under sections 3201 and 3201, see section 3231(e) and §31.3231(e)–1 (a).

(b) *Statement for use in reporting tips*—(1) *In general.* The statement described in paragraph (a) of this section can be provided on paper or transmitted electronically. The statement must be signed by the employee and must disclose:

(i) The name, address, and social security number of the employee.

(ii) The name and address of the employer.

(iii) The period for which, and the date on which, the statement is furnished. If the statement is for a period of less than 1 calendar month, the beginning and ending dates of the period must be included (for example, January 1 through January 8, 1998).

(iv) The total amount of tips received by the employee during the period covered by the statement which are required to be reported to the employer (see paragraph (a) of this section).

(2) *Form of statement*—(i) *In general.* No particular form is prescribed for use in furnishing the statement required by this section. The statement may be furnished on paper or transmitted electronically. An electronic system and all tip statements generated by that system must meet the requirements of paragraph (d) of this section. If the employer does not provide any other means for the employee to report tips, the employee may use Form 4070, “Employee's Report of Tips to Employer.”

(ii) *Single-purpose forms.* A statement may be furnished on an employer-provided form. The form may be on paper or in electronic form. An employer that provides a paper form must make blank copies of the form readily available to all tipped employees. Any form, whether paper or electronic, provided by an employer for use by its tipped employees solely to report tips must meet all the requirements of paragraph (b)(1) of this section.

(iii) *Regularly used forms.* Instead of requiring that tips be reported as described in paragraph (b)(2)(ii) of this section on a special form used solely for tip reporting, an employer may prescribe regularly used forms for use by employees in reporting tips. A regularly used form may be on paper or in electronic form (such as a time card or report), must meet the requirements of paragraph (b)(1) (iii) and (iv) of this section, must contain identifying information that will ensure accurate identification of the employee by the employer, and is permitted to be used only if the employer furnishes the employee a statement suitable for retention showing the amount of tips reported by the employee for the period. The employer statement may be furnished when the employee reports the tips, when wages

are first paid following the reporting of tips by the employee, or within a short time after the wages are paid. The employer may meet this requirement, for example, through the use of a payroll check stub or other payroll document regularly furnished (if not less frequent than monthly) by the employer to the employee showing gross pay and deductions.

(c) *Period covered by, and due date of, tip statement*—(1) *In general.* A tip statement furnished by an employee to an employer may not cover a period greater than 1 calendar month. An employer may, however, require the submission of a statement in respect of a specified period of time, for example, on a weekly or biweekly basis, regular payroll period, etc. An employer may specify, subject to the limitation in paragraph (a) of this section, the time within which, or the date on which, the statement for a specified period of time should be submitted by the employee. For example, a statement covering a payroll period may be required to be submitted on the first (or second) day following the close of the payroll period. A statement submitted by an employee after the date specified by the employer for its submission nevertheless is a statement furnished pursuant to section 6053(a) and this section if it is submitted to the employer on or before the 10th day following the month in which the tips were received.

(2) *Termination of employment.* If an employee's employment terminates, the employee must furnish a tip statement to the employer when the employee ceases to perform services for the employer. A statement submitted by an employee after the date on which the employee ceases to perform services for the employer is a statement furnished pursuant to section 6053(a) and this section if the statement is submitted to the employer on or before the earlier of the day on which the final wage payment is made by the employer to the employee or the 10th day following the month in which the tips were received.

(d) *Requirements for electronic systems*—(1) *In general.* The electronic system must ensure that the information received is the information transmitted by the employee and must document all occasions of access that result in the transmission of a tip statement. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and transmitting the statement is the employee identified in the statement transmitted.

(2) *Same information as on paper statement.* The electronic tip statement must provide the employer with all the information required by paragraph (b)(1) of this section.

(3) *Signature.* The electronic tip statement must be signed by the employee. The electronic signature must identify the employee transmitting the electronic tip statement and must authenticate and verify the transmission. For this purpose, the terms *authenticate* and *verify* have the same meanings as they do when applied to a written signature on a paper tip statement. Any form of electronic signature that satisfies the foregoing requirements is permissible.

(4) *Copies of electronic tip statements.* Upon request by the Internal Revenue Service (IRS), the

employer must supply the IRS with a hard copy of the electronic tip statement and a statement that, to the best of the employer's knowledge, the electronic tip statement was filed by the named employee. The hard copy of the electronic tip statement must provide the information required by paragraph (b)(1) of this section, but need not be a facsimile of Form 4070 or any employer-designed form.

(5) *Record retention.* The record retention requirements applicable to automatic data processing systems also apply to electronic tip reporting systems.

(6) *Effective date.* The provisions pertaining to electronic systems and electronic tip reports are applicable as of December 13, 2000. However, employers may apply these provisions to earlier periods.

[T.D. 7001, 34 FR 1004, Jan. 23, 1969, as amended by T.D. 8910, 65 FR 77819, Dec. 13, 2000]

§ 31.6053-2 Employer statement of uncollected employee tax.

top

(a) *Requirement that statement be furnished.* If—

(1) The amount of the employee tax imposed by section 3101 in respect of tips reported by an employee to his employer pursuant to section 6053(a) (see §31.6053–1) exceeds

(2) The amount of employee tax imposed by section 3101 in respect of such tips which can be collected by the employer from wages (exclusive of tips) of such employee or from funds furnished to the employer by the employee,

the employer shall furnish to the employee a statement showing the amount of the excess. For provisions relating to the collection of, and liability for, employee tax on tips, see §31.3102–3.

(b) *Form of statement.* Form W-2 is the form prescribed for use in furnishing the statement required by paragraph (a) of this section, except that if an employer files a composite return pursuant to §31.6011(a)–8 he may furnish to the employee, in lieu of Form W-2, a statement containing the required information in a form suitable for retention by the employee. A statement is required under this section in respect of an excess referred to in paragraph (a) of this section, even though the employer may not be required to furnish a statement to the employee under §31.6051. Provisions applicable to the furnishing of a statement under §31.6051 shall be applicable to statements under this section.

(c) *Excess to be shown on statement.* If there is an excess in respect of the tips reported by an employee in two or more statements furnished pursuant to section 6053(a), only the total excess for the period covered by the employer statement shall be shown on such statement.

[T.D. 7001, 34 FR 1005, Jan. 23, 1969, as amended by T.D. 7351, 40 FR 17145, Apr. 17, 1975]

§ 31.6053-3 Reporting by certain large food or beverage establishments with respect to tips.

top

(a) *Information return by an employer with respect to tips*—(1) *In general.* An employer shall file a separate information return for each calendar year (as defined in paragraph (j)(14) of this section) with respect to each large food or beverage establishment (as defined in paragraph (j)(7) of this section) in which such employer has employees. The information return shall contain the following:

(i) The employer's name, address, and employer identification number;

(ii) The establishment's name, address, and identification number (see paragraph (a)(5) of this section);

(iii) The aggregate gross receipts (other than nonallocable receipts) of the establishment from the provision of food or beverages;

(iv) The aggregate amount of charge receipts (other than nonallocable receipts) on which there were charged tips;

(v) The aggregate amount of charged tips shown on such charge receipts;

(vi) The aggregate amount of tips actually received by food or beverage employees of the establishment during the calendar year and reported to the employer under section 6053(a) (see paragraph (j)(15) of this section);

(vii) The aggregate amount the employer is required to report under section 6051 and the regulations thereunder with respect to service charges of less than 10 percent.

(viii) The name and social security number of each employee of the establishment during the calendar year to whom an allocation was made under section 6053(c)(3) and paragraph (d) of this section and the amount of such allocation.

(2) *Calendar year 1983 information return.* In the case of the 1983 calendar year information return, the information required by paragraphs (a)(1)(iii) through (viii) of this section shall be reported for the period beginning with the first payroll period ending on or after April 1, 1983, and ending with the end of the 1983 calendar year. See paragraph (c) of this section relating to information required for the first quarter of 1983.

(3) *Prescribed form.* The return required by this paragraph shall be made on Form 8027 with the transmittal form being Form 8027T. The information required by paragraph (a)(1)(viii) of this section may be provided by attaching to Form 8027 photocopies of each employee's W-2 for whom an allocation was made. A copy of any written good faith agreements applicable to a given calendar year (see paragraph (e) of this section) shall be attached to Form 8027 for such calendar year.

(4) *Time and place for filing.* The information return required by this paragraph (a) shall be filed on or before the last day of February (March 31 if filed electronically) of the year following the calendar year for which the return is made with the Internal Revenue Service Center specified by the Form 8027 or its instructions. See section 6652(a) relating to the penalty for failure to file this information return.

(5) *Large food or beverage establishment identification number.* Each large food or beverage establishment shall have a unique identification number to be included on Form 8027 and any employer's application pursuant to paragraph (h) of this section. If an identification number is changed for any reason, for example if the establishment becomes a different “type” of establishment as described in paragraph (a)(5)(ii) of this section, or if the employer identification number changes, the employer shall notify the Service by including both the old and new identification numbers on the Form 8027 filed for the year in which the identification number was changed. An establishment identification number shall be determined as follows:

(i) The first nine digits shall be the employer's identification number (EIN).

(ii) The next digit shall identify the type of large food or beverage establishment, with the categories as follows:

(A) The number “1” signifies an establishment that serves evening meals only (with or without alcoholic beverages).

(B) The number “2” signifies an establishment that serves evening meals and other meals (with or without alcoholic beverages).

(C) The number “3” signifies an establishment that serves only meals other than evening meals (with or without alcoholic beverages).

(D) The number “4” signifies an establishment that serves food, if at all, as only an incidental part of the business of serving alcoholic beverages.

(iii) The last five digits are to differentiate between multiple establishments reporting under the same EIN number. For this purpose, the employer shall assign each establishment reporting under such employer's EIN number a unique five digit number. For example, each establishment could be assigned a unique number by beginning with “00001” and progressing in numerical sequence (*i.e.*,

"00002", "00003", "00004", "00005") until each establishment has been assigned a number.

(6) *Definitions.* See paragraph (j) of this section for definitions of various terms used in this section.

(b) *Employer statement to employees*—(1) *In general.* The employer shall furnish to each employee to whom an amount is allocated under section 6053(c)(3) and paragraph (d) of this section a written statement for each calendar year containing the following information:

(i) The employer's name and address;

(ii) The name of the employee;

(iii) The aggregate amount allocated to the employee for the calendar year.

(2) *Prescribed form.* The written statement required by this paragraph shall be made on Form W-2.

(3) *Time and manner for furnishing the statement.* The written statement required by this paragraph shall be due at the same time and shall be furnished in the same manner as the statement required to be furnished under section 6051. See section 6678 relating to the penalty for failure to file this statement.

(4) *Employee's request for an early W-2.* If an employee's employment is terminated prior to the end of a calendar year and the employee requests an early W-2 under section 6051 and §31.6051–1(d), a tip allocation under section 6053(c) is not required to be shown on such early W-2. However, the employer may include on such early W-2 the employee's actual tip allocation under section 6053(c), if known, or a good faith estimate of such allocation. A good faith estimate of an allocation shall be signified by placing the word "estimate" next to the allocation on the employee's copy of the early W-2. An amended W-2 must be furnished to each employee to whom an amount is allocated under section 6053(c), during January of the calendar year following the calendar year for which the statement is made, if there is no tip allocation on the early W-2 or if the estimated allocation is found to vary from the actual allocation by more than 5 percent of the amount of the actual allocation.

(5) *Employee reporting of tip income.* Regardless of whether an employee receives an allocation under section 6053(c) and §31.6053–3, the employee is required to report as income on his or her Federal income tax return all tips received. For tips received before October 1, 1985, an employee must be able to substantiate the amount of reported tip income as provided in section 6001 and the regulations thereunder, For tips received on or after October 1, 1985, an employee must be able to substantiate the amount of reported tip income as provided in §31.6053–4. The Internal Revenue Service may determine that a tipped employee received a larger amount of tip income than is reflected by the employee's allocation.

(c) *First quarter report of 1983*—(1) *In general.* For the period beginning with the first day of calendar year 1983, and ending on the last day of the last payroll period ending before April 1, 1983,

an employer must file an information return for each large food or beverage establishment that was a large food or beverage establishment on January 1, 1983, that contains the information required by paragraph (a)(1)(i)–(vii) of this section for such period.

(2) *Prescribed form.* The information return required by this paragraph shall be made on Form 8027. The returns for the first calendar quarter of 1983 and for calendar year 1983 may be incorporated onto a single Form 8027 but must separately set forth the required information for each of the two return periods.

(3) *Time and place for filing.* The time and place for filing the information return required by this paragraph shall be the same as for the calendar year 1983 information return. See paragraph (a)(4) of this section.

(d) *Allocation of excess of 8 percent of gross receipts over the aggregate amount of reported tips*—(1) *In general.* An employer that operates a large food or beverage establishment shall allocate (as tips for purposes of the requirements of section 6053(c) among tipped employees at such establishment performing services during any payroll period an amount equal to the excess of:

(i) Eight percent of the gross receipts (other than nonallocable receipts) of such establishment for the payroll period, over

(ii) The aggregate amount of tips reported by employees at such establishment to the employer under section 6053(a) for such period. For this purpose, if an employee reports under section 6053(a) on the basis of a period other than a payroll period such employee may specify what portion of his or her reported tips are attributable to a given payroll period when reporting tips to the employer under section 6053(a). In the absence of any specification by the employee, the employer shall allocate the amount of tips reported by an employee to a given payroll period either:

(A) By multiplying the aggregate amount of those reported tips by a fraction, the numerator of which is the gross receipts attributable to the tipped employee for the payroll period and the denominator of which is the gross receipts attributable to the employee for the entire tip reporting period; or

(B) By multiplying the aggregate amount of those reported tips by a fraction, the numerator of which is the hours worked by the employee during the payroll period and the denominator of which is the total hours worked by the employee during the entire tip reporting period.

With respect to each establishment, the employer shall choose the method described in either paragraph (d)(1)(ii)(A) or paragraph (d)(1)(ii)(B) of this section for a calendar year and apply such method consistently in making all allocations required by the preceding sentence. If an employee is employed in more than one of an employer's food or beverage operations, such employee may specify what portion of his or her reported tips are attributable to a given operation when reporting tips to the employer under section 6053(a). In the absence of any specification by the employee, the employer

shall allocate the amount of tips reported by the employee to a given food or beverage operation in a manner similar to that provided above for allocation of tips among payroll periods. The employer shall choose the method described in either paragraph (d)(1)(ii)(A) or paragraph (d)(1)(ii)(B) of this section for a calendar year and apply such method consistently in making all allocations required by the preceding sentence.

(2) *Employer not liable to employees for allocations.* An employer who makes allocations (as tips for purposes of the requirements of section 6053(c) and this section) among such employer's employees in accordance with paragraph (d) and either paragraph (e) or (f) of this section shall not be liable to any employee if any amount is improperly allocated. However, if an employee's total tip allocations for a calendar year as reported on Form W-2 varies from the correct allocation amount by more than 5 percent of the correct allocation amount, the employer shall adjust such employee's allocation. If such an adjustment of an employee's allocation is required, the employer shall also review all tips allocations made to other employees in the same establishment to assure that the error did not distort other allocated amounts by more than 5 percent. Any adjustments made for variances of more than 5 percent shall be reflected in amended W-2's issued to the affected employees. Tip allocations made under this section shall have no effect on the withholding responsibilities of the employer under subtitle C of the Code. Withholding on tips is authorized only with respect to amounts of tips reported to employers by employees under section 6053(a).

(e) *Allocation pursuant to a good faith agreement.* The amount determined under paragraph (d)(2) of this section for each payroll period must be allocated among tipped employees providing services during such payroll period either on the basis of a good faith agreement described in this paragraph, or, if there is no good faith agreement applicable with respect to the payroll period on the basis of the allocation method provided in paragraph (f) of this section. A good faith agreement is a written agreement consented to by the employer and at least two-thirds of the members of each occupational category of tipped employees (*e.g.*, waiters, busboys, maitre d's) employed in the large food or beverage establishment at the time the agreement is adopted which:

(1) Provides for the allocation of the amount described in paragraph (d)(1) among tipped employees in a manner that, in combination with the tips reported by such employees under section 6053(a), will reflect a good faith approximation of the actual distribution of tip income among such tipped employees;

(2) Is effective prospectively beginning with the first day of a payroll period that begins after the date of adoption, but in no event later than the first day of the succeeding calendar year. However, a good faith agreement may be effective for calendar year 1983 if adopted on or before December 31, 1983.

(3) Is adopted at a time when there are tipped employees employed by the employer in each occupational category of tipped employees (*e.g.*, waiters, busboys, maitre d's) which would be affected by the agreement; and

(4) May be revoked prospectively by a written instrumnent adopted by a least two-thirds of the tipped employees who are employed in the establishment in occupational categories affected by the agreement at the time of the revocation. A revocation of an agreement shall be effective only at the beginning of a payroll period.

(f) *Allocation method to be used in the absence of a good faith agreement.* (1) In a case in which there is no good faith agreement in effect and the aggregate amount of tips reported pursuant to section 6053 (a) with respect to a payroll period is less than 8 percent of the establishment's gross receipts for the payroll period, the employer shall allocate the difference as tips for purposes of section 6053(c) as provided in this paragraph. No allocations shall be made to indirectly tipped employees. An allocation shall be made to each directly tipped employee performing services for the establishment who has a reporting shortfall (as determined under paragraph (f)(1)(v) of this section) for the payroll period. The amount of each allocation shall be determined in the following manner:

(i) Multiply the amount of the establishment's gross receipts for the payroll period by 8 percent (0.08).

(ii) Determine the aggregate amount of tips reported for the payroll period by indirectly tipped employees.

(iii) Subtract from the amount determined under paragraph (f)(1)(i) the aggregate amount of tips reported by indirectly tipped employees as determined under paragraph (f)(1)(ii) of this section. The excess is the directly tipped employees' aggregate share of 8 percent of the gross receipts of the establishment for the payroll period.

(iv) For each directly tipped employee, multiply the amount determined under paragraph (f)(1)(iii) of this section by a fraction, the numerator of which is the amount of gross receipts of the establishment for the payroll period that is attributable to the employee and the denominator of which is the aggregate amount of gross receipts for the payroll period that is attributable to all directly tipped employees. The product is each directly tipped employee's share of 8 percent of the gross receipts of the establishment for the payroll period. The employer may determine the fraction described in the first sentence of this subparagraph by substituting for the numerator the number of hours worked by the directly tipped employee during the payroll period and by substituting for the denominator the number of hours worked by all directly tipped employees during the payroll period. For payroll periods beginning after December 31, 1986, the method of allocation described in the preceding sentence may be used only by an employer that employs less than the equivalent of 25 full-time employees (as defined in paragraph (j)(19) of this section) at the establishment during the payroll period.

(v) For each directly tipped employee, determine the excess, if any, of the amount determined under paragraph (f)(1)(iv) of this section over the amount reported as tips by the employee for the payroll period pursuant to section 6053(a). Such excess, if any, is the employee's shortfall for the payroll period.

(vi) Subtract from the amount determined under paragraph (f)(1)(i) of this section the aggregate amount of tips reported pursuant to section 6053(a) by all directly and indirectly tipped employees for the payroll period. The excess is the amount to be allocated as tips among directly tipped employees who had a shortfall for the payroll period as determined under paragraph (f)(1)(v) of this section.

(vii) For each directly tipped employee who had a shortfall for the payroll period, multiply the amount determined under paragraph (f)(1)(vi) of this section by a fraction, the numerator of which is the amount of such employee's shortfall (determined under paragraph (f)(1)(v) of this section and the denominator of which is the aggregate of all shortfalls for the payroll period for all directly tipped employees. The product is the employee's allocation for the payroll period.

(2) The provisions of this paragraph may be illustrated by the following examples:

Example 1. X is a large food or beverage establishment that has chosen to make tip allocations using its actual payroll period and gross receipts attributable to employees. X had gross receipts for a payroll period of $100,000 and tips reported for the payroll period of $6,200. Directly tipped employees reported $5,700 while indirectly tipped employees reported $500.

Directly tipped employees	Gross receipts for payroll period	Tips reported
A	18,000	1,080
B	16,000	880
C	23,000	1,810
D	17,000	800
E	12,000	450
F	14,000	680
Total	100,000	5,700

The allocation computations would be as follows:

(1) $100,000 (gross receipts)×0.08=$8,000.

(2) Tips reported by indirectly tipped employees=$500.

(3) $8,000−$500 (indirect employees tips)=$7,500.

(4)

	Directly tipped employees		Directly tipped share of 8 pct gross	Employee gross
x Gross receipts pct	= share of ratio	8 pct		
A.				
$7,500 ..	18,000/100,000 ..	1,350		
B.				
7,500 ..	16,000/100,000 ..	1,200		
C.				
7,500 ..	23,000/100,000 ..	1,725		
D.				
7,500 ..	17,000/100,000 ..	1,275		
E.				
7,500 ..	12,000/100,000 ..	900		
F.				
7,500 ..	14,000/100,000 ..	1,050		
Total.			....	7,500

(5)

Directly tipped employees	Employee share of 8 pct gross	-	Tips reported	=	Employee shortfall
A	$1,350	..	$1,080	..	$270
B	1,200	..	880	..	320
C	1,725	..	1,810	..	.....
D	1,275	..	800	..	475
E	900	..	450	..	450
F	1,050	..	680	..	370
Total shortfall	.....	..	.....	..	1,885

Since employee C has no reporting shortfall there is no allocation to C.

(6) $8,000−6,200 (total tips reported)=$1,800 (amount allocable among shortfall employees).

(7)

Shortfall employees	Allocable amount	x	Shortfall ratio	=	Amount of allocation
A	$1,800	..	270/1885	..	$258
B	1,800	..	320/1885	..	306
D	1,800	..	475/1885	..	454
E	1,800	..	450/1885	..	430
F	1,800	..	370/1885	..	353

Example 2. Assume the same facts as in example 1 except that the employer uses employee hours worked to calculate tip allocations.

Directly tipped employees	Hours worked in payroll period	Tips reported
A	40	$1,080
B	35	880
C	45	1,810
D	40	800
E	15	450
F	25	680
Total	200	$5,700

The allocation computations would be as follows:

(1) $100,000 (gross receipts)×0.08=$8,000

(2) Tips reported by indirectly tipped employees=$500

(3) $8,000−$500 (indirect employees tips)=$7,500

(4)

Directly tipped employees	Directly tipped share of 8 pct gross	x	Hours worked ratio	=	Employee share of 8 pct gross
A	$7,500	..	40/200	..	$1,500

B	7,500	..	35/200	..	1,313
C	7,500	..	45/200	..	1,688
D	7,500	..	40/200	..	1,500
E	7,500	..	15/200	..	563
F	7,500	..	25/200	..	938

(5)

Directly tipped employees	Employee share of 8 pct gross	-	Tips reported	=	Employee shortfall
A	$1,500	..	$1,080	..	$420
B	1,313	..	880	..	433
C	1,688	..	1,810	..	.....
D	1,500	..	800	..	700
E	563	..	450	..	113
F	938	..	680	..	258
Total shortfall	.....	..	.....	..	$1,924

Since employee C has no reporting shortfall there is no allocation to C.

(6) $8,000−6,200 (total tips reported)=$1,800 (amount allocable among shortfall employees).

(7)

Shortfall employees	Allocable amount	x	Shortfall ratio	=	Amount of allocation

A	$1,800	..	420/1,924	..	$393
B	1,800	..	433/1,924	..	405
D	1,800	..	700/1,924	..	655
E	1,800	..	113/1,924	..	106
F	1,800	..	258/1,924	..	241

Example 3. X is a large food or beverage establishment that has chosen to make tip allocations using a calendar year period. X had gross receipts for a calendar year of $2,000,000 and tips reported for the calendar year of $176,000. The amount to be allocated as tips is equal to the excess of 8 percent of the gross receipts of the establishment for the calendar year over the aggregate amount of tips reported by the employees of the establishment to the employer under section 6053(a) for the calendar year. Because the reported tips for the year ($176,000) are in excess of 8 percent of the gross receipts ($2,000,000× .08=$160,000), no tip allocations are made to the employees of this establishment for the calendar year.

Example 4. X is a large food or beverage establishment that has chosen to make tip allocations using a calendar year period and gross receipts attributable to employees. X had gross receipts for a calendar year of $1,500,000 and tips reported for the calendar year of $110,000. Directly tipped employees reported $94,000 while indirectly tipped employees reported $16,000.

Directly tipped employees	Gross receipts for calendar year	Tips reported
A	260,000	$18,600
B	240,000	14,600
C	380,000	31,200
D	260,000	13,000
E	160,000	6,000
F	200,000	10,600
Total	$1,500,000	$94,000

The allocation computations are as follows:

(1) $1,500,000 (gross receipts) ×0.08=$120,000.

(2) Tips reported by indirectly tipped employees=$16,000.

(3) $120,000−16,000 (indirect employees tips)=$104,000.

(4)

	Directly tipped employees		Directly tipped share of 8 pct. gross	Employee gross
X Gross receipts = share of				
pct.	ratio	8 pct.		
A.				
$104,000	260,000/1,500,000	$18,027		
B.				
104,000	240,000/1,500,000	16,640		
C.				
104,000	380,000/1,500,000	26,347		
D.				
104,000	260,000/1,500,000	18,027		
E.				
104,000	160,000/1,500,000	11,093		
F.				
104,000	200,000/1,500,000	13,867		

(5)

Directly tipped employees	Employee share of 8 pct. gross	-	Tips reported	=	Employee shortfall
A	18,027	..	18,600	..	.....
B	16,640	..	14,600	..	2,040
C	26,347	..	31,200	..	.....
D	18,027	..	13,000	..	5,027
E	11,093	..	6,000	..	5,093
F	13,867	..	10,600	..	3,267
Total shortfall	.....	..	.....	..	15,427

Since employees A and C do not have a reporting shortfall there are no allocations to them.

(6) $120,000−110,000 (total tips reported)=$10,000 (amount allocable among shortfall employees).

(7)

Shortfall amount	x	Amount of Shortfall employees ratio	=	Allocable allocation
B				
10,000	..	2,040/15,427	..	$1,322
D				
10,000	..	5,027/15,427	..	3,259
E				
10,000	..	5,093/15,427	..	3,301
F				
10,000	..	3,267/15,427	..	2,118
Total			..	$10,000

Example 5. Assume the same facts as in example 4 except that the employer has chosen the employee hours worked method of computing tip allocations, the calendar year gross receipts were $1,000,000, and the tips reported for the calendar year were $74,000. Directly tipped employees reported $70,000 while indirectly tipped employees reported $4,000.

Directly tipped employees	Hours worked in the calendar year	Tips reported
A	2,000	$11,800
B	1,750	9,800
C	2,250	15,100
D	2,000	9,000
E	750	4,500
F	1,250	7,800
G	490	3,200
H	510	2,800
I	200	800
J	1,000	5,200
Total	12,200	$70,000

The allocation computations would be as follows:

(1) $1,000,000 (gross receipts) × 0.08 = $80,000.

(2) Tips reported by indirectly tipped employees = $4,000.

(3) $80,000 − $4,000 (indirect employee tips) = $76,000.

(4)

Directly tipped employees	Directly tipped share of 8 pct. gross	x	Hours worked ratio	=	Employee share of 8 pct. gross
A	$76,000	..	2,000/12,200	..	$12,459
B	76,000	..	1,750/12,200	..	10,902
C	76,000	..	2,250/12,200	..	14,016
D	76,000	..	2,000/12,200	..	12,459
E	76,000	..	750/12,200	..	4,672
F	76,000	..	1,250/12,200	..	7,787
G	76,000	..	490/12,200	..	3,052
H	76,000	..	510/12,200	..	3,177
I	76,000	..	200/12,200	..	1,246
J	76,000	..	1,000/12,200	..	6,230
Total	.....	..	.....	..	$76,000

(5)

Employee

Directly tipped employees	share of 8 pct. gross	-	Tips reported	=	Employee shortfall
A	12,459	..	11,800	..	$659
B	10,902	..	9,800	..	1,102
C	14,016	..	15,100	..	.....
D	12,459	..	9,000	..	3,459
E	4,672	..	4,500	..	172
F	7,787	..	7,800	..	.....
G	3,052	..	3,200	..	.....
H	3,177	..	2,800	..	377
I	1,246	..	800	..	446
J	6,230	..	5,200	..	1,030
Total shortfall	.....	..	.....	..	$7,245

Since employees C, F, and G have no reporting shortfalls, there are no allocations made to them.

(6) $80,000−74,000 (total tips reported)=$6,000.

(7)

Shortfall employees	Allocable amount	x	Shortfall ratio	=	Amount of allocation
A	$6,000	..	659/7,245	..	$546
B	6,000	..	1,102/7,245	..	913
D	6,000	..	3,459/7,245	..	2,865
E	6,000	..	172/7,245	..	142
H	6,000	..	377/7,245	..	312
I	6,000	..	446/7,245	..	369
J	6,000	..	1,030/7,245	..	853

Total	.....	..	.....	..	$6,000

(g) *Period of allocation.* In applying paragraphs (d), (e), (f), and (h)(3) of this section an employer may substitute the calendar year or any period that results from a reasonable division of a calendar year for the term "payroll period" each place it appears in such paragraphs. If an employer makes such a substitution with respect to a large food or beverage establishment the substituted period shall be stated on Form 8027 for such large food or beverage establishment and shall be effective for such employer's large food or beverage establishment for the entire calendar year.

(h) *Lowering the percentage to be used*—(1) *In general.* On and after July 18, 1984, an employer or a majority of the employees (as defined in paragraph (h)(2)(iii) of this section) of an employer may petition the district director for the internal revenue district in which the employer's establishment is located to have the percentage of gross receipts that is used to determine the amount to be allocated under section 6053(c)(3)(A) and paragraph (d) of §31.6053–3 reduced from 8 percent to the percentage that the petitioning employer or employees believe to be the actual percentage of the amount of the establishment's gross receipts that reflects the amount of tips. The district director may thereafter reduce the percentage of gross receipts used to determine the amount to be so allocated to the percentage that the district director determines to be the proper estimate of the actual percentage of gross receipts constituting tips. The district director, however, may not reduce the percentage below 2 percent. For the rules in effect prior to July 18, 1984, see 26 CFR 31.6053–3(h) (Rev. as of April 1, 1984).

(2) *Time and manner for petition to have percentage reduced*—(i) *In general.* The petition shall be in writing and shall include sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment. For example, such information might include the charged tip rate, the type of establishment, menu prices, the location of the establishment, the amount of "self-service" required, the days and hours open for business, and whether the customer receives the check from or pays the server for the meal.

(ii) *Employer petitions.* In the case of employer-originated petitions, the employer has the burden of supplying sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment. The employer also shall attach to the petition copies of Form 8027 (if any) filed for the establishment for the 3 years preceding calendar years.

(iii) *Employee petitions.* (A) In the case of employee-originated petitions, a majority of the employees of an establishment must consent to the petition. A majority for purposes of this paragraph is more than one-half of all the directly tipped employees (within the meaning of paragraph (j)(12) of this section) employed by the establishment at the time the petition is filed. In the case of a single petition for certain multi-establishment employers (see paragraph (h)(4) of this section), more than one-half of

the aggregate directly tipped employees (at the time the petition is filed) of the establishments covered by the petition must consent. The petition filed with the district director must state the total number of directly tipped employees employed by the establishment (or establishments) and the number of the directly tipped employees consenting to the petition.

(B) The petitioning employees have the burden of supplying sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment to the extent they possess such information. If the employer possesses relevant information, the employer must provide such information to the district director upon the request of the petitioning employees or district director. Employees who file a petition under this paragraph must promptly notify their employer of the petition. Promptly upon receipt of such notification, their employer must submit to the district director copies of the Form 8027 (if any) filed for the establishment for the 3 immediately preceding calendar years. Any information supplied by the employer during the petitioning process constitutes return information (as defined in section 6103(b)(2)) which shall not be disclosed by the Internal Revenue Service (except as provided in section 6103) to any employees of the employer or to representatives of such employees.

(3) *Effective date for reduced percentage.* The district director shall determine the term for which the reduced percentage is to be effective. At the end of such term, the reduced percentage shall cease to apply unless previously extended by the district director for the district in which the large food or beverage establishment is located. In no event shall the reduced percentage be applied to payroll periods before the date the petition described in paragraph (h)(2) of this section is filed unless the establishment is a new business (as described in paragraph (i) of §31.6053–3). In the case of a new business or a petition for reduction filed prior to September 30, 1983, the district director may allow the approved reduced percentage to be applied retroactively to the first day of the calendar year of the petition. Until such time as the employer is notified in writing by the district director of approval of a reduction, the employer must continue to use 8 percent of gross receipts for purposes of complying with section 6053(c) and this section.

(4) *Single petition for certain multi-establishment employers.* An employer (including a single employer as defined in section 52 (a) or (b)) or a majority of the employees of such employer may use a single petition for two or more of the employer's establishments if such establishments are essentially the same type of business, the petitioning employer or employees have made a good faith determination that the tip rates at such establishments are essentially the same, and the establishments are located in the same internal revenue region. Single petitions shall include the names and locations of the establishments for which a reduction is requested and the information required by paragraph (h)(2) of this section for a typical establishment. A single petition for multi-establishments located within an internal revenue region shall be filed with the district director for the internal revenue district in which the greatest number of the establishments included in the petition are located. If there is an equal number of establishments located in two or more internal revenue districts the employer or employees petitioning may choose the district to which the petition is sent.

(i) *Application of reporting requirements to new businesses*—(1) *In general.* A food or beverage

operation is a new business if the employer of the operation did not operate any food or beverage operations during the preceding calendar year. An employer will not be considered to have operated a food or beverage operation during a calendar year if each food or beverage operation of the employer was operated for less than one calendar month during such year. In a calendar year in which a food or beverage operation is a new business, the determination of whether the operation is a large food or beverage establishment shall be made as provided in paragraph (i)(2) of this section and the employer shall comply with section 6053(c) and this section as provided in paragraph (i)(3) of this section.

(2) *Determination of status as a large food or beverage establishment.* A food or beverage operation shall be considered a large food or beverage establishment during the calendar year in which it is a new business if the average number of hours worked per business day by all employees of the employer at the new business during each of any two consecutive calendar months of the calendar year, computed in the manner provided in the second sentence of paragraph (j)(9) of this section, is greater than 80 hours.

(3) *New business compliance under section 6053(c).* A new business that is determined to be a large food or beverage establishment under paragraph (i)(2) of this section shall comply with section 6053 (c) and this section beginning with the first payroll period that begins after the first period of two consecutive calendar months described in paragraph (i)(2) of this section.

(j) *Definitions.* For purposes of section 6053(c) and this section:

(1) *Gross receipts.* Gross receipts shall include all receipts (other than nonallocable receipts), from the provision of food or beverages by a large food or beverage establishment from cash sales, charge receipts (including charged tips only to the extent the cash sales amount has been reduced due to the employer paying cash to tipped employees for charged tips due them), charges to a hotel room (excluding tips charged to a hotel room only to the extent that the employer's accounting procedures allow such tips to be segregated out and excluding charges that are otherwise included in charge receipts), and the retail value of complimentary food or beverages (as defined in paragraph (j)(16) of this section) served to customers. Gross receipts shall not include state or local taxes. In the case of a trade or business that does not charge separately for the provision of food or beverages (*i.e.*, a trade or business that provides other goods or services along with food or beverages for a combined price, such as a “package deal” for food and lodging), the employer shall make a good faith estimate of the gross receipts attributable to the provision of the food or beverages that reflects the cost to the employer of providing the food or beverages plus a reasonable profit factor.

(2) *Gross receipts attributable to a directly tipped employee.* Gross receipts attributable to a directly tipped employee are those gross receipts (as defined in paragraph (j)(1) of this section) from the provision of food or beverages to customers with respect to which the employee provided services. For example, if a directly tipped employee's name is on every check given to customers for whom the employee has provided services, the gross receipts attributable to such employee could be determined by aggregating the amounts of all checks bearing that employee's name (other than amounts from

nonallocable receipts).

(3) *Nonallocable receipts.* Nonallocable receipts are receipts which are attributable to carryout sales or to services with respect to which a service charge of 10 percent or more is added. Carryout sales are sales of food or beverages for consumption off the premises of the establishment. Room service is not a carryout sale. If an establishment's accounting system does not segregate receipts from carryout sales from the establishment's other receipts, receipts from carryout sales may be determined as an estimated percentage of total receipts. The applicable percentage shall be determined in good faith by the employer on the basis of generally accepted accounting practices, including but not limited to, surveys of carryout sales as a percentage of gross sales. An employer may rely upon estimates as to carryout sales which are established in good faith between the employer and state or local governments for purposes of state or local taxation.

(4) *Charge receipts.* Charge receipts shall include credit card charges and charges under any other credit arrangement (e.g., house charges, city ledger, and charge arrangements to country club members). Charges to a hotel room may be excluded from charge receipts if such exclusion is consistent with the employer's normal accounting practices and the employer applies such exclusion consistently for a given large food or beverage establishment. Otherwise, charges to a hotel room shall be included in charge receipts.

(5) *Charged tips.* A tip included on a charge receipt is a charged tip.

(6) *Food or beverage operation.* A “food or beverage operation” is any business activity which provides food or beverages for consumption on the premises (other than “fast food” operations). If an employer conducts activities that provide food or beverages at more than one location, the activity at each separate location shall be considered to be a separate food or beverage operation, Each activity conducted within a single building shall be considered to be conducted at a separate location if the customers of the activity, while being provided with food or beverages, occupy an area separate from that occupied by customers of other activities and the gross receipts of the activity are recorded separately from the gross receipts of other activities. For example, a gourmet restaurant, a coffee shop, and a cocktail lounge in a hotel would each be treated as a separate food or beverage operation if gross receipts from each activity are recorded separately. In addition, an employer may treat different activities conducted in the identical place at different times as separate food or beverage operations if the gross receipts of the activities at each time are recorded separately. For example, a restaurant may record the gross receipts from its cafeteria style lunch operation separately from the gross receipts of its full service food or beverage operations.

(7) *Large food or beverage establishment.* A food or beverage operation is a “large food or beverage establishment” if:

(i) The employer at the food or beverage operation normally employed more than 10 employees on a typical business day during the preceding calendar year, and

(ii) The tipping of food or beverage employees of the food or beverage operation is customary. Generally, tipping would not be considered customary for a cafeteria style operation (as defined in paragraph (j)(18) of this section) or for a food or beverage operation where at least 95 percent of its total sales are nonallocable receipts, within the meaning of paragraph (j)(3) of this section, by reason of the addition of a service charge of 10 percent or more. Total sales shall include only gross receipts (as defined in paragraph (j)(1) of this section) and nonallocable receipts (other than carryout receipts) from the provision of food or beverages. In the case of an operation such as a restaurant that is a cafeteria style operation at lunch and that has full service with tipping customary at dinner, the entire operation is generally a large food or beverage establishment if the employer meets the 10-employee test. However, if the gross receipts of the cafeteria style operation at lunch are recorded separately from the dinner operation gross receipts the employer may treat the dinner operation as a large food or beverage establishment and the lunch operation as a separate food or beverage operation that is not a large food or beverage establishment due to the fact that tipping is not considered customary for cafeteria style operations.

(8) *Employee.* The term “employee” has the same meaning as in section 3401(c) and §31.3401(c)–1.

(9) *More than 10 employees on a typical business day.* An employer shall be considered to have normally employed more than 10 employees on a typical business day during a calendar year if one-half of the sum of the average number of employee hours worked per business day during the calendar month in which the aggregate gross receipts from food or beverage operations were the greatest plus the average number of employee hours worked per business day during the calendar month in which the aggregate gross receipts from food or beverage operations were the least, is greater than 80 hours. The average number of employee hours worked per business day during a month shall be computed by dividing the total number of hours worked during the month by all employees of the employer who are employed in a food or beverage operation by the average of the number of days during the month that each food or beverage operation at which such employees worked was open for business. If an employer operates both a food or beverage operation and a nonfood or beverage operation, and one or more of his or her employees work for both operations, the employer may make a good faith estimate of the number of hours such employees worked for each operation in a given month. Similarly, in cases where one or more of an employer's employees work for more than one of such employer's food or beverage operations, a good faith estimate may be made of the number of hours such employees worked for each operation in a given month. For purposes of this subparagraph, employees who are employed in a food or beverage operation include all employees of the operation, not just food or beverage employees. The employees of an employer shall include all employees at all food or beverage operations who, along with the employees of such employer, would be treated as employees of a single employer under section 52 (a) or (b) (as in effect on September 3, 1982) and the regulations thereunder. For example, if an employer at a food or beverage operation is a member of a controlled group of corporations, then all employees of all corporations which are members of such controlled group of corporations shall be treated as employed by each such employer for purposes of this paragraph. However, an individual who owns 50 percent or more in value of the stock of a corporation operating an establishment shall not be treated as an employee of any establishment owned by the

corporation.

(10) *Food or beverage employee.* A "food or beverage employee" is an employee who provides services in connection with the provision of food or beverages. Such employees include, but are not limited to, waiters, waitresses, busboys, bartenders, persons in charge of seating (such as a hostess, maitre d' or dining room captain), wine stewards, cooks, and kitchen help. Examples of employees who are not food or beverage employees include, but are not limited to, coat check persons, bellhops, and doormen.

(11) *Tipped employee.* A "tipped employee" of a food or beverage operation is an employee who is a food or beverage employee that customarily receives tip income from employment at that operation. An employee who occasionally receives small amounts of tip income is not a tipped employee. Generally, an employee who receives less than $20 per month in tip income would not be considered as customarily receiving tip income.

(12) *Directly tipped employee.* A "directly tipped employee" is any tipped employee who receives tips directly from customers, including an employee who after receiving tips directly from customers turns all the tips over to a tip pool. Examples of directly tipped employees are waiters, waitresses, and bartenders.

(13) *Indirectly tipped employee.* An "indirectly tipped employee" is a tipped employee who does not normally receive tips directly from customers. Examples of indirectly tipped employees are busboys, service bartenders and cooks. An employee, such as a maitre d', who receives tips both directly from customers and indirectly through tip splitting or tip pooling shall be treated as a directly tipped employee.

(14) *Calendar year.* The term "calendar year" shall mean either the period from January 1 through December 31 or the period that begins with the first day of the first payroll period ending on or after January 1 and ends with the last day of the last payroll period ending in December of the same year. With respect to any establishment, the employer shall choose one of these two descriptions and apply it consistently.

(15) *Tips reported for a specified period.* Tips reported to an employer for a specified period under section 6053(a) are those tips actually received by an employee during such period without regard to the time when the tips are reported to the employer. Thus, if an employee reports to the employer in calendar year 1984 tips the employee actually received in calendar year 1983, the amount of tips actually received in calendar year 1983 must be included by the employer when making such information returns, statements and allocations required under section 6053(c) and this section for calendar year 1983.

(16) *Complimentary food or beverages.* Food or beverages served to customers without charge are complimentary if:

(i) Tipping for the provision of such food or beverages is customary at the establishment, and

(ii) Such food or beverages are provided in connection with an activity that is engaged in for profit and whose receipts would not be included in gross receipts as defined in paragraph (j)(1) of this section but for this subparagraph and are not nonallocable receipts which are attributable to services with respect to which a service charge of 10 percent or more is added.

For example, the retail values of complimentary hors d'oeuvres served at a bar or a complimentary dessert served to a regular patron of a restaurant would not be included in gross receipts because the receipts of the bar or restaurant would be included in gross receipts as defined in paragraph (j)(1) of this section. The retail value of a complimentary fruit basket placed in a hotel room generally would not be included in gross receipts because tipping for the provision of such items is not customary. The retail value of complimentary drinks served to customers in a gambling casino would be included in gross receipts because tipping for the provision of such items is customary, the gambling casino is an activity engaged in for profit, and the gambling receipts of the casino would not be included in gross receipts as defined in paragraph (j)(1) of this section except for this subparagraph.

(17) *Fast food operation.* An operation is a “fast food” operation only if its customers order, pick up, and pay for food or beverages at a counter, window, etc., and then carry the food or beverages to another location (either on or off the premises of such activities).

(18) *Cafeteria style operation.* The term “cafeteria style” operation means a food or beverage operation which is primarily self-service and in which the total cost of food or beverages selected by a customer is paid prior to the customer's being seated or is stated on a check provided to the customer prior to the customer's being seated and is paid by the customer to a cashier. Generally, operations are primarily self-service if food or beverages are ordered or selected by a customer at one location and carried by the customer from such location to the customer's seat. For example, cafeteria lines, buffets, and smorgasbords are primarily self-service. If, after a customer is seated, a food or beverage employee delivers items such as an item that required additional preparation after being selected by the customer, condiments, beverages, or refills at no additional cost to the customer, a food or beverage operation's status as primarily self-service would not be affected.

(19) *Less than the equivalent of 25 full-time employees.* For purposes of paragraph (f)(1)(iv) of this section, an employer shall be considered to employ less than the equivalent of 25 full-time employees at an establishment during a payroll period (as defined in section 3401(b) and the regulations thereunder) if the average number of employee hours worked per business day during a payroll period is less than 200 hours. The average number of employee hours worked per business day during a payroll period shall be computed by dividing the total number of hours worked during the period by all employees of the employer who are employed in a food or beverage operation by the average of the number of days during the period that each food or beverage operation at which such employees worked was open for business. If an employer operates both a food or beverage operation and a nonfood or beverage operation, and one or more of his employees work for both operations, the

employer may make a good faith estimate of the number of hours such employees worked for each operation in a given payroll period. Similarly, in cases where one or more of an employer's employees work for more than one of such employer's food or beverage operations, a good faith estimate may be made of the number of hours such employees worked for each operation in a given payroll period. If there is more than one payroll period for the establishment, the payroll period which is used for the greatest number of employees shall be the payroll period for purposes of this paragraph (j)(19). For purposes of this paragraph (j)(19), employees who are employed in a food or beverage operation include all employees of the operation, not just food or beverage employees. The employees of an employer shall include all employees at all food or beverage operations who, along with the employees of such employer, would be treated as employees of a single employer under section 52 (a) or (b) (as in effect on September 3, 1982) and the regulations thereunder. For example, if an employer at a food or beverage operation is a member of a controlled group of corporations, then all employees of all corporations which are members of such controlled group of corporations shall be treated as employed by each such employer for purposes of this paragraph.

(k) *Permission to submit information on magnetic tape.* For rules relating to permission to submit the information required by section 6053(c) and this section on magnetic tape of other media, see §31.6011 (a)–8.

(l) *Recordkeeping requirements.* An employer shall keep records sufficient to substantiate any information returns, employer statements to employees, applications, or tip allocations made pursuant to section 6053(c) and this section. The records required by this paragraph shall be retained for 3 years after the due date of the return or statement to which they pertain.

(m) *Food or beverage operations outside the United States.* Employers at food or beverage operations outside the United States (as defined in section 7701(a)(9)) are not subject to the reporting requirements under section 6053(c) and this section.

(n) *Effective date.* This section is effective for calendar year 1983 and thereafter.

(96 Stat. 603, 26 U.S.C. 6053(c); 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7906, 48 FR 36809, Aug. 15, 1983; 48 FR 40518, Sept. 8, 1983, as amended by T.D. 8039, 50 FR 29965, July 23, 1985; T.D. 8141, 52 FR 21511, June 8, 1987; T.D. 8895, 65 FR 50408, Aug. 18, 2000]

§ 31.6053-4 Substantiation requirements for tipped employees.

top

(a) *Substantiation of tip income*—(1) *In general.* An employee shall maintain sufficient evidence to establish the amount of tip income received by the employee during a taxable year. A daily record

maintained by the employee (as described in paragraph (a)(2) of this section) shall constitute sufficient evidence. If the employee does not maintain a daily record, other evidence of the amount of tip income received during the year, such as documentary evidence (as described in paragraph (a)(3) of this section), shall constitute sufficient evidence, but only if such other evidence is as credible and as reliable as a daily record. The Commissioner may by revenue ruling, procedure or other guidance of general applicability provide for other methods of demonstrating evidence of tip income. However, notwithstanding any other provision of this paragraph (a) (1), a daily record or other evidence that is as credible and as reliable as a daily record may not be sufficient evidence if there are facts or circumstances which indicate that the employee received a larger amount of tip income. Moreover, oral statements of the employee, without corroboration, cannot constitute sufficient evidence.

(2) *Daily record.* The daily record shall state the employee's name and address, the employer's name, and the establishment's name. The daily record shall show for each work day the amount of cash tips and charge tips received directly from customers or from other employees, and the amount of tips, if any, paid out to other employees through tip sharing, tip pooling or other arrangements and the names of such employees. The record shall also show the date that each entry is made. Form 4070A, *Employee's Daily Record of Tips,* may be used to maintain such daily record. In addition, an electronic system maintained by the employer that collects substantially similar information as Form 4070A may be used to maintain such daily record, provided the employee receives and maintains a paper copy of the daily record. The daily record of tips received by an employee shall be prepared and maintained in such manner that each entry is made on or near the date the tip income is received. A daily record made on or near the date the tip income is received has a high degree of credibility not present with respect to a record prepared subsequent thereto when generally there is a lack of accurate recall. An entry is made “near the date the tip income is received” if the required information with respect to tips received and paid out by the employee for the day is recorded at a time when the employee has full present knowledge of those receipts and payments.

(3) *Documentary evidence.* Documentary evidence consists of copies of any documents that contain (i) amounts that were added to a check by customers as a tip and paid over to the employee or (ii) amounts that were paid by a customer for food or beverages with respect to which tips generally would be received by the employee. Examples of documentary evidence are copies of restaurant bills, credit card charges, or charges under any other arrangement (see §31.6053–3(j)(4)) containing amounts added by the customer as a tip.

(b) *Retention of records.* Records maintained under this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

(c) *Effective date.* The substantiation requirements of this §31.6053–4 shall be effective for tips received on or after October 1, 1985. For the rules in effect prior to October 1, 1985, see section 6001 and the regulations thereunder. Substantiation considered sufficient as provided in this §31.6053–4 will also be considered sufficient for tips received before October 1, 1985.

[T.D. 8141, 52 FR 21513, June 8, 1987, as amended by T.D. 8910, 65 FR 77820, Dec. 13, 2000]

§ 31.6061-1 Signing of returns.

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Each return required under the regulations in this subpart shall, if signature is called for by the form or instructions relating to the return, be signed by (a) the individual, if the person required to make the return is an individual; (b) the president, vice president, or other principal officer, if the person required to make the return is a corporation; (c) a responsible and duly authorized member or officer having knowledge of its affairs, if the person required to make the return is a partnership or other unincorporated organization; or (d) the fiduciary, if the person required to make the return is a trust or estate. The return may be signed for the taxpayer by an agent who is duly authorized in accordance with §31.6011(a)–7 to make such return.

§ 31.6065(a)-1 Verification of returns or other documents.

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If a return, statement, or other document made under the regulations in this part is required by the regulations contained in this part, or the form and instructions issued with respect to such return, statement, or other document, to contain or be verified by a written declaration that it is made under the penalties of perjury, such return, statement, or other document shall be so verified by the person signing it.

§ 31.6071(a)-1 Time for filing returns and other documents.

top

(a) *Federal Insurance Contributions Act and income tax withheld from wages and from nonpayroll payments*—(1) *Quarterly or annual returns.* Except as provided in subparagraph (4) of this paragraph, each return required to be made under §§31.6011(a)–1 and 31.6011(a)–1T, in respect of the taxes imposed by the Federal Insurance Contributions Act (26 U.S.C. 3101–3128), or required to be made under §§31.6011(a)–4 and 31.6011(a)–4T, in respect of income tax withheld, shall be filed on or before the last day of the first calendar month following the period for which it is made. However, a return may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations thereunder have been made in full payment of such taxes due for the period. For the purpose of the preceding sentence, a deposit which is not required by such regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of any deposit will be determined by the earliest date stamped on the applicable deposit form by an

authorized financial institution.

(2) *Monthly tax returns.* Each return in respect of the taxes imposed by the Federal Insurance Contributions Act or of income tax withheld which is required to be made under paragraph (a) of §31.6011(a)–5 shall be filed on or before the fifteenth day of the first calendar month following the period for which it is made.

(3) *Information returns*—(i) *General rule.* Each information return in respect of wages as defined in the Federal Insurance Contributions Act or of income tax withheld from wages which is required to be made under §31.6051–2 shall be filed on or before the last day of February (March 31 if filed electronically) of the year following the calendar year for which it is made, except that, if a tax return under §31.6011(a)–5(a) is filed as a final return for a period ending prior to December 31, the information statement shall be filed on or before the last day of the second calendar month following the period for which the tax return is filed.

(ii) *Expedited filing*—(A) *General rule.* If an employer who is required to make a return pursuant to §31.6011(a)–1 or §31.6011(a)–4 is required to make a final return on Form 941, or a variation thereof, under §31.6011(a)–6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages), the return which is required to be made under §31.6051–2 must be filed on or before the last day of the second calendar month following the period for which the final return is filed. The requirements set forth in this paragraph (a)(3)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See §31.6011(a)–1(a)(3).

(B) *Effective date.* This paragraph (a)(3)(ii) is effective January 1, 1997.

(4) *Employee returns under Federal Insurance Contributions Act.* A return of employee tax under section 3101 required under paragraph (d) of §31.6011(a)–1 to be made by an individual for a calendar year on Form 1040 shall be filed on or before the due date of such individual's return of income (see §1.6012–1 of this chapter (Income Tax Regulations)) for the calendar year, or, if the individual makes his return of income on a fiscal year basis, on or before the due date of his return of income for the fiscal year beginning in the calendar year for which a return of employee tax is required. A return of employee tax under section 3101 required under paragraph (d) of §31.601(a)–1 to be made for a calendar year—

(i) On Form 1040SS or Form 1040PR, or

(ii) On Form 1040 by an individual who is not required to make a return of income for the calendar year or for a fiscal year beginning in such calendar year,

shall be filed on or before the 15th day of the fourth month following the close of the calendar year.

(b) *Railroad Retirement Tax Act.* Each return of the taxes imposed by the Railroad Retirement Tax Act required to be made under §31.6011(a)–2 shall be filed on or before the last day of the second calendar month following the period for which it is made.

(c) *Federal Unemployment Tax Act.* Each return of the tax imposed by the Federal Unemployment Tax Act required to be made under §31.6011(a)–3 shall be filed on or before the last day of the first calendar month following the period for which it is made. However, a return for a period which ends after December 31, 1970, may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations thereunder have been made in full payment of such tax due for the period. For the purpose of the preceding sentence, a deposit which is not required by such regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of any deposit will be determined by the date the deposit is received (or is deemed received under section 7502(e)) by an authorized financial institution whichever is earlier.

(d) *Last day for filing.* For provisions relating to the time for filing a return when the prescribed due date falls on Saturday, Sunday, or a legal holiday, see the provisions of §301.7503–1 of this chapter (Regulations on Procedure and Administration).

(e) *Late filing.* For additions to the tax in case of failure to file a return within the prescribed time, see the provisions of §301.6651–1 of this chapter (Regulations on Procedure and Administration).

(f) *Cross reference.* For extensions of time for filing returns and other documents, see §31.6081(a)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6941, 32 FR 18041, Dec. 16, 1967; T. D. 7001, 34 FR 1005, Jan. 23, 1969; T.D. 7078, 35 FR 18525, Dec. 5, 1970; T.D. 7351, 40 FR 17146, Apr. 17, 1975; T.D. 7953, 49 FR 19644, May 9, 1984; T.D. 8504, 58 FR 68035, Dec. 23, 1993; T.D. 8895, 65 FR 50408, Aug. 18, 2000; T.D. 8952, 66 FR 33832, June 26, 2001; T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6071(a)-1A Time for filing returns with respect to the railroad unemployment repayment tax.

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(a) *In general.* Each return of the taxes imposed under section 3321 (a) and (b) required to be made under §31.6011(a)–3A shall be filed on or before the last day of the second calendar month following the period for which it is made.

(b) *Last day for filing.* For provisions relating to the time for filing a return when the prescribed due date falls on Saturday, Sunday, or a legal holiday, see the provisions of §301.7503–1 of this chapter (Regulations on Procedure and Administration).

(c) *Late filing.* For additions to the tax in the case of failure to file a return within the prescribed time, see the provisions of §301.6651–1 of this chapter (Regulations on Procedure and Administration).

[T.D. 8105, 51 FR 40169, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§ 31.6081(a)-1 Extensions of time for filing returns and other documents.

 top

(a) *Federal Insurance Contributions Act; income tax withheld from wages; and Railroad Retirement Tax Act*—(1) *In general.* Except as otherwise provided in subparagraphs (2) and (3) of this paragraph, no extension of time for filing any return or other document required in respect of the Federal Insurance Contributions Act, income tax withheld from wages, or the Railroad Retirment Tax Act will be granted.

(2) *Information returns of employers on Forms W-2 and W-3—In general.* The Commissioner may grant an extension of time in which to file the Social Security Administration copy of Forms W-2 and the accompanying transmittal form which constitutes an information return under §31.6051–2(a). For further guidance regarding extensions of time to file the Social Security Administration copy of Forms W-2 and W-3, see §1.6081–8 of this chapter.

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to file Forms W-2 where the employer is required to file the Form W-2 on an expedited basis.

(b) *Federal Unemployment Tax Act.* The Commissioner may, upon application of the employer, grant a reasonable extension of time (not to exceed 90 days) in which to file any return required in respect of the Federal Unemployment Tax Act. Any application for an extension of time for filing the return shall be in writing, properly signed by the employer or his duly authorized agent. Except as provided in paragraph (b) of §301.6091–1 (relating to hand-carried documents), each application shall be addressed to the internal revenue officer with whom the employer will file the return. Each application shall contain a full recital of the reasons for requesting the extension, to aid such officer in determining the period of the extension, if any, which will be granted. Such a request in the form of a letter to such internal revenue officer will suffice as an application. The application shall be filed on or before the due date prescribed in paragraph (c) of §31.6071(a)–1 for filing the return, or on or before the date prescribed for filing the return in any prior extension granted. An extension of time for filing a return does not operate to extend the time for payment of the tax or any part thereof.

(c) *Duly authorized agent.* In any case in which an employer is unable, by reason of illness, absence, or other good cause, to sign a request for an extension, any person standing in close personal or business relationship to the employer may sign the request on his behalf, and shall be considered as a

duly authorized agent for this purpose, provided the requests sets forth the reasons for a signature other than the employer's and the relationship existing between the employer and the signer.

(d) *Effective date.* Paragraph (a)(2)(i) of this section applies to requests for extensions of time to file the Social Security Administration copy of Forms W-2 and W-3 due after December 7, 2004.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6950, 33 FR 5358, Apr. 4, 1968; T.D. 7351, 40 FR 17146, Apr. 17, 1975; T.D. 9061, 68 FR 34799, June 11, 2003; T.D. 9163, 69 FR 70549 and 70550, Dec. 7, 2004]

§ 31.6091-1 Place for filing returns.

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(a) *Persons other than corporations.* Except as provided in paragraph (c) of this section, the return of a person other than a corporation shall be filed with any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves the principal place of business or legal residence of such person. If such person has no principal place of business or legal residence in any internal revenue district, the return shall be filed with the District Director at Baltimore, Maryland, except as provided in paragraph (c) of this section.

(b) *Corporations.* The return of a corporation shall be filed with any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves the principal place of business or principal office or agency of the corporation, except as provided in paragraph (c) of this section.

(c) *Returns of taxpayers outside the United States.* The return of a person (other than a corporation) outside the United States having no legal residence or principal place of business in the United States, or the return of a corporation having no principal place of business or principal office or agency in the United States, shall be filed with the Internal Revenue Service, Philadelphia, Pennsylvania 19255, or as otherwise directed in the applicable forms and instructions.

(d) *Returns filed with internal revenue service centers or Social Security Administration office.* Notwithstanding paragraphs (a), (b), and (c) of this section, whenever instructions applicable to such returns provide that the returns shall be filed with an internal revenue service center or an office of the Social Security Administration, such returns shall be so filed in accordance with such instructions.

(e) *Hand-carried returns.* Except as provided in subparagraph (3) of this paragraph, and notwithstanding paragraphs (1) and (2) of section 6091(b) and paragraph (d) of this section—

(1) *Persons other than corporations.* Returns of persons other than corporations which are filed by hand carrying shall be filed with any person assigned the responsibility to receive hand-carried returns

in the local Internal Revenue Service office as provided in paragraph (a) of this section.

(2) *Corporations.* Returns of corporations which are filed by hand carrying shall be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office as provided in paragraph (b) of this section.

(3) *Exceptions.* This paragraph shall not apply to returns of—

(i) Persons who have no legal residence, no principal place of business, nor principal office or agency served by a local Internal Revenue Service office,

(ii) Citizens of the United States whose principal place of abode for the period with respect to which the return is filed is outside the United States,

(iii) Persons who claim the benefits of section 911 (relating to earned income from sources without the United States), section 922 (relating to special deduction for Western Hemisphere trade corporations), section 931 (relating to income from sources within possessions of the United States), section 933 (relating to income from sources within Puerto Rico), or section 941 (relating to the special deduction for China Trade Act corporations), and

(iv) Nonresident alien persons and foreign corporations.

(f) *Permission to file in office other than required office.* The Commissioner may permit the filing of any return required to be made under the regulations in this subpart in any local Internal Revenue Service office, notwithstanding the provisions of paragraphs (1), (2), and (4) of section 6091(b) and paragraphs (a), (b), (c), (d), and (e) of this section.

(g) *Returns of officers and employees of the Internal Revenue Service.* The Commissioner may require any officer or employee of the Internal Revenue Service to file any return required of him under the regulations in this subpart in any local Internal Revenue Service office selected by the Commissioner, notwithstanding the provisions of paragraphs (1), (2), and (4) of section 6091(b) and paragraphs (a), (b), (c), (d), and (e) of this section.

(68A Stat. 747, 26 U.S.C. 6051; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6915, 32 FR 5261, Mar. 29, 1967; T.D. 7495, 42 FR 33727, July 1, 1977; T.D. 7580, 43 FR 60160, Dec. 26, 1978; T.D. 9156, 69 FR 55745, Sept. 16, 2004]

§ 31.6101-1 Period covered by returns.

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The period covered by any return required under the regulations in this subpart shall be as provided in those provisions of the regulations under which the return is required to be made. See §31.6011(a)–1, relating to returns of taxes under the Federal Insurance Contributions Act; §31.6011(a)–2, relating to returns of taxes under the Railroad Retirement Tax Act; §31.6011(a)–3, relating to returns of tax under the Federal Unemployment Tax Act; §31.6011(a)–4, relating to returns of income tax withheld under section 3402; and §31.6011 (a)–5, relating to monthly returns of taxes under the Federal Insurance Contributions Act and of income tax withheld under section 3402.

§ 31.6109-1 Supplying of identifying numbers.

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(a) *In general.* The returns, statements, and other documents required to be filed under this subchapter shall reflect such identifying numbers as are required by each return, statement, or document and its related instructions. See §301.6109–1 of this chapter (Regulations on Procedure and Administration).

(b) *Effective date.* The provisions of this section are effective for information which must be furnished after April 15, 1974. See 26 CFR §31.6109–1 (revised as of April 1, 1973) for provisions with respect to information which must be furnished before April 16, 1974.

[39 FR 9946, Mar. 15, 1974]

§ 31.6151-1 Time for paying tax.

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(a) *In general.* The tax required to be reported on each tax return required under this subpart is due and payable to the internal revenue officer with whom the return is filed at the time prescribed in §31.6071 (a)–1 for filing such return. See the applicable sections in Part 301 of this chapter (Regulations on Procedure and Administration), for provisions relating to interest on underpayments, additions to tax, and penalties.

(b) *Cross references.* For provisions relating to the use of authorized financial institutions in depositing the taxes, see §§31.6302(c)–1, 31.6302(c)–2, and 31.6302(c)–3. For rules relating to the payment of taxes in nonconvertible foreign currency, see §301.6316–7 of this chapter (Regulations on Procedure and Administration).

[T.D. 6872, 31 FR 149, Jan. 6, 1966; T.D. 6915, 32 FR 5261, Mar. 29, 1967; T.D. 7037, 35 FR 6709, Apr. 28, 1970; T.D. 7953, 49 FR 19644, May 9, 1984; T.D. 8952, 66 FR 33832, June 26, 2001]

§ 31.6157-1 Cross reference.

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For provisions relating to the time and manner of depositing the tax imposed by section 3301, see the provisions of §31.6302(c)–3. For provisions relating to the time and manner of depositing the railroad unemployment repayment tax imposed by section 3321(a), see §31.6302(c)–2A.

[T.D. 7037, 35 FR 6709, Apr. 28, 1970, as amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§ 31.6161(a)(1)-1 Extensions of time for paying tax.

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No extension of time will be granted for payment of any of the taxes to which the regulations in this part have application.

§ 31.6205-1 Adjustments of underpayments.

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(a) *In general.* (1) An employer who makes, or has made, an undercollection or underpayment of—

(i) Employee tax under section 3101, employer tax under section 3111, or the employee or employer tax under corresponding provisions of prior law,

(ii) Employee tax under section 3201, employer tax under section 3221, or the employee or employer tax under corresponding provisions of prior law, or

(iii) Income tax required under section 3402 to be withheld,

with respect to any payment of wages or compensation, shall correct such error as provided in this section. Such correction shall constitute an adjustment without interest to the extent provided in paragraph (b) or (c) of this section.

(2) Every correction under this section of an underpayment of tax with respect to a payment of wages or compensation shall be made on the return form which is prescribed for use, at the time the correction is made, in reporting tax which corresponds to the tax underpaid.

(3) Every return or supplemental return on which an underpayment is corrected pursuant to this

section must have securely attached as a part thereof a statement explaining the correction, designating the return period in which the error was ascertained and the return period to which the error relates, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return.

(4) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(5) If a correction is made under this section with respect to the erroneous reporting on a return, or omission from a return, under the Federal Insurance Contributions Act, as in effect prior to or on and after January 1, 1955, of an amount of wages required to be shown on the return as a separate item in respect of a particular employee, the statement referred to in paragraph (a)(3) of this section shall include the following information:

(i) The name and account number of each employee whose wages were erroneously reported or omitted from such return,

(ii) The period for which such wages were required to be reported on such return,

(iii) The amount, if any, of wages actually reported on such return for each such employee, and

(iv) The amount of wages which should have been reported on such return for each such employee.

No particular form is prescribed for furnishing the information required by this subparagraph, but if printed forms are desired, the district director will supply Form 941c or Form 941c PR, whichever is appropriate, upon request.

(6) No underpayment shall be reported pursuant to this section after the earlier of the following—

(i) Receipt from the Director of notice and demand for payment thereof based upon an assessment; or

(ii) Receipt from the Director of a Notice of Determination Concerning Worker Classification Under Section 7436 (Notice of Determination). (Prior to receipt of a Notice of Determination, the taxpayer may, in lieu of making a payment, make a cash bond deposit which would have the effect of stopping the accrual of any interest, but would not deprive the taxpayer of its right to receive a Notice of Determination and to petition the Tax Court under section 7436).

(7) For provisions relating to correction of erroneous statements furnished to employees in respect of wages subject to withholding of income tax under section 3402, and of wages under the Federal Insurance Contributions Act, see paragraph (c) of §31.6051–1.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act*—(1) *Undercollection*

ascertained before return is filed. If no employee tax or less than the correct amount of employee tax is deducted from any payment to an employee of wages, as defined in the Federal Insurance Contributions Act, or compensation as defined in the Railroad Retirement Tax Act, and the error is ascertained before the filing of the return on which the employee tax with respect to such wages or compensation is required to be reported, the employer shall nevertheless report on such return and pay to the district director the correct amount of such employee tax. However, the reporting and payment by the employer of the correct amount of such tax in accordance with this subparagraph do not constitute an adjustment.

(2) *Underpayment ascertained after return is filed.* (i) If a return is filed, and if no employee tax, no employer tax, or less than the correct amount of either such tax with respect to any payment to an employee of wages as defined in the Federal Insurance Contributions Act or corresponding provisions of prior law, or compensation as defined in the Railroad Retirement Tax Act or corresponding provisions of prior law, is reported on such return and paid to the district director, the employer shall adjust the underpayment (*a*) by reporting the additional amount due by reason of the underpayment as an adjustment on a return filed on or before the last day on which the return is required to be filed for the return period in which the error is ascertained, or (*b*) by reporting such additional amount on a supplemental return for the return period in which such payment of wages or compensation is made. The reporting of such underpayment on a supplemental return constitutes an adjustment within the meaning of this section only when the supplemental return is filed on or before the last day on which the return is required to be filed for the return period in which the error is ascertained. The amount of each underpayment adjusted in accordance with this subdivision shall be paid to the district director, without interest, at the time fixed for reporting the adjustment. If an adjustment is reported pursuant to this subdivision, but the amount thereof is not paid when due, interest thereafter accrues (see section 6601).

(ii) If a return is filed, and if no employee tax, no employer tax, or less than the correct amount of either such tax with respect to a payment to an employee of wages or compensation is reported on such return and paid to the district director, and such underpayment is not reported as an adjustment within the time prescribed by subdivision (i) of this subparagraph, the amount of such underpayment shall be (*a*) reported on the employer's next return, or (*b*) reported immediately on a supplemental return. For interest accruing on amounts so reported, see section 6601 and corresponding provisions of prior law.

(iii) If a return relating to tax under the Federal Insurance Contributions Act is filed although a return relating to tax under the Railroad Retirement Tax Act was required to be filed, or vice versa, and if the amount reported on the return filed and paid to the district director was less than the correct amount which should have been reported on the return required to be filed, the employer shall adjust the underpayment by reporting the additional amount due on an original return for the correct tax for the return period in which the payment of wages or compensation was made, accompanied by an explanation of the adjustment being reported. The reporting of such additional amount on an original return constitutes an adjustment within the meaning of this section only when the original return is filed on or before the last day on which the return for the correct tax is required to be filed for the

return period in which the error is ascertained. The amount of each underpayment adjusted in accordance with this subdivision shall be paid to the district director, without interest, at the time fixed for reporting the adjustment. If an adjustment is reported pursuant to this subdivision, but the amount thereof is not paid when due, interest thereafter accrues (see section 6601).

(3) *Deductions from employees.* If an employer collects no employee tax or less than the correct amount of employee tax from an employee with respect to a payment of wages as defined in the Federal Insurance Contributions Act or corresponding provisions of prior law, or compensation as defined in the Railroad Retirement Tax Act or corresponding provisions of prior law, the employer shall collect the amount of the undercollection by deducting such amount from remuneration of the employee, if any, under his control after he ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The amount of an undercollection of employee tax from an employee shall be reported and paid, as provided in paragraph (b)(1) or (2) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in the foregoing provisions of this subparagraph. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If any employer makes an erroneous collection of employee tax from two or more of his employees, a separate settlement must be made with respect to each employee. Thus, an overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee.

(c) *Income tax required to be withheld from wages*—(1) *Undercollection ascertained before return is filed.* If no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages is deducted from wages paid to an employee in any return period, and if the error is ascertained before the return is filed for the period in which such wages are paid, the employer shall nevertheless report on such return the correct amount of the tax required to be withheld. However, the reporting and payment by an employer of tax in accordance with this subparagraph do not constitute an adjustment.

(2) *Underpayment ascertained after return is filed.* (i) If a return is filed for a return period, and if no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages paid to an employee in such period, is reported on a return and paid to the district director, the employer shall (*a*) report the additional amount due by reason of the underpayment on a return for any return period in the calendar year in which the wages were paid, or (*b*) report such additional amount on a supplemental return for the return period in which such wages were paid. Such reporting constitutes an adjustment within the meaning of this section only if the return or supplemental return on which the underpayment is reported is filed on or before the last day on which the return is required to be filed for the return period in which the error was ascertained.

(ii) If a return is filed for a return period, and if no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages paid to an employee in such period is reported on such return and paid to the district director, and such underpayment is not

reported as an adjustment within the time prescribed by paragraph (c)(2)(i) of this section, the amount of such underpayment shall be (*a*) reported on the employer's next return, if such next return is for any return period in the calendar year in which the wages were paid, or (*b*) reported immediately on a supplemental return.

(3) *Payment of amounts reported as undercollections or underpayments.* (i) For provisions relating to the employer's liability for an underpayment of tax unless he can show that the income tax against which the tax under section 3402 may be credited has been paid, see §31.3402(d)–1.

(ii) Except as provided in §31.3402 (d)–1, any amount reported as an adjustment within the meaning of this paragraph shall be paid to the district director, without interest, at the time fixed for reporting the adjustment.

(iii) For interest accruing on amounts which are not paid when due, see section 6601.

(4) *Deductions from employee.* If no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages is deducted from wages paid to an employee in a calendar year, the employer shall collect the amount of the undercollection on or before the last day of such year by deducting such amount from remuneration of the employee, if any, under his control. Such deductions may be made even though the remuneration, for any reason, does not constitute wages. Any undercollection in a calendar year not corrected by a deduction made pursuant to the foregoing provisions of this subparagraph is a matter for settlement between the employee and the employer within such calendar year. For provisions relating to the employer's liability for the tax, whether or not he collects it from the employee, see §31.3403–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7783, 46 FR 37890, July 23, 1981; T.D. 8959, 66 FR 39640, Aug. 1, 2001]

§ 31.6205-2 Adjustments of underpayments of hospital insurance taxes that accrue after March 31, 1986, and before January 1, 1987, with respect to wages of State and local government employees.

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(a) *Adjustments without interest.* A State or local government employer who makes, or has made, an undercollection or underpayment of the hospital insurance taxes imposed by sections 3101(b) and 3111 (b) that—

(1) Are required to be paid by reason of section 3121(u)(2), and

(2) Are required to be reported on returns due July 31, 1986, October 31, 1986, or February 2, 1987.

may make an adjustment without interest with respect to such taxes provided that all such taxes for the

time period specified in paragraph (a)(2) (except for amounts that are subsequently paid pursuant to an interest-free adjustment under §31.6205–1) are paid on or before February 2, 1987.

(b) *Example.* The application of the provisions of this section are illustrated by the following example:

Example. A State or local government employer should have withheld and paid $100 dollars in hospital insurance taxes for the quarter beginning April 1, 1986, and ending June 30, 1986. The due date for the return and payment for that period is July 31, 1986. If the employer made the payment by February 2, 1987, then, under section 6601, interest is not assessable with respect to the underpayment of the hospital insurance taxes. If the employer did not make the payment by February 2, 1987, the interest is assessable for the period from July 31, 1986, until the time of payment.

[T.D. 8156, 52 FR 33582, Sept. 4, 1987]

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(c)(5) Exception to the monthly and semi-weekly deposit rules for employers in the Employers' Annual Federal Tax Program (Form 944).

(c)(6) Extension of time to deposit rule for employers in the Employers' Annual Federal Tax Program (Form 944) during the preceding year.

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(f)(5) *Examples 1* and *2* [Reserved]

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§31.6302–2 Federal tax deposit rules for amounts withheld under the Railroad Retirement Tax Act (R.R.T.A.) attributable to payments made after December 31, 1992.

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[T.D. 8436, 57 FR 44102, Sept. 24, 1992, as amended by T.D. 9239, 71 FR 14, Jan. 3, 2006]

§ 31.6302-1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

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(a) *Introduction.* With respect to employment taxes attributable to payments made after December 31, 1992, an employer is either a monthly depositor or a semi-weekly depositor based on an annual determination. An employer must generally deposit employment taxes under one of two rules: the Monthly rule in paragraph (c)(1) of this section, or the Semi-Weekly rule in paragraph (c)(2) of this section. Various exceptions and safe harbors are provided. Paragraph (f) of this section provides certain safe harbors for employers who inadvertently fail to deposit the full amount of taxes. Paragraph (c)(3) of this section provides an overriding exception to the Monthly and Semi-Weekly rules where an employer has accumulated $100,000 or more of employment taxes. Paragraph (e) of this section provides the definition of employment taxes.

(b) *Determination of status*—(1) *In general.* The determination of whether an employer is a monthly or semi-weekly depositor for a calendar year is based on an annual determination and generally depends upon the aggregate amount of employment taxes reported by the employer for the lookback period as defined in paragraph (b)(4) of this section.

(2) *Monthly depositor*—(i) *In general.* An employer is a monthly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period is $50,000 or less.

(ii) *Special rule.* An employer ceases to be a monthly depositor on the first day after the employer is subject to the One-Day ($100,000) rule in paragraph (c)(3) of this section. At that time, the employer immediately becomes a semi-weekly depositor for the remainder of the calendar year and for the following calendar year.

(3) *Semi-weekly depositor.* An employer is a semi-weekly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period exceeds $50,000.

(4) *Lookback period*—(i) [Reserved] For further guidance, see §31.6302–1T(b)(4)(i).

(ii) [Reserved] For further guidance, see §31.6302–1T(b)(4)(ii).

(c) *Deposit rules*—(1) *Monthly rule.* An employer that is a monthly depositor must deposit employment taxes accumulated with respect to payments made during a calendar month in an authorized financial institution on or before the 15th day of the following month. If the 15th day of the following month is not a banking day, taxes will be treated as timely deposited if deposited on the first banking day thereafter in accordance with paragraph (c)(4) of this section.

(2) *Semi-Weekly rule*—(i) *In general.* An employer that is a semi-weekly depositor for a calendar year must deposit its employment taxes in an authorized financial institution on or before the dates set forth below:

Payment dates/semi-weekly periods	Deposit date
Wednesday, Thursday and/or Friday.....	On or before the following Wednesday.
Saturday, Sunday, Monday and/or Tuesday...	On or before the following Friday.

(ii) *Semi-weekly period spanning two return periods.* A special rule is provided in the case of a return period (quarterly or annual) that ends during a semi-weekly period. In this case, an employer must complete the Federal Tax Deposit (FTD) coupon in a manner which designates the proper return period for which the deposit relates (the return period in which the payment is made). In addition, if the return period ends during a semi-weekly period in which an employer has two or more payment dates, two deposit obligations may exist. For example, if one quarterly return period ends on Thursday and a new quarterly return period begins on Friday, employment taxes from payments on Wednesday and Thursday are subject to one deposit obligation, and taxes from payments on Friday are subject to a separate obligation. Two separate Federal Tax Deposit coupons are required.

(iii) *Special rule for non-banking days.* Semi-weekly depositors shall have at least three banking days following the close of the semi-weekly period by which to deposit employment taxes accumulated during the semi-weekly period. Thus, if any of the three weekdays following the close of a semi-weekly period is a holiday on which banks are closed, the employer shall have an additional banking day by which to make the required deposit. For example, if the Monday following the close of a Wednesday to Friday semi-weekly period is a holiday on which banks are closed, the required deposit for the semi-weekly period may be made by the following Thursday rather than the following Wednesday.

(3) *Exception—One-Day rule.* Notwithstanding paragraphs (c)(1) and (c)(2) of this section, if on any day within a deposit period (monthly or semi-weekly) an employer has accumulated $100,000 or more of employment taxes, those taxes must be deposited in an authorized financial institution by the close of the next banking day. For purposes of determining whether the $100,000 threshold is met—

(i) A monthly depositor takes into account only those employment taxes accumulated in the calendar month in which the day occurs; and

(ii) A semi-weekly depositor takes into account only those employment taxes accumulated in the Wednesday-Friday or Saturday-Tuesday semi-weekly period in which the day occurs.

(4) *Deposits required only on banking days.* If taxes are required to be deposited under this section on any day that is not a banking day, the taxes will be treated as timely deposited if deposited on the first banking day thereafter.

(5) [Reserved] For further guidance, see §31.6302–1T(c)(5).

(6) [Reserved] For further guidance, see §31.6302–1T(c)(6).

(d) *Examples.* The provisions of paragraphs (a), (b) and (c) of this section are illustrated by the following examples:

Example 1. Monthly depositor. (i) *Determination of status.* For the calendar year 1993, Employer *A* determines its depositor status using the lookback period July 1, 1991 to June 30, 1992. For the four calendar quarters within this period, *A* reported aggregate employment tax liabilities of $42,000 on its quarterly Forms 941. Because the aggregate amount did not exceed $50,000, *A* is a monthly depositor for the entire calendar year 1993.

(ii) *Monthly rule.* During January 1993, *A* (a monthly depositor) accumulates $3,500 in employment taxes. *A* has a $3,500 deposit obligation that must be satisfied by the 15th day of the following month. Since February 15, 1993, President's Day, is a holiday which is not a banking day, *A*'s deposit obligation will be satisfied if the deposit is made by the next banking day after February 15.

Example 2. Semi-weekly depositor. (i) *Determination of status.* For the four calendar quarters spanning July 1991 to June 1992, Employer *B* reported $88,000 in aggregate employment tax liabilities on its Forms 941. Because that amount exceeds $50,000, *B* is a semi-weekly depositor for the entire calendar year 1993.

(ii) *Semi-weekly rule.* On Friday, January 1, 1993, *B* (semi-weekly depositor) has a pay day on which it accumulates $4,000 in employment taxes. *B* has a $4,000 deposit obligation that must be satisfied on or before the following Wednesday, January 6, 1993.

(iii) *Deposit made within three banking days after payroll.* The example is the same as *Example 2 (ii)*, except that *B* deposits its accumulated employment taxes within three banking days after payroll. *B* deposits its $4,000 in employment taxes on Wednesday, January 6, three banking days after its Friday payroll. Because *B* deposited its employment taxes on or before the following Wednesday, *B* has satisfied its semi-weekly deposit obligation. An employer who deposits within three banking days after payroll will always meet the Semi-Weekly rule.

Example 3. One-Day rule. On Monday, January 4, 1993, Employer *C* accumulates $110,000 in employment taxes with respect to wages paid on that date. *C* has a deposit obligation of $110,000 that must be satisfied by the next banking day. If *C* was not subject to the semi-weekly rule on January 4, 1993, *C* becomes subject to that rule as of January 5, 1993. See paragraph (b)(2)(ii) of this section.

Example 4. One-Day Rule in combination with subsequent deposit obligation. Employer *D* is subject to the semi-weekly rule for calendar year 1993. On Monday, January 4, 1993, *D* accumulates $110,000 in employment taxes. *D* has a $110,000 deposit obligation that must be satisfied by the next banking day. On Tuesday, January 5, *D* accumulates an additional $30,000 in employment taxes. Although *D* has a previous $110,000 deposit obligation incurred earlier in the semi-weekly period, *D* has an additional and separate deposit obligation of $30,000 on Tuesday that must be satisfied by the following Friday.

Example 5. Special non-banking day rule for semi-weekly depositors. Employer *E*, a semi-weekly depositor, accumulates $8,000 in employment taxes on Friday, February 12, 1993, a payment date. Under the general rule, *E* would be required to deposit the employment taxes on or before the following Wednesday, February 17. However, because Monday, February 15, is President's Day (a holiday on which banks are closed), *E* will have an additional day by which to satisfy its $8,000 deposit obligation. *E*'s deposit obligation is due on or before Thursday, February 18, 1993.

Example 6. For further guidance, see §31.6302–1T(d) *Example 6.*

(e) *Employment taxes defined.* (1) For purposes of this section, the term "employment taxes" means—

(i) The employee portion of the tax withheld under section 3102;

(ii) The employer tax under section 3111;

(iii) The income tax withheld under sections 3402 and 3405, except income tax withheld with respect to payments made after December 31, 1993, on the following—

(A) Certain gambling winnings under section 3402(q);

(B) Retirement pay for service in the Armed Forces of the United States under section 3402;

(C) Certain annuities described in section 3402(o)(1)(B); and

(D) Pensions, annuities, IRAs, and certain other deferred income under section 3405; and

(iv) The income tax withheld under section 3406, relating to backup withholding with respect to reportable payments made before January 1, 1994.

(2) The term "employment taxes" does not include taxes with respect to wages for domestic service in a private home of the employer, unless the employer is otherwise required to file a Form 941 under §31.6011(a)–4 or 31.6011(a)–5. In the case of employers paying advance earned income credit amounts, the amount of taxes required to be deposited shall be reduced by advance amounts paid to employees. Also, see §31.6302–3 concerning a taxpayer's option with respect to payments made before January 1, 1994, to treat backup withholding amounts under section 3406 separately.

(f) *Safe harbor/De minimis rules*—(1) *Single deposit safe harbor.* An employer will be considered to have satisfied its deposit obligation imposed by this section if—

(i) The amount of any shortfall does not exceed the greater of $100 or 2 percent of the amount of employment taxes required to be deposited; and

(ii) The employer deposits the shortfall on or before the shortfall make-up date.

(2) *Shortfall defined.* For purposes of this paragraph (f), the term "shortfall" means the excess of the amount of employment taxes required to be deposited for the period over the amount deposited for the period. For this purpose, a period is either a monthly, semi-weekly or daily period.

(3) *Shortfall make-up date*—(i) *Monthly rule.* A shortfall with respect to a deposit required under the Monthly rule must be deposited or remitted no later than the due date for the quarterly return, in accordance with the applicable form and instructions.

(ii) *Semi-Weekly rule and One-Day rule.* A shortfall with respect to a deposit required under the Semi-Weekly rule or the One-Day rule must be deposited on or before the first Wednesday or Friday (whichever is earlier), falling on or after the 15th day of the month following the month in which the deposit was required to be made or, if earlier, the return due date for the return period.

(4) *De minimis rule*—(i) *De minimis deposit rule for quarterly and annual return periods beginning on or after January 1, 2001.* If the total amount of accumulated employment taxes for the return period is less than $2,500 and the amount is fully deposited or remitted with a timely filed return for the return period, the amount deposited or remitted will be deemed to have been timely deposited.

(ii) [Reserved]

(iii) [Reserved] For further guidance, see §31.6302–1T(f)(4)(iii).

(5) *Examples.* The provisions of this paragraph (f) may be illustrated by the following examples:

Example 1. Safe-harbor rule satisfied. On Monday, January 4, 1993, *J* (a semi-weekly depositor), pays wages and accumulates employment taxes. As required under this section, *J* makes a deposit on or before the following Friday, January 8, 1993, in the amount of $4,000. Subsequently, *J* determines that it was actually required to deposit $4,090 by Friday. *J* has a shortfall of $90. The $90 shortfall does not exceed the greater of $100 or 2% of the amount required to be deposited (2% of $4,090=$81.80). Therefore, *J* satisfies the safe harbor of paragraph (f)(1) of this section as long as the $90 shortfall is deposited by the first deposit date (Wednesday or Friday) on or after the 15th day of the next month (in this case Wednesday, February 17, 1993).

Example 2. Safe-harbor rule not satisfied. The facts are the same as in *Example 1* except that on Friday, January 8, 1993, *J* makes a deposit of $25,000, and later determines that it was actually required to deposit $26,000. Since the $1,000 shortfall ($26,000 less $25,000) exceeds $520 (the greater of $100 or 2% of the amount required to be deposited (2% of $26,000=$520)), the safe harbor of paragraph (f)(1) of this section is not satisfied, and absent reasonable cause, *J* will be subject to a failure-to-deposit penalty under section 6656.

Example 3. For further guidance, see §31.6302–1T(f)(5) *Example 3.*

(g) *Agricultural employers—special rules*—(1) *In general.* An agricultural employer reports wages paid to farm workers annually on Form 943 (Employer's Annual Tax Return for Agricultural Employees) and reports wages paid to nonfarm workers quarterly on Form 941 (Employer's Quarterly Federal Tax Return). Accordingly, an agricultural employer must treat employment taxes reportable on Form 943 (“Form 943 taxes”) separately from employment taxes reportable on Form 941 (“Form 941 taxes”). Form 943 taxes and Form 941 taxes are not combined for purposes of determining whether a deposit of either is due, whether the One-Day rule of paragraph (c)(3) of this section

applies, or whether any safe harbor is applicable. In addition, separate Federal tax deposit coupons must be used to deposit Form 943 taxes and Form 941 taxes. (See paragraph (b) of this section for rules for determining an agricultural employer's deposit status for Form 941 taxes.) The determination of whether an agricultural employer is a monthly or semi-weekly depositor of Form 943 taxes is made according to the rules of this paragraph (g).

(2) *Monthly depositor.* An agricultural employer is a monthly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) is $50,000 or less. An agricultural employer ceases to be a monthly depositor of Form 943 taxes on the first day after the employer is subject to the One-Day rule in paragraph (c)(3) of this section. At that time, the agricultural employer immediately becomes a semi-weekly depositor of Form 943 taxes for the remainder of the calendar year and the succeeding calendar year.

(3) *Semi-weekly depositor.* An agricultural employer is a semi-weekly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) exceeds $50,000.

(4) *Lookback period.* For purposes of this paragraph (g), the lookback period for Form 943 taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1993 is calendar year 1991.

(5) The following example illustrates the provisions of this section.

Example. A, an agricultural employer, employs both farm workers and nonfarm workers (employees in its administrative offices). *A*'s depositor status for calendar year 1993 for Form 941 taxes will be based upon its employment tax liabilities reported on Forms 941 for the third and fourth quarters of 1991 and the first and second quarters of 1992 (the period July 1 to June 30). *A*'s depositor status for Form 943 taxes will be based upon its employment tax liability reported on its annual Form 943 for calendar year 1991.

(h) *Time and manner of deposit—deposits required to be made by electronic funds transfer*—(1) *In general.* Section 6302(h) requires the Secretary to prescribe such regulations as may be necessary for the development and implementation of an electronic funds transfer system to be used for the collection of the depository taxes as described in paragraph (h)(3) of this section. Section 6302(h)(2) provides a phase-in schedule that sets forth escalating minimum percentages of those depository taxes to be deposited by electronic funds transfer. This paragraph (h) prescribes the rules necessary for implementing an electronic funds transfer system for collection of depository taxes and for effecting an orderly and expeditious phase-in of that system.

(2) *Applicability of requirement*—(i) *Deposits for return periods beginning before January 1, 2000.* (A) Taxpayers whose aggregate deposits of the taxes imposed by Chapters 21 (Federal Insurance Contributions Act), 22 (Railroad Retirement Tax Act), and 24 (Collection of Income Tax at Source on Wages) of the Internal Revenue Code during a 12-month determination period exceed the applicable

threshold amount are required to deposit all depository taxes described in paragraph (h)(3) of this section by electronic funds transfer (as defined in paragraph (h)(4) of this section) unless exempted under paragraph (h)(5) of this section. If the applicable effective date is January 1, 1995, or January 1, 1996, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after the applicable effective date. If the applicable effective date is July 1, 1997, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after July 1, 1997 with respect to deposit obligations incurred for return periods beginning on or after January 1, 1997. If the applicable effective date is January 1, 1998, or thereafter, the requirement to deposit by electronic funds transfer applies to all deposits required to be made with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. In general, each applicable effective date has one 12-month determination period. However, for the applicable effective date January 1, 1996, there are two determination periods. If the applicable threshold amount is exceeded in either of those determination periods, the taxpayer becomes subject to the requirement to deposit by electronic funds transfer, effective January 1, 1996. The threshold amounts, determination periods and applicable effective dates for purposes of this paragraph (h)(2)(i)(A) are as follows:

Threshold amount	Determination period	Applicable effective date
$78 million	1-1-93 to 12-31-93	Jan. 1, 1995.
$47 million	1-1-93 to 12-31-93	Jan. 1, 1996.
$47 million	1-1-94 to 12-31-94	Jan. 1, 1996.
$50 thousand	1-1-95 to 12-31-95	July 1, 1997.
$50 thousand	1-1-96 to 12-31-96	Jan. 1, 1998.
$50 thousand	1-1-97 to 12-31-97	Jan. 1, 1999.

(B) Unless exempted under paragraph (h)(5) of this section, a taxpayer that does not deposit any of the taxes imposed by chapters 21, 22, and 24 during the applicable determination periods set forth in paragraph (h)(2)(i)(A) of this section, but that does make deposits of other depository taxes (as described in paragraph (h)(3) of this section), is nevertheless subject to the requirement to deposit by electronic funds transfer if the taxpayer's aggregate deposits of all depository taxes exceed the threshold amount set forth in this paragraph (h)(2)(i)(B) during an applicable 12-month determination period. This requirement to deposit by electronic funds transfer applies to all depository taxes due with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. The threshold amount, determination periods, and applicable effective dates for purposes of this paragraph (h)(2)(i)(B) are as follows:

Threshold amount	Determination period	Applicable effective date
$50 thousand	1-1-95 to 12-31-95	Jan. 1, 1998.
$50 thousand	1-1-96 to 12-31-96	Jan. 1, 1998.
$50 thousand	1-1-97 to 12-31-97	Jan. 1, 1999.

(C) This paragraph (h)(2)(i) applies only to deposits required to be made for return periods beginning before January 1, 2000. Thus, a taxpayer, including a taxpayer that is required under this paragraph (h)(2)(i) to make deposits by electronic funds transfer beginning in 1999 or an earlier year, is not required to use electronic funds transfer to make deposits for return periods beginning after December 31, 1999, unless deposits by electronic funds transfer are required under paragraph (h)(2)(ii) of this section.

(ii) *Deposits for return periods beginning after December 31, 1999.* Unless exempted under paragraph (h)(5) of this section, a taxpayer that deposits more than $200,000 of taxes described in paragraph (h)(3) of this section during a calendar year beginning after December 31, 1997, must use electronic funds transfer (as defined in paragraph (h)(4) of this section) to make all deposits of those taxes that are required to be made for return periods beginning after December 31 of the following year and must continue to deposit by electronic funds transfer in all succeeding years. Thus, a taxpayer that exceeds the $200,000 deposit threshold during calendar year 1998 is required to make deposits for

return periods beginning in or after calendar year 2000 by electronic funds transfer.

(iii) *Voluntary deposits.* A taxpayer that is not required by this section to use electronic funds transfer to make a deposit of taxes described in paragraph (h)(3) of this section may voluntarily make the deposit by electronic funds transfer, but remains subject to the rules of paragraph (i) of this section, pertaining to deposits by Federal tax deposit (FTD) coupon, in making deposits other than by electronic funds transfer.

(3) *Taxes required to be deposited by electronic funds transfer.* The requirement to deposit by electronic funds transfer under paragraph (h)(2) of this section applies to all the taxes required to be deposited under §§1.6302–1, 1.6302–2, and 1.6302–3 of this chapter; §§31.6302–1, 31.6302–2, 31.6302–3, 31.6302–4, and 31.6302(c)–3; and §40.6302(c)–1 of this chapter.

(4) *Definitions*—(i) *Electronic funds transfer. An electronic funds transfer* is any transfer of depository taxes made in accordance with Revenue Procedure 97–33, (1997–30 I.R.B.), (see §601.601 (d)(2) of this chapter), or in accordance with procedures subsequently prescribed by the Commissioner.

(ii) *Taxpayer.* For purposes of this section, a *taxpayer* is any person required to deposit federal taxes, including not only individuals, but also any trust, estate, partnership, association, company or corporation.

(5) *Exemptions.* If any categories of taxpayers are to be exempted from the requirement to deposit by electronic funds transfer, the Commissioner will identify those taxpayers by guidance published in the Internal Revenue Bulletin. (See §601.601(d)(2)(ii)(*b*) of this chapter.)

(6) *Separation of deposits.* A deposit for one return period must be made separately from a deposit for another return period.

(7) *Payment of balance due.* If the aggregate amount of taxes reportable on the applicable tax return for the return period exceeds the total amount deposited by the taxpayer with regard to the return period, then the balance due must be remitted in accordance with the applicable form and instructions.

(8) *Time deemed deposited.* A deposit of taxes by electronic funds transfer will be deemed made when the amount is withdrawn from the taxpayer's account, provided the U.S. Government is the payee and the amount is not returned or reversed.

(9) *Time deemed paid.* In general, an amount deposited under this paragraph (h) will be considered to be a payment of tax on the last day prescribed for filing the applicable return for the return period (determined without regard to any extension of time for filing the return) or, if later, at the time deemed deposited under paragraph (h)(8) of this section. In the case of the taxes imposed by chapters 21 and 24 of the Internal Revenue Code, solely for purposes of section 6511 and the regulations

thereunder (relating to the period of limitation on credit or refund), if an amount is deposited prior to April 15th of the calendar year immediately succeeding the calendar year that includes the period for which the amount was deposited, the amount will be considered paid on April 15th.

(i) *Time and manner of deposit*—(1) *General rules.* A deposit required to be made by this §31.6302–1 must be made separately from a deposit required by any other section. See §31.6302–3 for an exception in the case of backup withholding amounts. Further, a deposit for a deposit period in one return period must be made separately from a deposit for a deposit period in another return period.

(2) *Payment of balance due.* If the aggregate amount of taxes reportable on the return for the return period exceeds the total amount deposited by the employer with regard to the return period pursuant to this section, the balance due must be remitted in accordance with the applicable form and instructions.

(3) *Federal Tax Deposit (FTD) coupon.* Each deposit required to be made under this section must be accompanied by an FTD coupon (Form 8109). The FTD coupon shall be prepared in accordance with the instructions applicable thereto. The deposit, together with the FTD coupon, shall be forwarded to a financial institution authorized as a depository for Federal taxes in accordance with 31 CFR part 203.

(4) *Procurement of FTD coupons.* A new employer should receive its initial supply of FTD coupon books after receiving its employer identification number. In the event that a deposit is required to be made before receipt of the FTD coupon books, the employer should contact the local IRS office and furnish the following information: the business name as it appears on IRS records, the employer identification number, address where the coupon books are to be sent, and the number of coupon books being requested. Filers of Form 1120, Form 990–C, Form 990PF (with net investment income), Form 990–T or Form 2438 must also provide the month the employer's tax year ends. If an employer has applied for an employer identification number but has not received it, and a deposit is required to be made, the employer should send a check or money order for the deposit amount to its Internal Revenue Service center. There should be included on the payment, the name and address of the entity as shown on Form SS–4, Application for Employer Identification Number, the kind of tax, the period covered, and the date on which the employer applied for the employer identification number.

(5) *Time deemed deposited.* The timeliness of a deposit will be determined by the date stamped on the FTD coupon by the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e).

(6) *Time deemed paid.* In general, amounts deposited under this section will be considered as paid at the time deemed deposited under paragraph (h)(5) of this section, or on the last day prescribed for filing the return (determined without regard to any extension of time for filing the return), whichever is later. For purposes of section 6511 and the regulations hereunder (relating to the period of limitation on credit or refund), if an amount is deposited prior to April 15th of the calendar year immediately succeeding the calendar year that contains the period for which the amount was deposited, the amount will be considered paid on April 15th.

(j) *Voluntary payments by electronic funds transfer.* Any person may voluntarily remit by electronic funds transfer any payment of tax imposed by subtitle C of the Internal Revenue Code. Such payment must be made in accordance with procedures prescribed by the Commissioner.

(k) *Special rules*—(1) *Notice exception.* The provisions of this section are not applicable with respect to employment taxes for any month in which the employer receives notice that a return is required under §31.6011(a)–5 (or for any subsequent month for which such a return is required), if those taxes are also required to be deposited under the separate accounting procedures provided in §301.7512–1 of the Regulations on Procedure and Administration (which procedures are applicable if notification is given by the Commissioner of failure to comply with certain employment tax requirements). In cases in which a monthly return is required under §31.6011(a)–5 but the taxes are not required to be deposited under the separate accounting procedures provided in §301.7512–1, the provisions of this section shall apply except those provisions shall not authorize the deferral of any deposit to a date after the date on which the return is required to be filed.

(2) *Wages paid in nonconvertible foreign currency.* The provisions of this section are not applicable with respect to wages paid in nonconvertible foreign currency pursuant to §301.6316–7.

(l) [Reserved]

(m) *Cross references*—(1) *Failure to deposit penalty.* For provisions relating to the penalty for failure to make a deposit within the prescribed time, see section 6656.

(2) *Saturday, Sunday, or legal holiday.* For provisions relating to the time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday, see the provisions of §301.7503–1.

(n) *Effective date.* Sections 31.6302–1 through 31.6302–3 apply with respect to the deposit of employment taxes attributable to payments made after December 31, 1992. To the extent that the provisions of §§31.6302–1 through 31.6302–3 are inconsistent with the provisions of §§31.6302(c)–1 and 31.6302(c)–2, a taxpayer will be considered to be in compliance with §§31.6301–1 through 31.6302–3 if the taxpayer makes timely deposits during 1993 in accordance with §§31.6302(c)–1 and 31.6302(c)–2.

[T.D. 8436, 57 FR 44102, Sept. 24, 1992; 57 FR 48724, Oct. 28, 1992, as amended by T.D. 8504, 58 FR 68035, Dec. 23, 1993; T.D. 8436, 59 FR 6218, Feb. 10, 1994; T.D. 8723, 62 FR 37493, July 14, 1997; T.D. 8771, 63 FR 32736, June 16, 1998; T.D. 8822, 64 FR 32409, June 17, 1999; T.D. 8828, 64 FR 37676, July 13, 1999; T.D. 8909, 65 FR 76153, Dec. 6, 2000; T.D. 8946, 66 FR 28370, May 23, 2001; T.D. 8947, 66 FR 32542, June 15, 2001; T.D. 8952, 66 FR 33831, 33832, June 26, 2001; T.D. 9239, 71 FR 13, 15, Jan. 3, 2006]

§ 31.6302-1T Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992

(temporary).

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(a) through (b)(3) [Reserved] For further guidance, see §31.6302–1(a) through (b)(3).

(4) *Lookback period*—(i) *In general.* For employers who file Form 941, the lookback period for each calendar year is the twelve month period ended the preceding June 30. For example, the lookback period for calendar year 2006 is the period July 1, 2004 to June 30, 2005. The lookback period for employers who are in the Employers' Annual Federal Tax Program (Form 944), or were in it during the previous calendar year, is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 2006 is calendar year 2004. In determining status as either a monthly or semi-weekly depositor, an employer should determine the aggregate amount of employment tax liabilities reported on its return(s) (Form 941 or Form 944) for the lookback period. New employers shall be treated as having employment tax liabilities of zero for any part of the lookback period before the date the employer started or acquired its business.

(ii) *Adjustments.* The tax liability shown on an original return for the return period shall be the amount taken into account in determining whether more than $50,000 has been reported during the lookback period. In determining the aggregate employment taxes for each return period in a lookback period, an employer does not take into account any adjustments for the return period made on a supplemental return filed after the due date of the return. However, adjustments made on a Form 941c, Statement to Correct Information, attached to a Form 941 or Form 944 filed for a subsequent return period are taken into account in determining the employment tax liability for the subsequent return period.

(c)(1) through (c)(4) [Reserved] For further guidance, see §31.6302–1(c)(1) through (c)(4).

(5) *Exception to the monthly and semi-weekly deposit rules for employers in the Employers' Annual Federal Tax Program (Form 944).* Generally, an employer in the Employers' Annual Federal Tax Program (Form 944) may remit its accumulated employment taxes with its timely filed return and is not required to deposit under either the monthly or semi-weekly rules set forth in paragraphs (c)(1) and (2) of this section. An employer in the Employers' Annual Federal Tax Program (Form 944) whose actual employment tax liability exceeds the eligibility threshold, as set forth in §31.6011(a)–1T(a)(5)(ii) and §31.6011(a)–4T(a)(4)(ii), will not qualify for this exception and should follow the deposit rules set forth in this section.

(6) *Extension of time to deposit for employers in the Employers' Annual Federal Tax Program (Form 944) during the preceding year.* An employer who was in the Employers' Annual Federal Tax Program (Form 944) in the preceding year, but who is no longer qualified because its annual employment tax liability exceeded the eligibility threshold set forth in §31.6011(a)–1T(a)(5)(ii) and §31.6011(a)–4T(a)(4)(ii) in that preceding year, is required to deposit pursuant to §31.6302–1. The employer will be deemed to have timely deposited its January deposit obligation(s) under §31.6302–1

(c)(1) through (4) for the first quarter of the year in which it must file quarterly using Form 941 if the employer deposits the amount of such deposit obligation(s) by March 15 of that year.

(d) *Examples 1* through *5* [Reserved] For further guidance, see §31.6302–1(d) *Examples 1* through *5*.

Example 6. Extension of time to deposit for employers in the Employers' Annual Federal Tax Program (Form 944) during the preceding year satisfied. F (a monthly depositor) was notified to file Form 944 to report its employment tax liabilities for the 2006 calendar year. F filed Form 944 on January 31, 2007, reporting a total employment tax liability for 2006 of $3,000. Because F's annual employment tax liability for the 2006 taxable year exceeded $1,000 (the eligibility requirement threshold), F may not file Form 944 for calendar year 2007. Based on F's liability during the lookback period (calendar year 2005, pursuant to §31.6302–1T(b)(4)(i)), F is a monthly depositor for 2007. F accumulates $1,000 in employment taxes during January 2007. Because F is a monthly depositor, F's January deposit obligation is due February 15, 2007. F does not deposit these accumulated employment taxes on February 15, 2007. F accumulates $1,500 in employment taxes during February 2007. F's February deposit is due March 15, 2007. F deposits the $2,500 of employment taxes accumulated during January and February on March 15, 2007. Pursuant to §31.6302–1T(c)(6), F will be deemed to have timely deposited the employment taxes due for January 2007, and, thus, the IRS will not impose a failure-to-deposit penalty under section 6656 for that month.

(e) through (f)(4)(ii) [Reserved] For further guidance, see §31.6302–1(e) through (f)(4)(ii).

(iii) *De minimis deposit rule for employers currently in the Employers' Annual Federal Tax Program (Form 944).* An employer in the Employers' Annual Federal Tax Program (Form 944) whose employment tax liability for the year equals or exceeds $2,500 but whose employment tax liability for a quarter of the year is *de minimis* pursuant to §31.6302–1(f)(4)(i) will be deemed to have timely deposited the employment taxes due for that quarter if the employer fully deposits the employment taxes accumulated during the quarter by the last day of the month following the close of that quarter. Employment taxes accumulated during the fourth quarter can be either deposited by January 31 or remitted with a timely filed return for the return period.

(5) *Examples 1* and *2* [Reserved] For further guidance, see §31.6302–1(f)(5) *Examples 1* and *2*.

Example 3. De minimis deposit rule for employers currently in the Employers' Annual Federal Tax Program (Form 944) satisfied. K (a monthly depositor) was notified to file Form 944 to report its employment tax liabilities for the 2006 calendar year. In the first quarter of 2006, K accumulates employment taxes in the amount of $1,000. On April 28, 2006, K deposits the $1,000 of employment taxes accumulated in the 1st quarter. K accumulates another $1,000 of employment taxes during the second quarter of 2006. On July 31, 2006, K deposits the $1,000 of employment taxes accumulated in the 2nd quarter. K's business grows and accumulates $1,500 in employment taxes during the third quarter of 2006. On October 31, 2006, K deposits the $1,500 of employment taxes accumulated in the 3rd quarter. K accumulates another $2,000 in employment taxes during the fourth quarter. K files Form 944 on January 31, 2007, reporting a total employment tax liability for 2006 of $5,500 and submits a check for the remaining $2,000 of employment taxes with the return. K will be deemed to have timely deposited the employment taxes due for all of 2006, because K complied with the *de minimis* deposit rule provided in §31.6302–1T(f)(4)(iii). Therefore, the IRS will not impose a failure-to-

deposit penalty under section 6656 for any month of the year. Under this *de minimis* deposit rule, as K was required to file Form 944 for calendar year 2006, if K's employment tax liability for a quarter is *de minimis*, then K may deposit that quarter's liability by the last day of the month following the close of the quarter. This new *de minimis* rule allows K to have the benefit of the same quarterly *de minimis* amount K would have received if K filed Form 941 each quarter instead of Form 944 annually. Thus, as K's employment tax liability for each quarter was *de minimis*, K could deposit quarterly.

(g) through (n) [Reserved] For further guidance, see §31.6302–1(g) through (n).

[T.D. 9239, 71 FR 15, Jan. 3, 2006]

§ 31.6302-2 Federal Tax Deposit Rules for amounts withheld under the Railroad Retirement Tax Act (R.R.T.A.) attributable to payments made after December 31, 1992.

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(a) *General rule.* Except as otherwise provided in this section, the rules of §31.6302–1 determine the time and manner of making deposits of employee tax withheld under section 3202 and employer tax imposed under sections 3221 (a) and (b) attributable to payments made after December 31, 1992. Railroad retirement taxes described in section 3221(c) arising during the month must be deposited on or before the first date after the 15th day of the following month on which taxes are otherwise required to be deposited under §31.6302–1.

(b) *Separate application of deposit rules.* A person who accumulates tax under sections 3202 or 3221 shall not take that tax into account for purposes of determining when taxes described in paragraph (e) of §31.6302–1 must otherwise be deposited.

(c) *Modification of Monthly rule determination*—(1) *General rule.* Except as otherwise provided in this section, any person is allowed to use the Monthly rule of §31.6302–1(c)(1) for an entire calendar year unless the amount of R.R.T.A. taxes required to be deposited under this section during the lookback period was more than $50,000. The lookback period is defined as the calendar year preceding the calendar year just ended. Thus, for purposes of determining if an R.R.T.A. employer qualifies to use the Monthly rule for calendar year 1993, a lookback must be made to calendar year 1991. New employers shall be treated as having employment tax liabilities of zero for any calendar year during which the employer did not exist.

(2) *Exception.* An employer shall immediately cease to be allowed to use the Monthly rule after any day on which that employer is subject to the One-Day rule set forth in §31.6302–1(c)(3). Such employer immediately becomes subject to the Semi-Weekly rule of §31.6302–1(c)(2) for the remainder of the calendar year and the following calendar year.

(d) *Wire-transfer exception.* If, for the calendar year prior to the calendar year preceding the current

calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, the employer must deposit the aggregate amount of railroad retirement taxes required to be deposited for the current calendar year in accordance with §31.6302(c)–2(a)(1).

[T.D. 8436, 57 FR 44105, Sept. 24, 1992]

§ 31.6302-3 Federal tax deposit rules for amounts withheld under the backup withholding requirements of section 3406 for payments made after December 31, 1992.

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(a) *General rule.* The rules of §31.6302–1 shall apply to determine the time and manner of making deposits of amounts withheld under the backup withholding requirements of section 3406.

(b) *Treatment of backup withholding amounts separately.* A taxpayer that withholds income tax under section 3406 with respect to reportable payments made after December 31, 1992, and before January 1, 1994, may, in accordance with the instructions provided with Form 941, deposit such tax under the rules of §31.6302–1 without taking into account the other taxes described in paragraph (e) of §31.6302–1 for purposes of determining when tax withheld under section 3406 must be deposited. A taxpayer that treats backup withholding amounts separately with respect to reportable payments made after December 31, 1992, and before January 1, 1994, shall not take tax withheld under section 3406 into account for purposes of determining when the other taxes described in paragraph (e) of §31.6302–1 must otherwise be deposited under that section. See §31.6302–4 for rules regarding the deposit of income tax withheld under section 3406 with respect to reportable payments made after December 31, 1993.

(c) *Example.* The following example illustrates the provisions of this section.

Example. For the last two calendar quarters of 1991 and the first two calendar quarters of 1992, Bank *A* reports employment taxes with respect to wages paid totalling in excess of $50,000. For the same four quarters, pursuant to section 3406, *A* withholds income tax with respect to dividend payments in an amount aggregating less than $50,000. For deposit and reporting purposes, *A* treated the backup withholding amounts separately from the employment taxes with respect to wages paid. Accordingly, for calendar year 1993, if *A* chooses to treat the items separately, *A* must use the Semi-Weekly rule of §31.6302–1(c)(2) to deposit taxes with respect to wages paid but may use the Monthly rule of §31.6302–1(c)(1) for the deposit of backup withholding amounts. If *A* chooses not to treat the items separately, the Semi-Weekly rule would apply to the combined amount of both the taxes with respect to wages paid and the backup withholding amounts.

[T.D. 8436, 57 FR 44106, Sept. 24, 1992, as amended by T.D. 8504, 58 FR 68035, Dec. 23, 1993]

§ 31.6302-4 Federal tax deposit rules for withheld income taxes attributable to nonpayroll payments made after December 31, 1993.

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(a) *General rule.* With respect to nonpayroll withheld taxes attributable to nonpayroll payments made after December 31, 1993, a taxpayer is either a monthly or a semi-weekly depositor based on an annual determination. Except as provided in this section, the rules of §31.6302–1 shall apply to determine the time and manner of making deposits of nonpayroll withheld taxes as though they were employment taxes. Paragraph (b) of this section defines nonpayroll withheld taxes. Paragraph (c) of this section provides rules for determining whether a taxpayer is a monthly or a semi-weekly depositor.

(b) *Nonpayroll withheld taxes defined.* For purposes of this section, effective with respect to payments made after December 31, 1993, *nonpayroll withheld taxes* means—

(1) Amounts withheld under section 3402(q), relating to withholding on certain gambling winnings;

(2) Amounts withheld under section 3402 with respect to amounts paid as retirement pay for service in the Armed Forces of the United States;

(3) Amounts withheld under section 3402(o)(1)(B), relating to certain annuities;

(4) Amounts withheld under section 3405, relating to withholding on pensions, annuities, IRAs, and certain other deferred income; and

(5) Amounts withheld under section 3406, relating to backup withholding with respect to reportable payments.

(c) *Determination of deposit status*—(1) *Rules for calendar years 1994 and 1995.* On January 1, 1994, a taxpayer's depositor status for nonpayroll withheld taxes is the same as the taxpayer's status on January 1, 1994, for taxes reported on Form 941 under §31.6302–1. A taxpayer generally retains that depositor status for nonpayroll withheld taxes for all of calendar years 1994 and 1995. However, a taxpayer that under this paragraph (c) is a monthly depositor for 1994 and 1995 will immediately lose that status and become a semi-weekly depositor of nonpayroll withheld taxes if the One-Day rule of §31.6302–1(c)(3) is triggered with respect to nonpayroll withheld taxes. See paragraph (d) of this section for a special rule regarding the application of the One-Day rule of §31.6302–1(c)(3) to nonpayroll withheld taxes.

(2) *Rules for calendar years after 1995*—(i) *In general.* For calendar years after 1995, the determination of whether a taxpayer is a monthly or a semi-weekly depositor for a calendar year is based on an annual determination and generally depends on the aggregate amount of nonpayroll withheld taxes reported by the taxpayer for the lookback period as defined in paragraph (c)(2)(iv) of this section.

(ii) *Monthly depositor.* A taxpayer is a monthly depositor of nonpayroll withheld taxes for a calendar year if the amount of nonpayroll withheld taxes accumulated in the lookback period (as defined in paragraph (c)(2)(iv) of this section) is $50,000 or less. A taxpayer ceases to be a monthly depositor of nonpayroll withheld taxes on the first day after the taxpayer is subject to the One-Day rule in §31.6302–1(c)(3) with respect to nonpayroll withheld taxes. At that time, the taxpayer immediately becomes a semi-weekly depositor of nonpayroll withheld taxes for the remainder of the calendar year and the succeeding calendar year. See paragraph (d) of this section for a special rule regarding the application of the One-Day rule of §31.6302–1(c)(3) to nonpayroll withheld taxes.

(iii) *Semi-weekly depositor.* A taxpayer is a semi-weekly depositor of nonpayroll withheld taxes for a calendar year if the amount of nonpayroll withheld taxes accumulated in the lookback period (as defined in paragraph (c)(2)(iv) of this section) exceeds $50,000.

(iv) *Lookback period.* For purposes of this section, the lookback period for nonpayroll withheld taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1996 is calendar year 1994. A new taxpayer is treated as having nonpayroll withheld taxes of zero for any calendar year in which the taxpayer did not exist.

(d) *Special rules.* A taxpayer must treat nonpayroll withheld taxes, which are reported on Form 945, Annual Return of Withheld Federal Income Tax, separately from taxes reportable on Form 941, Employer's Quarterly Federal Tax Return. Taxes reported on Form 945 and taxes reported on Form 941 are not combined for purposes of determining whether a deposit of either is due, whether the One-Day rule of §31.6302–1(c)(3) applies, or whether any safe harbor is applicable. In addition, separate Federal tax deposit coupons must be used to deposit taxes reported on Form 945 and taxes reported on Form 941. (See paragraph (b) of §31.6302–1 for rules for determining an employer's deposit status for taxes reported on Form 941.) A deposit of taxes reported on Form 945 for one calendar year must be made separately from a deposit of taxes reported on Form 945 for another calendar year.

[T.D. 8504, 58 FR 68036, Dec. 23, 1993]

§ 31.6302(b)-1 Method of collection.

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For provisions relating to collection by means of returns of the taxes imposed by chapter 21 (Federal Insurance Contributions Act), see §§31.6011(a)–1 and 31.6011(a)–5.

§ 31.6302(c)-1 Use of Government depositories in connection with taxes under Federal Insurance Contributions Act and income tax withheld for amounts attributable to payments made before January 1, 1993.

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(a) *Requirement for calendar months beginning after December 31, 1980, but before January 1, 1993* —(1) *In general.* (i) In the case of a calendar month which begins after December 31, 1980, but before April 1, 1991—

(*a*) Except as provided in paragraph (b) of this section and hereinafter in this subdivision (i), if at the close of any calendar month the aggregate amount of undeposited taxes (as defined in paragraph (a)(1)(iii) of this section) is $500 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized financial institution (see paragraph (a)(3)(iii) of this section) within 15 calendar days after the close of such calendar month.

However, this (*a*) of subdivision (i) shall not apply if the employer was required to make a deposit of taxes pursuant to (*b*) of this subdivision (i) with respect to an eighth-monthly period which occurred during the calendar month.

(*b*) Except as provided in paragraph (b) of this section and except in the case of first-time 3-banking-day depositors, if at the close of any eighth-monthly period the aggregate amount of undeposited taxes is $3,000 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized financial institution within 3 banking days after the close of such eighth-monthly period. For purposes of determining the amount of undeposited taxes at the close of an eighth-monthly period, undeposited taxes with respect to wages paid during a prior eighth-monthly period shall not be taken into account if the employer has made a deposit with respect to such prior eighth-monthly period. An employer will be considered to have complied with the requirements of this paragraph (a)(1)(i)(*b*) for a deposit with respect to the close of an eighth-monthly period if—

(*1*) His deposit is not less than 95 percent (90 percent before January 1, 1982) of the aggregate amount of the taxes with respect to wages paid during the period for which the deposit is made, and

(*2*) If such eighth-monthly period occurs in a month other than the last month of a period for which a return is required to be filed (hereinafter in this subparagraph referred to as a return period), he deposits any underpayment with his first deposit which is otherwise required by this paragraph (a)(1)(i)(*b*) to be made after the 15th day of the following month.

For purposes of this paragraph (a)(1)(i)(*b*), a “first-time 3-banking-day depositor” is an employer who establishes to the satisfaction of the Commissioner that he was not required (but for this exception) to make a deposit pursuant to this paragraph (a)(1)(i)(*b*) (or pursuant to paragraph (a)(1)(ii)(*b*) of this section) with respect to each period in any preceding month of the current calendar quarter and with respect to each period in the 4 calendar quarters preceding the current calendar quarter. An employer may in no event qualify as a “first-time 3-banking-day depositor” with respect to any eighth-monthly period if the undeposited taxes at the close of that period are $10,000 or more.

The excess (if any) of a deposit over the actual taxes for a deposit period shall be applied in order of time to each of the employer's succeeding deposits with respect to the same return period, until exhausted, to the extent that the amount by which the taxes for a subsequent deposit period exceed the deposit for such subsequent deposit period. For purposes of this paragraph (a)(1)(i), "eighth-monthly period" means the first 3 days of a calendar month, the 4th day through the 7th day of a calendar month, the 8th day through the 11th day of a calendar month, the 12th day through the 15th day of a calendar month, the 16th day through the 19th day of a calendar month, the 20th day through the 22nd day of a calendar month, the 23rd day through the 25th day of a calendar month, or the portion of a calendar month following the 25th day of such month.

(*c*) The periods within which taxes must be desposited under this section are determined, in the case of employers paying advance earned income credit amounts, by reference to the amount of taxes required to be deposited after reduction for advance amounts paid to employees.

(ii) In the case of a calendar month which begins after March 31, 1991, but before January 1, 1993—

(*a*) Except as provided in §31.6302(c)–1(a)(1)(ii) (*b*) or (*c*), or §31.6302(c)–1(b), if with respect to any calendar month the aggregate amount of taxes (as defined in §31.6302(c)–1(a)(1)(iii)) accumulated with respect to wages paid is $500 or more, but less than $3,000, then the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution within 15 calendar days after the close of that calendar month. Taxes accumulated with respect to wages paid in a prior calendar month within the same return period shall not be taken into account in determining the aggregate amount of taxes accumulated if a deposit was required to be made under this section with respect to such tax amounts. Deposits made during the calendar month of taxes with respect to wages paid during that month do not reduce the aggregate amount of taxes accumulated for purposes of determining the deposit requirement (if any) for that month. However, this paragraph (a)(1)(ii)(*a*) shall not apply if the employer was required to make a deposit of taxes pursuant to paragraph (a)(1)(ii)(*b*) of this section with respect to an eighth-month period which occurred during the calendar month.

Example 1. Employer *A*'s aggregate amount of taxes accumulated with respect to wages paid in April 1991 is $800. Since that amount is in excess of $500, but less than $3,000, *A* must deposit the $800 in a Federal Reserve bank or authorized financial institution by May 15, 1991.

Example 2. Employer *B*'s aggregate amount of taxes accumulated with respect to wages paid in April 1991 is $400. Since that amount is less than $500, *B* has no deposit obligation for the month of April. In May 1991 *B*'s aggregate amount of taxes accumulated with respect to wages paid during the month is $450. Since the $400 in taxes in April was not required to be deposited, that amount is taken into account in determining if a deposit is required for May. The aggregate amount of taxes accumulated with respect to wages paid for the two months is in excess of $500, thus requiring a deposit. Since June 15, 1991, is a Saturday, *B* must deposit the $850 in a Federal Reserve bank or authorized financial institution by Monday, June 17, 1991, pursuant to section 7503 of the Code.

Example 3. The facts are the same as in *Example 2* except that *B* deposits the $400 in taxes from April on

May 15, 1991. Because the $400 was not required to be deposited, that amount is taken into account in determining if a deposit obligation exists for May. Since the aggregate amount of taxes accumulated with respect to wages paid for the two months, $850, is in excess of $500, a deposit in the aggregate amount of $850 is required by Monday, June 17, 1991. Since $400 was previously deposited, *B* must deposit an additional $450 by June 17, 1991.

Example 4. On Friday, April 5, 1991, a payroll date, Employer *C* accumulates $450 in taxes with respect to wages paid on that date. Although not required to do so, *C* deposits the $450 in an authorized depository. On Friday, April 19, 1991, *C* accumulates an additional $450 in taxes with respect to wages paid. The aggregate amount of taxes accumulated with respect to wages paid during the calendar month is $900. *C* has a deposit obligation of $900 for the calendar month and must deposit an additional $450 in an authorized depository by May 15, 1991.

(*b*) Except as provided in §31.6302(c)–1(a)(1)(ii)(*c*) or §31.6302(c)–1(b), and except in the case of first-time 3-banking-day depositors (as defined in §31.6302(c)–1(a)(1)(i)(*b*)(*2*)), if with respect to any eighth-monthly period (as defined in §31.6302(c)–1(a)(1)(i)(*b*)) the aggregate amount of taxes accumulated with respect to wages paid is $3,000 or more, but less than $100,000, the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution within 3 banking days after the close of that eighth-monthly period. Taxes accumulated with respect to wages paid during a prior eighth-monthly period shall not be taken into account if a deposit was required to be made under this section with respect to such tax amounts. Deposits made during the eighth-monthly period of taxes with respect to wages paid during that eighth-monthly period do not reduce the aggregate amount of taxes accumulated for purposes of determining the deposit requirement (if any) for that eighth-monthly period. Solely for purposes of the examples in this paragraph (a)(1)(ii)(*b*) and paragraphs (a)(1)(ii)(*c*), (*d*), and (*f*) of this section, “banking days” are assumed to include all calendar days except Saturdays, Sundays, and Federal holidays.

Example 1. For the eighth-monthly period April 1–3, 1991, Employer *D*'s aggregate amount of taxes accumulated with respect to wages paid is $3,500. Since that amount is in excess of $3,000, but less than $100,000, *D* has a deposit obligation of $3,500 that must be satisfied by April 8, 1991, the third banking day after the close of the eighth-monthly period.

Example 2. For the eighth-monthly period April 1–3, 1991, Employer *E*'s aggregate amount of taxes accumulated with respect to wages paid is $3,500. *E* has a deposit obligation of $3,500 that must be satisfied by April 8, 1991, three banking days after the close of the April 1–3 eighth-monthly period. For the eighth-monthly period April 4–7, 1991, *E*'s aggregate amount of taxes accumulated with respect to wages paid is $2,800. Since *E* was required to make a deposit for the April 1–3 eighth-monthly period, that $3,500 amount is not taken into account in determining any obligations that arise in subsequent eighth-monthly periods. *E* does not have an eighth-monthly deposit obligation with respect to the April 4–7 period.

Example 3. For the eighth-monthly period April 1–3, 1991, Employer *F*'s aggregate amount of taxes accumulated with respect to wages paid is $2,800. Since that amount is less than $3,000, no deposit is required with respect to that eighth-monthly period. For the eighth-monthly period April 4–7, 1991, *F*'s aggregate amount of taxes accumulated with respect to wages paid is $2,500. Since *F* was not required to deposit the

$2,800 in taxes from the April 1–3 eighth-monthly period, that amount is taken into account in determining *F*'s deposit obligation for the April 4–7 eighth-monthly period. The aggregate amount of taxes accumulated for the two eighth-monthly periods is $5,300. *F* has a deposit obligation of $5,300 that must be satisfied by April 10, 1991, three banking days after the close of the April 4–7 eighth-monthly period.

Example 4. The facts are the same as in *Example 3* except that *F* deposits the $2,800 from the April 1–3 eighth-monthly period on April 4, 1991. Because the $2,800 was not required to be deposited, that amount is taken into account in determining *F*'s deposit obligation for the April 4–7 eighth-monthly period. The aggregate amount of taxes accumulated for the two eighth-monthly periods is $5,300. Since that amount is in excess of $3,000, a deposit obligation exists after the close of the April 4–7 eighth-monthly period. As $2,800 of that amount was previously deposited, *F* has a deposit obligation of $2,500 that must be satisfied by April 10, 1991, three banking days after the close of the April 4–7 eighth-monthly period.

Example 5. On Friday, April 12, 1991, the beginning of an eighth-monthly period (April 12–15), *G* accumulates $3,500 in taxes with respect to wages paid and deposits the $3,500 in an authorized depository on that date although a deposit of the $3,500 was not required to be made on that date. On Monday, April 15, 1991, the end of the April 12–15 eighth-monthly period, *G* accumulates an additional $2,000 in taxes with respect to wages paid. The aggregate amount of taxes accumulated with respect to wages paid during the April 12–15 eighth-monthly period of $5,500. *G* has a deposit obligation for the eighth-monthly period of $5,500. Since $3,500 of that amount was previously deposited, *G* has a remaining deposit obligation of $2,000 that must be satisfied by Thursday, April 18, 1991, three banking days after the close of the eighth-monthly period.

(*c*) If on any day within an eighth-monthly period the aggregate amount of taxes accumulated with respect to wages paid is $100,000 or more, the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution on the first banking day after that day. Taxes accumulated with respect to wages paid prior to that day shall not be taken into account if a deposit was required under this section with respect to such tax amounts. Taxes deposited on any given day with respect to wages paid on that day do not reduce the aggregate amount of taxes accumulated on that day for purposes of determining the deposit requirement (if any) for that day.

Example 1. On Thursday, April 4, 1991, the beginning of the April 4–7 eighth-monthly period, Employer *H* accumulates $55,000 in taxes with respect to wages paid on that date. On Saturday, April 6, 1991, *H* accumulates an additional $50,000 in taxes with respect to wages paid. *H* has a deposit obligation of $105,000 that must be satisfied by Monday, April 8, the next banking day after Saturday, April 6.

Example 2. On Friday, April 12, 1991, the beginning of the April 12–15 eighth-monthly period, *J* accumulates $60,000 in taxes with respect to wages paid and deposits the $60,000 in an authorized depository on that date although a deposit of the $60,000 was not required to be made on that date. On Monday, April 15, 1991, the last day in the April 12–15 eighth-monthly period, *J* accumulates an additional $50,000 in taxes with respect to wages paid. On Monday, April 15, the aggregate amount of taxes accumulated with respect to wages paid during the eighth-monthly period to date totals $110,000. *J* has a $110,000 deposit obligation that must be satisfied by the next banking day after the $100,000 threshold is reached. Since $60,000 of the $110,000 was already deposited, *J* has a remaining deposit obligation of $50,000 that must be satisfied by Tuesday, April 16, 1991, the next banking day following April 15th.

Example 3. On Monday, April 1, 1991, Employer *K* accumulates $105,000 in taxes with respect to wages paid on that date. On that same day, *K* deposits in an authorized depository $10,000 of the $105,000 accumulated. *K* has a $105,000 deposit obligation that must be satisfied by the next banking day, April 2, 1991. The $10,000 deposited on April 1 cannot be used to reduce the aggregate amount of accumulated taxes with respect to that date. *K* has a remaining deposit obligation of $95,000 that must be satisfied by April 2, 1991.

(*d*) If, with respect to any eighth-monthly period, an employer incurs an obligation to deposit in accordance with §31.6302(c)–1(a)(1)(ii)(*c*), and later, within the same eighth-monthly period, accumulates with respect to wages paid taxes of $3,000 or more, but less than $100,000, an additional deposit is required in accordance with §31.6302(c)–1(a)(1)(ii)(*b*). However, if the amount of taxes is $100,000 or more, an additional deposit is required in accordance with §31.6302(c)–1(a)(1)(ii)(*c*).

Example. On Tuesday, April 2, 1991, Employer *L* accumulates $110,000 in aggregate taxes with respect to wages paid. In accordance with paragraph (a)(1)(ii)(*c*) of this section, *L* has a $110,000 deposit obligation that must be satisfied by Wednesday, April 3, 1991, the next banking day following April 2. On Wednesday, April 3, 1991, *L* accumulates an additional $10,000 in taxes with respect to wages paid that date. In accordance with paragraph (a)(1)(ii)(*b*) of this section, *L* now has an additional deposit obligation of $10,000 that must be satisfied by Monday, April 8, 1991, the 3rd banking day following the close of the April 1–3 eighth-monthly period. The obligation to deposit the $10,000 is separate and distinct from the obligation to deposit the $110,000.

(*e*) An employer will be considered to have satisfied the deposit obligation imposed by paragraphs (a)(1)(ii) (*b*), (*c*) and (*d*) of this section if—

(*1*) The deposit that is made is not less than 95 percent of the aggregate amount of taxes accumulated with respect to wages paid during the period for which the deposit is made, and

(*2*) If the eighth-monthly period (or, in the case of a deposit required under paragraph (a)(1)(ii)(*c*) of this section, the day on which the obligation arose) is in a month other than the last month of the return period, the employer deposits any remaining amount due with the first deposit otherwise required to be made after the fifteenth day of the following month. In the case of the last month of the return period, see §31.6302(c)–1(a)(1)(iv).

(*f*) Any excess of a deposit over the actual taxes required to be deposited to date (overdeposit) during the return period shall be applied in order of time to each of the employer's succeeding deposit obligations within the same return period. In the determination of the aggregate amount of taxes accumulated with respect to wages paid in succeeding deposit periods, the overdeposit does not reduce the aggregate amount accumulated although the overdeposit is credited to the depositor's account.

Example. Employer *M*'s deposit obligation for the eighth-monthly period April 1–3, 1991, is $3,200. On April 8, 1991, three banking days after the close of the eighth-monthly period, *M* deposits $4,000 in an authorized depository, $800 in excess of the amount required to be deposited. During the eighth-monthly period April 4–

7, 1991, *M* accumulates $3,750 in taxes with respect to wages paid during such period. Although the $800 overdeposit for the April 1–3 eighth-monthly period is credited to *M*'s account, it may not be used to determine whether a deposit obligation exists for the April 4–7 eighth-monthly period. The two deposit obligations are separate and distinct. Since the amount of taxes accumulated with respect to the April 4–7 eighth-monthly period is an amount greater than $3,000, a deposit is required under paragraph (a)(1)(ii)(*b*) of this section within three banking days after the close of the period. *M* has a remaining deposit obligation of $2,950 ($3,750 accumulated less $800 overdeposit) that must be satisfied by April 10, 1991, three banking days after the close of the period.

(*g*) The periods within which taxes must be deposited under this section are determined, in the case of employers paying advance earned income credit amounts, by reference to the amount of taxes required to be deposited after reduction for advance amounts paid to employees.

(*h*) For purposes of this paragraph (a)(1)(ii), the term "wages paid" includes all amounts included in wages, e.g., under section 3121(v) of the Code, regardless of whether they have actually been paid.

(iii) As used in subdivisions (i) and (ii) of this subparagraph, the term "taxes" means—

(*a*) The employee tax withheld under section 3102,

(*b*) The employer tax under section 3111, and

(*c*) The income tax withheld under section 3402, including amounts withheld with respect to qualified State individual income taxes,

Exclusive of taxes with respect to wages for domestic service in a private home of the employer or, if paid before April 1, 1971, wages for agricultural labor. In addition, with respect to wages paid after December 31, 1970, and before April 1, 1971, for agricultural labor, any taxes described in paragraph (a)(2)(ii) of this section which are not required under such subparagraph to be deposited, and any income tax (including qualified State individual income tax) withheld under section 3402 with respect to such wages, shall be deemed to be "taxes" on and after April 1, 1971. For the requirements relating to the deposit and payment of withheld tax and with respect to qualified State individual income taxes, see paragraph (d)(3)(iii) of §301.6361–1 of this chapter (Regulations on Procedure and Administration).

(iv) If the aggregate amount of taxes reportable on a return (other than a return on Form 942) for a return period exceeds the total amount deposited by the employer pursuant to paragraph (a)(1) (i) or (ii) of this section for such return period (*a*) by $500 or more in the case of a return period which ends after December 31, 1980, or (*b*) by more than $200 in the case of a return period which ends after December 31, 1970, and before January 1, 1981, the employer shall, on or before the last day of the first calendar month following the return period, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes reportable on the return exceed the total deposits (if any) made pursuant to subdivision (i) or (ii) of this subparagraph for such period.

As used in this subdivision, the term "taxes" shall have the meaning assigned to such term in subdivision (iii) of this subparagraph, except that the term shall include the taxes referred to in (*a*), (*b*), and (*c*) of such subdivision (iii) of this subparagraph with respect to any wages for domestic service in a private home of the employer which the employer elects to report on a quarterly return other than a quarterly return made on Form 942.

(v) If the aggregate amount of taxes reportable on Form CT–1, the return relating to an employer's railroad retirement tax payments, for a return period exceeds the total amount deposited by the employer pursuant to paragraph (a)(1)(i) of this section for such return period by $100 or more, the employer shall, on or before the last day of the second calendar month following the return period, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes reportable on Form CT–1 exceed the total deposits (if any) of such taxes made pursuant to subdivision (i) of this subparagraph for such period.

(2) *Depositary forms*—(i) *In general.* A deposit required to be made by this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one, remittance of the amount required to be deposited. However, a deposit for a period in one calendar quarter shall be made separately from any deposit for a period in another calendar quarter. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires.

(ii) *Deposits.* Each remittance of amounts required to be deposited under paragraph (a)(1) of this section shall be accompanied by a Federal Tax Deposit form. Such form shall be prepared in accordance with the instructions applicable thereto. The remittance, together with the Federal Tax Deposit form, shall be forwarded to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR Part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR Part 214.7. The timeliness of the deposit will be determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e). Each employer making deposits under this section shall report on the return, for the period with respect to which such deposits are made, information regarding such deposits according to the instructions that apply to such return and pay at that time (or deposit by the due date of such return) the balance, if any, of the taxes due for such period.

(iii) *Time deemed paid.* In general, amounts deposited under subdivision (ii) of this subparagraph shall be considered as paid on the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to April 15th of a calendar year immediately succeeding the calendar year which contains the period for which such amount was so deposited, such amount shall be considered as paid on such April 15th.

(3) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to it. An employer not supplied with the Federal Tax Deposit form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by application therefor; such application shall supply the employer's name, identification number, address, and the taxable period to which the deposits will relate.

(b) *Exceptions*—(1) *Monthly returns.* The provisions of this section are not applicable with respect to taxes for the month in which the employer receives notice that returns are required under §31.6011 (a)–5 (or for any subsequent month for which such a return is required), if those taxes are also required to be deposited under the separate accounting procedures provided in §301.7512–1 of this chapter (Regulations on Procedure and Administration) (which procedures are applicable if notification is given of failure to comply with certain employment tax requirements). In cases in which a monthly return is required under §31.6011 (a)–5 but the taxes are not required to be deposited under the separate accounting procedures provided in §301.7512–1, the provisions of this section shall apply except that paragraph (a)(1)(iv) shall not authorize the deferral of any deposit to a date after the date on which the return is required to be filed.

(2) *Wages paid in nonconvertible foreign currency.* The provisions of this section are not applicable with respect to taxes paid in nonconvertible foreign currency pursuant to §301.6316–7 of this chapter (Regulations on Procedure and Administration).

(68A Stat. 775, 917; 26 U.S.C. 6302, 7805; secs. 6302 (c) and 7805 of the Internal Revenue Code of 1954; 68A Stat. 775, 26 U.S.C. 6302 (c); 68A Stat. 917; 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960]

Editorial Note: For Federal Register citations affecting §31.6302(c)–1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 31.6302(c)-2 Use of Government depositories in connection with employee and employer taxes under Railroad Retirement Tax Act for amounts attributable to payments made before January 1, 1993.

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(a) *Requirement*—(1) *In general: after 1983 and before April 1, 1991.* In the case of a calendar month which begins after December 31, 1983, and before April 1, 1991, if, at a time prescribed under §31.6302(c)–1(a)(1) (i) or (v) for the deposit of undeposited taxes, the aggregate amount of undeposited employee tax withheld after December 31, 1983, and before April 1, 1991, under section 3202 and employer tax imposed after December 31, 1983, and before April 1, 1991, under section 3221(a) and (b) equals an amount required to be deposited under §31.6302(c)–1(a)(1) (i) or (v) the

employer shall deposit the undeposited railroad retirement taxes described in sections 3202 and 3221 at such time in the manner prescribed in §31.6302(c)–1(a)(1) (i) or (v) (except that undeposited railroad retirement taxes described in section 3221 (c) shall in no case be required to be deposited earlier than the first day on which a deposit is otherwise required by §31.6302(c)–1(a)(1)(i) to be made after the 15th day of the month following the month in which the section 3221 (c) tax arises).

Notwithstanding the preceding sentence, and notwithstanding subdivision (v) of §31.6302 (c)–1 (a) (1), if, for the calendar year prior to the calendar year preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, such employer shall deposit his undeposited railroad retirement taxes required to be deposited for the current calendar year in accordance with Revenue Procedure 83–90, 1983–52 I.R.B. 18, (relating to transfers by wire to the Treasury).

(2) *In general: After March 31, 1991 and before January 1, 1993.* In the case of a calendar month which begins after March 31, 1991, if, at a time prescribed under §31.6302(c)–1(a)(1)(ii) or (v) for the deposit of accumulated taxes, the aggregate amount of accumulated employee tax withheld after March 31, 1991, under section 3202 and employer tax imposed after March 31, 1991, under section 3221(a) and (b) equals an amount required to be deposited under §31.6302(c)–1(a)(1)(ii) or (v), the employer shall deposit the accumulated railroad retirement taxes described in sections 3202 and 3221 at the time and in the manner prescribed in §31.6302(c)–1(a)(1)(ii) or (v) (except that accumulated railroad retirement taxes described in section 3221(c) shall in no case be required to be deposited earlier than the first day on which a deposit is otherwise required by §31.6302(c)–1(a)(1)(ii) to be made after the 15th day of the month following the month in which the section 3221(c) tax arises). Notwithstanding the preceding sentence, and notwithstanding §31.6302(c)–1(a)(1)(v), if, for the calendar year prior to the calendar year preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, such employer shall deposit the aggregate amount of railroad retirement taxes required to be deposited for the current calendar year in accordance with Revenue Procedure 83–90, 1983–2 C.B. 615 (relating to transfers by wire to the Treasury).

(3) *Special requirement.* If an employer files a return on Form CT–1 for a return period beginning before January 1, 1984, and the taxes shown thereon exceed by more than $100 the total amount deposited by him pursuant to paragraph (a)(1) of this section for such return period the employer shall, on or before the last day of the second calendar month following the period for which the return is filed, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes shown on the return exceed the total deposits (if any) made pursuant to paragraph (a)(1) of this section for such return period.

(b) *Depositary forms*—(1) *In general.* A deposit required to be made by this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one remittance of the amount required to be deposited. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires. If the aggregate amount of the taxes deposited is in excess of the taxes shown on the return, a credit or refund may be obtained; and

in the event the excess is applied as a credit against such taxes for a subsequent return period, the employer shall reduce the amount of one or more of the deposits otherwise required for such subsequent return period by the amount of such credit.

(2) *Deposits.* Each remittance of amounts required to be deposited shall be accompanied by a Federal Tax Deposit form which shall be prepared in accordance with the instructions applicable thereto. Except as provided in paragraph (a)(1) or (a)(2) of this section, the remittance, together with the form, shall be forwarded to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR part 214.7. The timeliness of the deposit will be determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e). Each employer making deposits under this section shall report on the return, for the period with respect to which such deposits are made, information regarding such deposits according to the instructions that apply to such return and pay at that time (or deposit by the due date of such return) the balance, if any, of the taxes due for such period.

(3) *Time deemed paid.* In general, amounts deposited under subparagraph (2) of this paragraph shall be considered as paid on the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to April 15th of a calendar year immediately succeeding the calendar year in which occurs the period for which such amount was so deposited, such amount shall be considered as paid on such April 15th.

(c) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to it. An employer not supplied with the form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by applying therefor and supplying its name, identification number, address, and the taxable period to which the deposits will relate. Copies of the Federal Tax Deposit form may be secured by application therefor.

(Secs. 6302 (c) and 7805 of the Internal Revenue Code of 1954 (68A Stat. 775, 26 U.S.C. 6302 (c); 68A Stat. 917; 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6941, 32 FR 18041, Dec. 16, 1967; T. D. 6957, 33 FR 8272, June 4, 1968; T.D. 7419, 41 FR 19632, May 13, 1976; T.D. 7931, 48 FR 57274, Dec. 29, 1983; T.D. 7953, 49 FR 19645, May 9, 1984; T.D. 8341, 56 FR 13403, Apr. 2, 1991; T.D. 8436, 57 FR 44106, Sept. 24, 1992; T.D. 9239, 71 FR 13, Jan. 3, 2006]

§ 31.6302(c)-2A Use of Government depositaries in connection with the railroad unemployment repayment tax.

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(a) *Effective date.* The provisions of this section apply with respect to the tax imposed by section 3321 (a) on rail employers (as defined in section 3323(a)) on wages paid on or after July 1, 1986, during a taxable period.

(b) *Requirement*—(1) *Rail employers*—(i) *In general.* Except as provided in this section, every rail employer who is required by section 6157(d) to compute the tax imposed by section 3321(a) on a quarterly basis shall deposit the amount of the tax so computed with respect to a calendar quarter (other than the fourth quarter of a calendar year) with an authorized financial institution on or before the last day of the first calendar month following the close of the calendar quarter.

(ii) *Special rule for certain rail employers.* If, for the calendar year prior to the calendar year immediately preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 of the Code (relating to the railroad retirement tax) with respect to an employer equaled or exceeded $1,000,000, such employer shall (except as provided below) deposit his undeposited railroad unemployment repayment tax imposed by section 3321(a) with respect to the current calendar year at the time such tax would otherwise be required to be deposited under this section in the manner set forth in Revenue Procedure 83–90, 1983–2 C.B. 615 (relating to transfers by wire to the Treasury). The funds transfer message described in Revenue Procedure 83–90 (with respect to the railroad retirement tax) shall be completed in the same manner as is prescribed in that Revenue Procedure, except that the amount required by item 12(f) shall be the amount of the railroad unemployment repayment tax (to be labeled as such by the rail employer). Item 12(g) is to be disregarded with respect to the use of the Revenue Procedure for deposits of the railroad unemployment repayment tax. A wire transfer required to be made by a rail employer with respect to the railroad unemployment repayment tax shall be made separately from any wire transfer required to be made with respect to any other tax.

(2) *Special rule where accumulated amount does not exceed $100.* The provisions of paragraph (b)(1) of this section shall not apply with respect to any calendar quarter if the amount of tax imposed by section 3321(a) for such calendar quarter as computed under section 6157, plus unpaid amounts for prior calendar quarters within the taxable period, does not exceed $100.

(3) *Requirement for deposit in lieu of payment with return.* If the amount of the tax reportable on a return of tax on Form CT–1 for a taxable period (as defined in section 3322(a)) exceeds by more than $100 the sum of the amounts deposited pursuant to paragraph (b)(1) of this section for such taxable period, the rail employer shall, on or before the last day of the first calendar month following the period, deposit the balance of the tax due with a Federal Reserve bank or with an authorized financial institution.

(4) *Special rule for third calendar quarter of 1986.* Notwithstanding paragraph (b)(1)(i) of this section, every rail employer required by section 6157(d) to compute the tax imposed by section 3321 (a) for the third calendar quarter of 1986 shall deposit the tax so computed on or before December 15, 1986, in the manner provided by this section.

(c) *Depositary forms.* The provisions of paragraphs (b) and (c) of §31.6302(c)–2, relating to depositary forms, are incorporated in this §31.6302(c)–2A by reference.

[T.D. 8105, 51 FR 40169, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988; T.D. 8952, 66 FR 33832, June 26, 2001]

§ 31.6302(c)-3 Use of Government depositaries in connection with tax under the Federal Unemployment Tax Act.

top

(a) *Requirement*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, every person who, by reason of the provisions of section 6157, computes the tax imposed by section 3301 on a quarterly or other time period basis shall—

(i) If he is a person described in subsection (a)(1) of section 6157, deposit the amount of such tax with an authorized financial institution on or before the last day of the first calendar month following the close of each of the first three calendar quarters in the calendar year, or

(ii) If he is a person other than a person described in subsection (a)(1) of section 6157, deposit the amount of such tax with an authorized financial institution on or before the last day of the first calendar month following the close of—

(*a*) The period beginning with the first day of the calendar year and ending with the last day of the calendar quarter (excluding the last calendar quarter) in which such person becomes an employer (as defined in section 3306(a)), and

(*b*) The third calendar quarter of such year, if the period specified in (*a*) of this subdivision includes only the first two calendar quarters of the calendar year.

(2) *Special rule where accumulated amount does not exceed $500.* The provisions of paragraph (a)(1) of this section shall not apply with respect to any period described therein if the amount of the tax imposed by section 3301 for such period (as computed under section 6157) plus amounts not deposited for prior periods does not exceed $500 ($100 in the case of periods ending on or before December 31, 2004). Thus, an employer shall not be required to make a deposit for a period unless his tax for such period plus tax not deposited for prior periods exceeds $500.

(3) *Requirement for deposit in lieu of payment with return.* If the amount of tax reportable on a return on Form 940 exceeds by more than $500 ($100 in the case of calendar years before 2005) the sum of the amounts deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year, the employer shall, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, deposit the balance of the tax due with an authorized financial institution.

(b) *Manner of deposit—deposits required to be made by Federal tax deposit (FTD) coupon*—(1) *In general.* A deposit required to be made by an employer under this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one, remittance of the amount required to be deposited. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires.

(2) *Use of Federal Tax Deposit form.* Each remittance of amounts required to be deposited under this section shall be accompanied by a prepunched and preinscribed Federal Tax Deposit form which shall be prepared in accordance with the instructions applicable thereto. The employer shall forward such remittance, together with the Federal Tax Deposit form, to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR part 203. The timeliness of deposits is determined by the date stamped on the Federal Tax Deposit form by the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e).

(3) *Time deemed paid.* In general, amounts deposited under this section shall be considered as paid on the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), such amount shall be considered as paid on such last day.

(4) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to him. An employer not supplied with the proper form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by applying therefor and supplying his name, identification number, address and the taxable year to which the deposits will relate. Copies of the Federal Tax Deposit form may be secured by.

(c) *Manner of deposit—deposits required to be made by electronic funds transfer.* For the requirement to deposit tax under the Federal Unemployment Tax Act by electronic funds transfer, see §31.6302–1 (h). A taxpayer not required to deposit by electronic funds transfer pursuant to §31.6302–1(h) remains subject to the rules of paragraph (b) of this section.

(d) *Effective date.* The provisions of paragraphs (a) and (b) of this section apply with respect to calendar quarters beginning after December 31, 1969. The provisions of paragraph (c) of this section apply with respect to calendar quarters beginning on or after January 1, 1995.

[T.D. 7037, 35 FR 6709, Apr. 28, 1970; 35 FR 7070, May 5, 1970, as amended by T.D. 7062, 35 FR 14840, Sept. 24, 1970; T.D. 7953, 49 FR 19645, May 9, 1984; 49 FR 25239, June 20, 1984; T.D. 8723, 62 FR 37494, July 14, 1997; T.D. 8952, 66 FR 33831, 33832, June 26, 2001; T.D. 9162, 69 FR 69820, Dec. 1, 2004; T.D. 9239, 71 FR 13, Jan. 3, 2006]

§ 31.6302(c)-4 Cross references.

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(a) *Failure to deposit.* For provisions relating to the penalty for failure to make a deposit within the prescribed time, see section 6656.

(b) *Saturday, Sunday, or legal holiday.* For provisions relating to the time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday, see the provisions of §301.7503–1 of this chapter (Regulations on Procedure and Administration).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960. Redesignated by T.D. 7037, 35 FR 6709, Apr. 28, 1970, as amended by T.D. 8947, 66 FR 32542, June 15, 2001]

§ 31.6361-1 Collection and administration of qualified State individual income taxes.

top

Except as otherwise provided in §§301.6361–1 to 301.6385–2, inclusive, of this chapter (Regulations on Procedure and Administration), the provisions of this part under subtitle F or chapter 24 of the Internal Revenue Code of 1954 relating to the collection and administration of the taxes imposed by chapter 1 of such Code on the incomes of individuals (or relating to civil or criminal sanctions with respect to such collection and administration) shall apply to the collection and administration of qualified State individual income taxes (as defined in section 6362 of such Code and the regulations thereunder) as if such taxes were imposed by chapter 1 of chapter 24.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7577, 43 FR 59360, Dec. 20, 1978]

§ 31.6402(a)-1 Credits or refunds.

top

(a) *In general.* For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§31.6402(a)–2, 31.6402(a)–3, and 31.6414–1, for regulations under section 6402 of general application to credits or refunds, see §§301.6402–1 and 301.6402–2 of this chapter (Regulations on Procedure and Administration). For provisions relating to credits of employment taxes which constitute adjustments without interest, see §§31.6413(a)–1 and 31.6413(a)–2.

(b) *Period of limitation.* For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see §301.6511(a)–1 of this chapter (Regulations on Procedure and Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

§ 31.6402(a)-2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act.

top

(a) *Claim by person who paid tax to district director*—(1) *In general.* Any person who pays to the district director more than the correct amount of—

(i) Employee tax under section 3101, or employer tax under section 3111, of the Federal Insurance Contributions Act,

(ii) Employee tax under section 3201, employee representative tax under section 3211, or employer tax under section 3221, of the Railroad Retirement Tax Act,

(iii) Any such tax under a corresponding provision of prior law, or

(iv) Interest, addition to the tax, additional amount, or penalty with respect to any such tax,

may file a claim for refund of the overpayment (except to the extent that the overpayment must be credited pursuant to §31.3503–1, or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and §301.6402–2 of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return filed by the person making the claim. The return on which the credit is claimed must be on a form which is prescribed for use, at the time of the claim, in reporting tax which corresponds to the tax overpaid. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, designating the return period in which the error was

ascertained, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return. No refund or credit of employee tax under the Federal Insurance Contributions Act shall be allowed if for any reason (for example, an overcollection of employee tax having been inadvertently included by the employee in computing a special refund—see §31.6413(c)–1 the employee has taken the amount of such tax into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected.

(2) *Statements supporting employers' claims for employee tax.* (i) Every claim filed by an employer for refund or credit of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written receipt of the employee showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every claim filed by an employer for refund or credit of employee tax under section 3101, or a corresponding provision of prior law, collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also shall include a statement that the employer has obtained from the employee a written statement (*a*) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (*b*) that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

(b) *Claim by employee*—(1) *In general.* If more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, is collected by an employer from an employee and paid to the district director, the employee may file a claim for refund of the overpayment if (i) the employee does not receive reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit, (ii) the overcollection cannot be corrected under §31.3503–1, and (iii) in the case of employee tax under section 3101 or a corresponding provision of prior law, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected. See §31.6413(c)–1.

(2) *Statements supporting employee's claim.* (i) Each employee who makes a claim under subparagraph (1) of this paragraph shall submit with such claim a statement setting forth (*a*) the extent, if any, to which the employer has reimbursed the employee in any manner for the overcollection, and (*b*) the amount, if any, of credit or refund of such overpayment claimed by the employer or authorized by the employee to be claimed by the employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the district director. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his knowledge and belief, and shall include therein an explanation of his inability to obtain the statement from the

employer.

(ii) Each individual who makes a claim under subparagraph (1) of this paragraph for refund of employee tax under section 3101, or a corresponding provision of prior law, also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his income tax, and the amount, if any, so claimed (see §31.6413(c)–1).

(c) *Statements to accompany employers' and employees' claims under the Federal Insurance Contributions Act.* Whenever a claim for credit or refund of employee tax under section 3101, employer tax under section 3111, or either such tax under a corresponding provision of prior law, is made with respect to remuneration which was erroneously reported on a return or schedule as wages paid to an employee, such claim shall include a statement showing (1) the identification number of the employer, if he was required to make application therefor, (2) the name and account number of such employee, (3) the period covered by such return or schedule, (4) the amount of remuneration actually reported as wages for such employee, and (5) the amount of wages which should have been reported for such employee. No particular form is prescribed for making such statement, but if printed forms are desired, the district director will supply copies of Form 941c or Form 941c PR, whichever is appropriate, upon request.

§ 31.6402(a)-3 Refund of Federal unemployment tax.

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Any person who pays to the district director more than the correct amount of—

(a) Tax under section 3301 of the Federal Unemployment Tax Act or a corresponding provision of prior law, or

(b) Interest, addition to the tax, additional amount, or penalty with respect to such tax,

may file a claim for refund of the overpayment, in the manner and subject to the conditions stated in §301.6402–2 of this chapter (Regulations on Procedure and Administration). See §31.6413(d) and the corresponding section of prior law for provisions which bar the allowance or payment of interest on the amount of any refund based on credit allowable for contributions paid under the unemployment compensation law of a State.

§ 31.6404(a)-1 Abatements.

top

For regulations under section 6404 of general application to the abatement of taxes, see §301.6404–1 of this chapter (Regulations on Procedure and Administration). Every claim filed by an employer for abatement of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, shall be made in the manner and subject to the conditions stated in paragraphs (a) (2) and (c) of §31.6402(a)–2, as if the claim for abatement were a claim for refund.

§ 31.6413(a)-1 Repayment by employer of tax erroneously collected from employee.

top

(a) *Before employer files return*—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer—

(*a*) During any return period collects from an employee more than the correct amount of tax under section 3101 or section 3201, or a corresponding provision of prior law,

(*b*) Repays the amount of the over-collection to the employee before the return for such period is filed with the district director, and

(*c*) Obtains and keeps as part of his records the written receipt of the employee showing the date and amount of the repayment,

the employer shall not report on any return or pay to the district director the amount of the overcollection.

(ii) Any overcollection not repaid to and receipted for by the employee as provided in paragraph (a)(1)(i) of this section shall be reported and paid to the district director with the return for the return period in which the overcollection was made. Such return shall be accompanied by a statement explaining the overcollection, setting forth the account number (if known) and name of the individual from whom the overcollection was made, and showing the total amount overcollected from and not repaid to the individual. If the employer is not required to make a return for such period, the employer nevertheless shall furnish to the district director a statement as described in the preceding sentence, on or before the date fixed for filing a return for such period, and shall pay the amount of the overcollection with such statement.

(2) *Income tax withheld from wages.* (i) If an employer—

(*a*) During any return period collects from an employee more than the correct amount of tax under section 3402,

(*b*) Repays the amount of the overcollection to the employee before the return for such period is filed with the district director and before the end of the calendar year in which the overcollection was made,

and

(*c*) Obtains and keeps as part of his records the written receipt of the employee showing the date and amount of the repayment,

the employer shall not report on any return or pay to the district director the amount of the overcollection.

(ii) Any overcollection not repaid to and receipted for by the employee as provided in subdivision (i) of this subparagraph shall be reported and paid to the district director with the return for the return period in which the overcollection was made.

(b) *After employer files return*—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer collects from any employee and pays to the district director more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, and if the error is ascertained within the applicable period of limitation on credit or refund, the employer shall repay or reimburse the employee in the amount thereof prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of such limitation period. This subparagraph has no application in any case in which an overcollection is made the subject of a claim by the employer for refund or credit, and the employer elects to secure the written consent of the employee to the allowance of the refund or credit under the procedure provided in paragraph (a)(2)(i) of §31.6402(a)–2.

(ii) If the amount of an overcollection is repaid to an employee, the employer shall obtain and keep as part of his records the written receipt of the employee, showing the date and amount of the repayment. If, in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee tax under section 3101, or a corresponding provision of prior law, which was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of his records a written statement (*a*) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (*b*) that the employee will not claim refund or credit of such amount. See §31.6413(c)–1.

(iii) If the employer does not repay the employee the amount overcollected, the employer shall reimburse the employee by applying the amount of the overcollection against the employee tax which attaches to wages or compensation paid to the employee prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of the applicable period of limitation on credit or refund. If the amount of the overcollection exceeds the amount so applied against such employee tax, the excess amount shall be repaid to the employee as required by this subparagraph.

(iv) For purposes of this subparagraph, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(v) For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see §301.6511(a)–1 of this chapter (Regulations on Procedure and Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

(2) *Income tax withheld from wages.* (i) If, in any return period in a calendar year, an employer collects from any employee more than the correct amount of tax under section 3402, and the employer pays the amount of such overcollection to the district director, the employer may repay or reimburse the employee in the amount thereof in any subsequent return period in such calendar year.

(ii) If the amount of the overcollection is repaid to the employee, the employer shall obtain and keep as part of his records the written receipt of the employee, showing the date and amount of the repayment. If the employer does not repay the amount of the overcollection, the employer may reimburse the employee by applying the amount of the overcollection against the tax under section 3402 which otherwise would be required to be withheld from wages paid by the employer to the employee in the calendar year in which the overcollection is made.

§ 31.6413(a)-2 Adjustment of overpayments.

top

(a) *Taxes under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act*—(1) *Employee tax.* After an employer repays or reimburses an employee in the amount of an overcollection, as provided in paragraph (b)(1) of §31.6413(a)–1, the employer may claim credit for such amount in the manner, and subject to the conditions, stated in §31.6402(a)–2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on a return for a period ending on or before the last day of the return period following the return period in which the error was ascertained. No credit or adjustment in respect of an overpayment shall be entered on a return after the filing of a claim for refund of such overpayment.

(2) *Employer tax.* If an employer pays more than the correct amount of employer tax under section 3111 or section 3221, or a corresponding provision of prior law, the employer may claim credit for the amount of the overpayment in the manner, and subject to the conditions, stated in §31.6402(a)–2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on the same return on which the employer adjusts, pursuant to paragraph (a)(1) of this section, a corresponding overpayment of employee tax.

(b) *Income tax withheld from wages.* If, pursuant to paragraph (b)(2) of §31.6413(a)–1, an employer repays or reimburses an employee in the amount of an overcollection of tax under section 3402, the employer may adjust the overcollection, without interest, by entering the amount thereof as a deduction on a return of tax under section 3402, filed by the employer for any return period in the

calendar year in which the employer repays or reimburses the employee. The return on which the adjustment is entered as a deduction shall have attached thereto a statement explaining the adjustment, designating the return period in which the error occurred, and setting forth such other information as is required by the regulations in this subpart and by the instructions relating to the return.

§ 31.6413(a)-3 Repayment by payor of tax erroneously collected from payee.

 top

(a) *In general*—(1) *Erroneous withholding under section 3406 of the Internal Revenue Code.* If a payor or broker withholds under section 3406 from a payee in error or withholds more than the proper amount of the tax under section 3406, the payor or broker may refund the amount erroneously withheld as provided in section 6413 and this section. A payor or broker will be considered to have withheld erroneously under section 3406 only if the amount is withheld because of an error by the payor or broker (e.g., an error in flagging or identifying an account that is subject to withholding under section 3406). The payor or broker may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee if—

(i) The payor or broker requires a payee described in §31.3406(g)–1(a) or described in a provision of the Internal Revenue Code requiring the reporting of a payment subject to withholding under section 3406 to certify that it is an exempt recipient, the payee fails to make the required certification, and the payor or broker subsequently withholds under section 3406 from a payment to the payee;

(ii) The payor or broker does not require the payee to certify concerning its exempt status and the payor or broker withholds under section 3406;

(iii) The payor or broker withholds under section 3406 from a payee after the payee provides a taxpayer identification number or required certification (including the documentation described in §1.1441–1(e)(1)(ii), 1.6045–1(g)(3), or 1.6049–5(c) of this chapter) to the payor, but before the payor or broker treats the number or required certification as having been received under §31.3406(e)–1(b); or

(iv) The amount is withheld because a payor imposed backup withholding on a payment made to a person because the payee failed to furnish the documentation described in §1.1441–1(e)(1)(ii) of this chapter and the payee subsequently furnishes, completes, or corrects the documentation. The documentation must be furnished, completed, or corrected prior to the end of the calendar year in which the payment is made and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the withholding erroneously occurred.

(2) For purposes of paragraph (a)(1) of this section (other than erroneous withholding occurring under the circumstances described in paragraph (a)(1)(iv) of this section), if a payor or broker withholds because the payor or broker has not received a taxpayer identifying number or required certification

and the payee subsequently provides a taxpayer identifying number or a required certification to the payor, the payor or broker may not refund the amount to the payee.

(b) *Refunding amounts erroneously withheld*—(1) *Time and manner.* If a payor or broker withholds under section 3406 from a payee in error (including withholding more than the correct amount, as described in paragraph (a) of this section), the payor or broker may refund the amount erroneously withheld to the payee if the refund is made prior to the end of the calendar year and prior to the time the payor or broker furnishes a Form 1099 to the payee with respect to the payment for which the erroneous withholding occurred. If the amount of the erroneous withholding is refunded to the payee, the payor or broker must—

(i) Keep as part of its records a receipt showing the date and amount of refund and must provide a copy of the receipt to the payee (a canceled check or an entry in a statement is sufficient, provided that the check or statement contains a specific notation that it is a refund of tax erroneously withheld);

(ii) Not report on a Form 1099 as tax withheld any amount which the payor or broker has refunded to a payee; and

(iii) Not deposit the amount erroneously withheld if the payor or broker has not deposited the amount of the tax prior to the time that the refund is made to the payee.

(2) *Adjustment after the deposit of the tax*—(i) *In general.* Except as provided in paragraph (b)(2)(ii) of this section, if the amount erroneously withheld has been deposited prior to the time that the refund is made to the payee, the payor or broker may adjust any subsequent deposit of the tax collected under chapter 24 of the Internal Revenue Code that the payor or broker is required to make in the amount of the tax that has been refunded to the payee.

(ii) *Erroneous withholding from a payee that is a foreign person.* Where a payor withholds in error from a payee that is a nonresident alien or foreign person, as described in paragraph (a)(1)(iv) of this section, the payor may refund some or all of the amount subject to backup withholding under section 3406. A refund may be paid in accordance with the requirements of this paragraph (b)(2)(ii) where the documentation is furnished, completed, or corrected prior to the end of the calendar year in which the payment is made and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the withholding erroneously occurred. The amount of the refund will be the amount erroneously withheld less the amount of tax required to be withheld, if any, under chapter 3 of the Internal Revenue Code and the regulations under that chapter. With respect to the amount of the payment to the foreign person and the amount of tax required to be withheld under chapter 3 of the Internal Revenue Code (and the regulations thereunder), returns must be made in accordance with the requirements of §1.1461–1 (b) and (c) of this chapter.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53494, Oct. 14, 1997]

§ 31.6413(b)-1 Overpayments of certain employment taxes.

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For provisions relating to the adjustment of overpayments of tax imposed by section 3101, 3111, 3201, 3221, or 3402, see §31.6413(a)–2. For provisions relating to refunds of tax imposed by section 3101, 3111, 3201, or 3221, see §§31.6402(a)–1 and 31.6402(a)–2. For provisions relating to refunds of tax imposed by section 3402, see §§31.6402(a)–1 and 31.6414–1.

§ 31.6413(c)-1 Special refunds.

top

(a) *Who may make claims*—(1) *In general.* (i) If an employee receives wages, as defined in section 3121(a), from two or more employers in any calendar year:

(*a*) After 1954 and before 1959 in excess of $4,200,

(*b*) After 1958 and before 1966 in excess of $4,800,

(*c*) After 1965 and before 1968 in excess of $6,600,

(*d*) After 1967 and before 1972 in excess of $7,800,

(*e*) After 1971 and before 1973 in excess of $9,000,

(*f*) After 1972 and before 1974 in excess of $10,800,

(*g*) After 1973 and before 1975 in excess of $13,200, or

(*h*) After 1974 in excess of the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective with respect to such year,

the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed by section 3101 with respect to such wages and deducted therefrom (whether or not paid) exceeds the employee tax with respect to the amount specified in (*a*) through (*h*) of this subdivision for the calendar year in question. Employee tax imposed by section 3101 with respect to tips reported by an employee to his employer and collected by the employer from funds turned over by the employee to the employer (see section 3102(c)) shall be treated, for purposes of this paragraph, as employee tax deducted from wages received by the employee. If the employee is required to file an income tax return for such calendar year (or for his last taxable year beginning in such calendar year)

he may obtain the benefit of the special refund only by claiming credit as provided in §1.31–2 of this chapter (Income Tax Regulations).

(ii) The application of this subparagraph may be illustrated by the following examples:

Example 1. Employee A in the calendar year 1968 receives taxable wages in the amount of $5,000 from each of his employers, B, C, and D, for services performed during such year (or at any time after 1936), or a total of $15,000. Employee tax (computed at 4.4 percent, the aggregate employee tax rate in effect in 1968) is deducted from A's wages in the amount of $220 by B and $220 by C, or a total of $440. Employer D pays employee tax in the amount of $220 without deducting such tax from A's wages. The employee tax with respect to the first $7,800 of such wages is $343.20. A is entitled to a special refund of $96.80 ($440 minus $343.20). The $5,000 of wages received from employer D and the $220 of employee tax paid with respect thereto have no bearing in computing A's special refund since such tax was not deducted from his wages.

Example 2. Employee E in the calendar year 1968 performs services for employers F and G, for which E is entitled to wages of $7,800 from each employer, or a total of $15,600. On account of such services, E in 1967 received an advance payment of $1,800 of wages from F; and in 1968, receives wages in the amount of $6,000 from F and $7,800 from G. Employee tax was deducted as follows: In 1967, $79.20 ($1,800 × 4.4 percent, the aggregate employee tax rate in effect in 1967) by employer F; and in 1968, $264.00 ($6,000 × 4.4 percent, the aggregate employee tax rate in effect in 1968) by employer F, and $343.20 ($7,800 × 4.4 percent) by employer G. Thus, E in the calendar year 1968 received $13,800 in wages from which $607.20 of employee tax was deducted. The amount of employee tax with respect to the first $7,800 of such wages received in 1968 is $343.20. E is entitled to a special refund of $264.00 ($607.20 minus $343.20). The $1,800 advance of wages received in 1967 from F, and the $79.20 of employee tax with respect thereto, have no bearing in computing E's special refund for 1968, because the wages were not received in 1968. Such amounts could not form the basis for a special refund unless E during 1967 received from F and at least one more employer wages totaling more than $6,600.

(2) *Federal employees.* For purposes of special refunds of employee tax, each head of a Federal agency or of a wholly owned instrumentality of the United States who makes a return pursuant to section 3122 (and each agent designated by a head of a Federal agency or instrumentality who makes a return pursuant to such section) is considered a separate employer. For such purposes, the term "wages" includes the amount which each such head (or agent) determines to constitute wages paid an employee, but not in excess of the amount specified in paragraph (a)(1)(i) (*a*) through (*h*) of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents of one or more Federal agencies and the amount of such wages is in excess of $13,200 the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from an agency or wholly owned instrumentality of the United States and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(3) *State employees.* For purposes of special refunds of employee tax, the term "wages" includes such

remuneration for services covered by an agreement made pursuant to section 218 of the Social Security Act, relating to voluntary agreements for coverage of employees of State and local governments, as would be wages if such services constituted employment (see §31.3121(a)–1, relating to wages); the term "employer" includes a State or any political subdivision thereof, or any instrumentality of any one or more of the foregoing; and the term "tax" or "tax imposed by section 3101" includes an amount equivalent to the employee tax which would be imposed by section 3101 if such services constituted employment. The provisions of paragraph (a)(1) of this section are applicable whether or not any amount deducted from an employee's remuneration as a result of an agreement made pursuant to section 218 of the Social Security Act has been paid pursuant to such agreement. Thus, the special refund provisions are applicable to amounts equivalent to employee tax deducted from employees' remuneration by States, political subdivisions, or instrumentalities by reason of agreements made under section 218 of the Social Security Act. Moreover, if during any calendar year an employee receives remuneration for services covered by such an agreement and during the same calendar year receives wages from one or more other employers, either private or governmental, the total amount of such remuneration and wages shall be taken into account for purposes of the special refund provisions.

(4) *Employees of certain foreign corporations.* For purposes of special refunds of employee tax, the term "wages" includes such remuneration for services covered by an agreement made pursuant to section 3121(l), relating to agreements for coverage of employees of certain foreign corporations, as would be wages if such services constituted employment (see §31.3121(a)–1, relating to wages); the term "employer" includes any domestic corporation which has entered into an agreement pursuant to section 3121(l); and the term "tax" or "tax imposed by section 3101" includes, in the case of services covered by an agreement entered into pursuant to section 3121(l), an amount equivalent to the employee tax which would be imposed by section 3101 if such services constituted employment. The provisions of paragraph (a)(1) of this section are applicable whether or not any amount deducted from the employee's remuneration by reason of such agreement has been paid to the district director. Thus, the special refund provisions are applicable to amounts equivalent to employee tax deducted from employees' remuneration by reason of agreements made under section 3121(l). A domestic corporation which enters into an agreement pursuant to section 3121(l) shall, for purposes of this paragraph, be considered an employer in its capacity as a party to such agreement separate and distinct from its identity as an employer employing individuals on its own account (see section 3121(l)(9)). If during any calendar year an employee receives remuneration for services covered by such an agreement and during the same calendar year receives wages for services in employment, the total amount of such remuneration and wages shall be taken into account for purposes of the special refund provisions. For provisions relating to agreements entered into under section 3121(l), see the regulations in part 36 of this chapter (Regulations on Contract Coverage of Employees of Foreign Subsidiaries).

(5) *Governmental employees in American Samoa.* For purposes of special refunds of employee tax, the Governor of American Samoa and each agent designated by him who makes a return pursuant to section 3125(b) (see §31.3125) is considered a separate employer. For such purposes, the term "wages" includes the amount which the Governor (or any agent) determines to constitute wages paid

an employee, but not in excess of the amount specified in paragraph (a)(1)(i) (*a*) through (*h*) of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents pursuant to section 3125(b) and the total amount of such wages is in excess of $13,200, the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from the Government of American Samoa, from a political subdivision thereof, or from any wholly-owned instrumentality of such government or political subdivision and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(6) *Governmental employees in the District of Columbia.* For purposes of special refunds of employee tax, the Commissioner of the District of Columbia (or, prior to the transfer of functions pursuant to Reorganization Plan No. 3 of 1967 (81 Stat. 948), the Commissioners of the District of Columbia) and each agent designated by him who makes a return pursuant to section 3125(c) (see §31.3125) is considered a separate employer. For such purposes, the term "wages" includes the amount which the Commissioner (or any agent) determines to constitute wages paid an employee, but not in excess of the amount specified in paragraph (a)(1)(i) (*a*) through (*h*) of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents pursuant to section 3125(c) and the total amount of such wages is in excess of $13,200 the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from the Government of the District of Columbia or from a wholly-owned instrumentality thereof and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(b) *Claims for special refund*—(1) *In general.* An employee who is entitled to a special refund under section 6413(c) may claim such refund under the provisions of this section only if the employee is not entitled to claim the amount thereof as a credit against income tax as provided in §1.31–2 of this chapter (Income Tax Regulations). Each claim under this section shall be made with respect to wages received within one calendar year (regardless of the year or years after 1936 during which the services were performed for which such wages are received), and shall be filed after the close of such year.

(2) *Form of claim.* Each claim for special refund under this section shall be made on Form 843, in accordance with the regulations in this subpart and the instructions relating to such form. In the case of a claim filed prior to April 15, 1968, the claim shall be filed with the district director for the internal revenue district in which the employee resides or, if the employee does not reside in any internal revenue district, with the District Director, Baltimore, Md. 21202. Except as provided in paragraph (b) of §301.6091–1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim shall be filed with the service center serving such internal revenue district. However, in the case of an employee who does not reside in any internal revenue district and who is outside the United

States, the claim shall be filed with the Director of International Operations, U.S. Internal Revenue Service, Washington, D.C. 20225, unless the employee resides in Puerto Rico or the Virgin Islands, in which case the claim shall be filed with the Director of International Operations, U.S. Internal Revenue Service, Hato Rey, P.R. 00917. The claim shall include the employee's account number and the following information with respect to each employer from whom he received wages during the calendar year: (i) The name and address of such employer, (ii) the amount of wages received during the calendar year to which the claim relates, and (iii) the amount of employee tax collected by the employer from the employee with respect to such wages. Other information may be required but should be submitted only upon request.

(3) *Period of limitation.* For the period of limitation upon special refund of employee tax imposed by section 3101, see §301.6511(a)–1 of this chapter (Regulations on Procedure and Administration).

(c) *Special refunds with respect to compensation as defined in the Railroad Retirement Tax Act*—(1) *In general.* In the case of any individual who, during any calendar year after 1967, receives wages (as defined by section 3121(a)) from one or more employers and also receives compensation (as defined by section 3231(e)) which is subject to the tax imposed on employees by section 3201 or the tax imposed on employee representatives by section 3211 such compensation shall, solely for purposes of applying section 6413(c)(1) and this section with respect to the hospital insurance tax imposed by section 3101(b), be treated as wages (as defined by section 3121(a)) received from an employer with respect to which the hospital insurance tax imposed by section 3101(b) was deducted. For purposes of this section, compensation received shall be determined under the principles provided in chapter 22 of the Code and the regulations thereunder (see section 3231(e) and §31.3231(e)–1). Therefore, compensation paid for time lost shall be deemed earned and received for purposes of this section in the month in which such time is lost, and compensation which is earned during the period for which a return of taxes under chapter 22 is required to be made and which is payable during the calendar month following such period shall be deemed to have been received for purposes of this section during such period only. Further, compensation is deemed to have been earned and received when an employee or employee representative performs services for which he is paid, or for which there is a present or future obligation to pay, regardless of the time at which payment is made or deemed to be made.

(2) *Example.* The application of this paragraph may be illustrated by the following example.

Example. Employee A rendered services to X during 1973 for which he was paid compensation at the monthly rate of $650 which was taxable under the Railroad Retirement Tax Act. A was paid $550 by X in January 1973 which was earned and deemed received in December 1972 and $650 in January of 1974 which was earned and deemed received in December of 1973. A also earned and received wages in 1973 from employer Y, which were subject to the employee tax under the Federal Insurance Contributions Act, in the amount of $6,000. A paid hospital insurance tax on $13,800 ($7,800 compensation from X including $650 earned and deemed received in December 1973 but paid in January 1974 and not including $550 paid in January 1973 but earned and deemed received in December 1972, $6,000 compensation from Y) received or deemed received or earned in 1973. For purposes of the hospital insurance tax imposed by section 3101(b),

these amounts are all wages received from an employer in 1973. Therefore, A is entitled to a special refund for 1973 under section 6413(c) and this section of $30 (1.0% × $13,800 − 1.0% × $10,800).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6950, 33 FR 5359, Apr. 4, 1968; T.D. 6983, 33 FR 18020, Dec. 4, 1968; T.D. 7374, 40 FR 30954, July 24, 1975; T.D. 7374, 69 FR 57639, Sept. 27, 2004]

§ 31.6414-1 Credit or refund of income tax withheld from wages.

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(a) *In general.* Any employer who pays to the district director more than the correct amount of—

(1) Tax under section 3402 or a corresponding provision of prior law, or

(2) Interest, addition to the tax, additional amount, or penalty with respect to such tax,

may file a claim for refund of the overpayment or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and §301.6402–2 of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return of tax under section 3402 filed by the employer. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement, which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, and showing such other information as is required by the regulations in this subpart and by the instructions relating to the return. No refund or credit to the employer shall be allowed under this section for the amount of any overpayment of tax which the employer deducted or withheld from an employee.

(b) *Period of limitation.* For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see §301.6511(a)–1 of this chapter (Regulations on Procedure and Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

§ 31.6652(c)-1 Failure of employee to report tips for purposes of the Federal Insurance Contributions Act.

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(a) *In general.* In the case of failure by an employee to furnish, pursuant to the provisions of section 6053(a), to his employer a report of tips received by him in the course of his employment, which constitute wages (as defined in section 3121(a)), there shall be paid by the employee, in addition to the

tax imposed by section 3101 with respect to the amount of tips which he so failed to report, an amount equal to 50 percent of such tax. The additional amount imposed for such failure shall be paid in the same manner as tax upon notice and demand by the district director.

(b) *Reasonable cause.* Payment of an amount equal to 50 percent of the tax imposed by section 3101 with respect to the tips which the employee failed to report will not be required if it is established to the satisfaction of the district director or the director of the regional service center that such failure was due to reasonable cause and not due to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration that it is made under the penalties of perjury, setting forth all the facts alleged as a reasonable cause. An employee's reluctance to disclose to his employer the amount of tips received by him will not establish that the employee's failure to report tips to his employer was due to reasonable cause and not due to willful neglect.

[T.D. 7001, 34 FR 1005, Jan. 23, 1969]

§ 31.6674-1 Penalties for fraudulent statement or failure to furnish statement.

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Any person required to furnish a statement to an employee under the provisions of section 6051 or 6053(b) is subject to a civil penalty for willful failure to furnish such statement in the manner, at the time, and showing the information required under such section (or §31.6051–1 or §31.6053–2), or for willfully furnishing a false or fraudulent statement to an employee. The penalty for each such violation is $50, which shall be assessed and collected in the same manner as the tax imposed on employers under the Federal Insurance Contributions Act. See section 7204 for criminal penalty.

[T.D. 7001, 34 FR 1006, Jan. 23, 1969]

§ 31.6682-1 False information with respect to withholding.

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(a) *Civil penalty.* If any individual makes a statement under section 3402 (relating to income tax collected at source) which results in a lesser amount of income tax actually deducted and withheld than is properly allowable under section 3402 and, at the time the statement was made, there was no reasonable basis for the statement, the individual shall pay a penalty of $500 for the statement. There was a reasonable basis for a statement of the number of exemptions an individual claimed on a Form W–4, if the individual properly completed the Form W–4 by taking into account only allowable amounts for items which are allowable and by computing the number of exemptions in accordance with the instructions on the Form W–4. This penalty is in addition to any criminal penalty provided by law. This penalty may be assessed at any time after the statement is made, until the expiration of the

applicable statute of limitations.

(b) *Deficiency procedures not to apply.* The civil penalty imposed by section 6682 may be assessed and collected without regard to the deficiency procedures provided by Subchapter B of Chapter 63 of the Code.

[T.D. 7963, 49 FR 28706, July 16, 1984]

§ 31.7805-1 Promulgation of regulations.

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In pursuance of section 7805 of the Internal Revenue Code of 1954, the foregoing regulations are hereby prescribed. (See §31.0–3 of subpart A of the regulations in this part relating to the scope of the regulations.)

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Code

Sec. 31.3121(e)-1 State, United States, and citizen.

(a) When used in the regulations in this subpart, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to services performed after 1960) Guam and American Samoa.

(b) When used in the regulations in this subpart, the term 'United States', when used in a geographical sense, means the several states (including the Territories of Alaska and Hawaii before their admission as States), the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. When used in the regulations in this subpart with respect to services performed after 1960, the term 'United States' also includes Guam and American Samoa when the term is used in a geographical sense. The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

[T.D. 6744, 29 FR 8314, July 2, 1964]

§ 7701. Definitions

How Current is This?

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) Person

The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner

The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation

The term "corporation" includes associations, joint-stock companies, and insurance companies.

(4) Domestic

The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign

The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) Fiduciary

The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock

The term "stock" includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder

The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(9) United States

The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

(10) State

The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term "or his delegate"—

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa

The term "delegate," in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any

possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner

The term "Commissioner" means the Commissioner of Internal Revenue.

(14) Taxpayer

The term "taxpayer" means any person subject to any internal revenue tax.

(15) Military or naval forces and armed forces of the United States

The term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent

The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife

As used in sections 682 and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term "husband" shall be read "wife" and the term "wife" shall be read "husband."

(18) International organization

The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(19) Domestic building and loan association

The term "domestic building and loan association" means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association—

(A) which either (i) is an insured institution within the meaning of section 401(a) [1] of the National Housing Act (12 U.S.C., sec. 1724 (a)), or (ii) is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B) the business of which consists principally of acquiring the savings

of the public and investing in loans; and

(C) at least 60 percent of the amount of the total assets of which (at the close of the taxable year) consists of—

(i) cash,

(ii) obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii) certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv) loans secured by a deposit or share of a member,

(v) loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi) loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans made for the improvement of any such real property,

(vii) loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities,

(viii) property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix) loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x) property used by the association in the conduct of the business described in subparagraph (B), and

(xi) any regular or residual interest in a REMIC, but only in the proportion which the assets of such REMIC consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC are assets described in clauses (i) through (x), the entire interest in

the REMIC shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee

For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term "employee" shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

(21) Levy

The term "levy" includes the power of distraint and seizure by any means.

(22) Attorney General

The term "Attorney General" means the Attorney General of the United States.

(23) Taxable year

The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year

The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued

The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business

The term "trade or business" includes the performance of the functions of a public office.

(27) Tax Court

The term "Tax Court" means the United States Tax Court.

(28) Other terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code

The term "Internal Revenue Code of 1986" means this title, and the term "Internal Revenue Code of 1939" means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person

The term "United States person" means—

(A) a citizen or resident of the United States,

(B) a domestic partnership,

(C) a domestic corporation,

(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E) any trust if—

(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii) one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust

(A) Foreign estate

The term "foreign estate" means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust

The term "foreign trust" means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank

The term "cooperative bank" means an institution without capital stock organized and operated for mutual purposes and without profit, which—

(A) either—

(i) is an insured institution within the meaning of section 401 (a) [2] of the National Housing Act (12 U.S.C., sec. 1724 (a)), or

(ii) is subject by law to supervision and examination by State or Federal authority having supervision over such institutions, and

(B) meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility

The term "regulated public utility" means—

(A) A corporation engaged in the furnishing or sale of—

(i) electric energy, gas, water, or sewerage disposal services, or

(ii) transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii) transportation (not included in clause (ii)) by motor vehicle—

if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B) A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C) A corporation engaged as a common carrier

(i) in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or

(ii) in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D) A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E) A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F) A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G) A rail carrier subject to part A of subtitle IV of title 49, if

(i) substantially all of its railroad properties have been leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954,

(ii) each lease is for a term of more than 20 years, and

(iii) at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H) A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term "regulated public utility" does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that (i) its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and (ii) the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

[(34) Repealed. Pub. L. 98–369, div. A, title IV, §●4112(b)(11), July 18, 1984, 98 Stat. 792]

(35) Enrolled actuary

The term "enrolled actuary" means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Income tax return preparer

(A) In general

The term "income tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions

A person shall not be an "income tax return preparer" merely because such person—

(i) furnishes typing, reproducing, or other mechanical assistance,

(ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii) prepares as a fiduciary a return or claim for refund for any person, or

(iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan

The term "individual retirement plan" means—

(A) an individual retirement account described in section 408 (a), and

(B) an individual retirement annuity described in section 408 (b).

(38) Joint return

The term "joint return" means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States

If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to—

(A) jurisdiction of courts, or

(B) enforcement of summons.

(40) Indian tribal government

(A) In general

The term "Indian tribal government" means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives

No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN

The term "TIN" means the identifying number assigned to a person under section 6109.

(42) Substituted basis property

The term "substituted basis property" means property which is—

(A) transferred basis property, or

(B) exchanged basis property.

(43) Transferred basis property

The term "transferred basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property

The term "exchanged basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction

The term "nonrecognition transaction" means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement

In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term "employee representatives" shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

(47) Executor

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent.

(48) Off-highway vehicles

(A) Off-highway transportation vehicles

(i) In general A vehicle shall not be treated as a highway vehicle if such vehicle is specially designed for the primary function of transporting a particular type of load other than over the public highway and because of this special design such vehicle's capability to transport a load over the public highway is substantially limited or impaired.

(ii) Determination of vehicle's design For purposes of clause (i), a vehicle's design is determined solely on the basis of its physical characteristics.

(iii) Determination of substantial limitation or impairment For purposes of clause (i), in determining whether substantial limitation or impairment exists, account may be taken of factors such as the size of the vehicle, whether such vehicle is subject to the licensing, safety, and other requirements applicable to highway vehicles, and whether such vehicle can transport a load at a sustained speed of at least 25 miles per hour. It is immaterial that a vehicle can transport a greater load off the public highway than such vehicle is permitted to transport over the public highway.

(B) Nontransportation trailers and semitrailers

A trailer or semitrailer shall not be treated as a highway vehicle if it is specially designed to function only as an enclosed stationary shelter for the carrying on of an off-highway function at an off-highway site.

(b) Definition of resident alien and nonresident alien

(1) In general

For purposes of this title (other than subtitle B)—

(A) Resident alien

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test Such individual meets the substantial presence test of paragraph (3).

(iii) First year election Such individual makes the election provided in paragraph (4).

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency

(A) First year of residency

(i) In general If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be the 1st day during such calendar year on which the individual is treated as a resident of the United States under that paragraph.

(B) Last year of residency

An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if—

(i) such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii) during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii) the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded

(i) In general For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test

(A) In general

Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the "current year") if—

(i) such individual was present in the United States on at least 31 days during the calendar year, and

(ii) the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days:

The applicable In the case of days in: multiplier is: Current year 1 1st preceding year 1/3 2nd preceding year 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if—

(i) such individual is present in the United States on fewer than 183 days during the current year, and

(ii) it is established that for the current year such individual has a tax home (as defined in section 911 (d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases

Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year—

(i) such individual had an application for adjustment of status pending, or

(ii) such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions

An individual shall not be treated as being present in the United States on any day if—

(i) such individual is an exempt individual for such day, or

(ii) such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

(4) First-year election

(A) An alien individual shall be deemed to meet the requirements of this subparagraph if such individual—

(i) is not a resident of the United States under clause (i) or (ii) of

paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the "election year"),

(ii) was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii) is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv) is both—

(I) present in the United States for a period of at least 31 consecutive days in the election year, and

(II) present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the "testing period") for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B) An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C) An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D) The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E) An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F) An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined

For purposes of this subsection—

(A) In general

An individual is an exempt individual for any day if, for such day, such individual is—

(i) a foreign government-related individual,

(ii) a teacher or trainee,

(iii) a student, or

(iv) a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274 (l)(1)(B).

(B) Foreign government-related individual

The term "foreign government-related individual" means any individual temporarily present in the United States by reason of—

(i) diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii) being a full-time employee of an international organization, or

(iii) being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee

The term "teacher or trainee" means any individual—

(i) who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii) who substantially complies with the requirements for being so present.

(D) Student

The term "student" means any individual—

(i) who is temporarily present in the United States—

(I) under subparagraph (F) or (M) of section 101(15) of the Immigration and Nationality Act, or

(II) as a student under subparagraph (J) or (Q) of such section 101 (15), and

(ii) who substantially complies with the requirements for being so present.

(E) Special rules for teachers, trainees, and students

(i) Limitation on teachers and trainees An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872 (b)(3), the preceding sentence shall be applied by substituting "4 calendar years" for "2 calendar years".

(ii) Limitation on students For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual does not intend to

permanently reside in the United States and that such individual meets the requirements of subparagraph (D)(ii).

(6) Lawful permanent resident

For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if—

(A) such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B) such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

(7) Presence in the United States

For purposes of this subsection—

(A) In general

Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico

If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points

If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present

An individual who is temporarily present in the United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages in any trade or business in the United States on such day.

(8) Annual statements

The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year

(A) In general

For purposes of this title, an alien individual who has not established

a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer

If—

(i) an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii) after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877

If—

(A) an alien individual was treated as a resident of the United States during any period which includes at least 3 consecutive calendar years (hereinafter referred to as the "initial residency period"), and

(B) such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877 (b). The preceding sentence shall apply only if the tax imposed pursuant to section 877 (b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including

The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico

Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1—

(1) In general

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not

—

(A) the service recipient is in physical possession of the property,

(B) the service recipient controls the property,

(C) the service recipient has a significant economic or possessory interest in the property,

(D) the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E) the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F) the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities

(A) In general

Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient—

(i) with respect to—

(I) the operation of a qualified solid waste disposal facility,

(II) the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III) the operation of a water treatment works facility, and

(ii) which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility

For purposes of subparagraph (A), the term "qualified solid waste disposal facility" means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility

For purposes of subparagraph (A), the term "cogeneration facility" means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility

For purposes of subparagraph (A), the term "alternative energy facility" means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility

For purposes of subparagraph (A), the term "water treatment works facility" means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases

(A) In general

Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if—

(i) the service recipient (or a related entity) operates such facility,

(ii) the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii) the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv) the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term "related entity" has the same meaning as when used in section 168 (h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract

For purposes of subparagraph (A), there shall not be taken into account—

(i) any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii) any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events

(i) Temporary shut-downs, etc. For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing

This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250 (a)(1)(B) (relating to low-income housing) if—

(A) such property is operated by or for an organization described in paragraph (3) or (4) of section 501 (c), and

(B) at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167 (k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconcilation [3] Act of 1990).

(6) Regulations

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities

The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with—

(1) the linking of borrowing to investment, or

(2) diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness

For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases

(1) In general

For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause —

(A) such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B) the lessee shall not be treated as the owner of the property subject to an agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined

For purposes of this subsection—

(A) In general

The term "qualified motor vehicle operating agreement" means any agreement with respect to a motor vehicle (including a trailer) which meets the requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor

An agreement meets the requirements of this subparagraph if under such agreement the sum of—

(i) the amount the lessor is personally liable to repay, and

(ii) the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership

An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee—

(i) under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii) which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false

An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined

(A) In general

For purposes of this subsection, the term "terminal rental adjustment clause" means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers

The term "terminal rental adjustment clause" also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined

price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools

(1) Treated as separate corporations

A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined

For purposes of this title—

(A) In general

Except as otherwise provided in this paragraph, a taxable mortgage pool is any entity (other than a REMIC) if—

(i) substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii) such entity is the obligor under debt obligations with 2 or more maturities, and

(iii) under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools

Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan

Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests

To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's

If—

(A) a real estate investment trust is a taxable mortgage pool, or

(B) a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E (d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund

(1) In general

For purposes of this title—

(A) the Thrift Savings Fund shall be treated as a trust described in section 401 (a) which is exempt from taxation under section 501 (a);

(B) any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C) subject to section 401 (k)(4)(B) and any dollar limitation on the application of section 402 (e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements

Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401 (k) or to matching contributions (as described in section 401 (m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act

Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term "wages" for the purposes of section 209 of the Social Security Act or section 3121 (a) of this title.

(4) Definitions

For purposes of this subsection, the terms "Member", "employee", and "Thrift Savings Fund" shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law

No provision of law not contained in this title shall apply for purposes of determining the treatment under this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity

In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170 (c)—

(1) such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and

(2) no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements

The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets

Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Special rules for determining when an individual is no longer a United States citizen or long-term resident

An individual who would (but for this subsection) cease to be treated as a citizen or resident of the United States shall continue to be treated as a citizen or resident of the United States, as the case may be, until such individual—

(1) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Secretary of State or the Secretary of Homeland Security, and

(2) provides a statement in accordance with section 6039G.

(o) Cross references

(1) Other definitions

For other definitions, see the following sections of Title 1 of the United States Code:

(1) Singular as including plural, section 1.

(2) Plural as including singular, section 1.

(3) Masculine as including feminine, section 1.

(4) Officer, section 1.

(5) Oath as including affirmation, section 1.

(6) County as including parish, section 2.

(7) Vessel as including all means of water transportation, section 3.

(8) Vehicle as including all means of land transportation, section 4.

(9) Company or association as including successors and assigns, section 5.

(2) Effect of cross references

For effect of cross references in this title, see section 7806 (a).

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be "Reconciliation".

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Sec. 7701. - Definitions

(a)

When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -

(1) Person

The term ''person'' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner

The term ''partnership'' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ''partner'' includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation

The term ''corporation'' includes

associations, joint-stock companies, and insurance companies.

(4) Domestic

The term ''domestic'' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign

The term ''foreign'' when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) Fiduciary

The term ''fiduciary'' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock

The term ''stock'' includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder

The term ''shareholder'' includes a member in an association, joint-stock company, or insurance company.

(9) United States

The term ''United States'' when used in a geographical sense includes only the States and the District of Columbia.

(10) State

The term ''State'' shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary

(A) Secretary of the Treasury

The term ''Secretary of the Treasury'' means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary

The term ''Secretary'' means the Secretary of the Treasury or his delegate.

(12) Delegate

(A) In general

The term ''or his delegate'' -

(i)

when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform

the function mentioned or described in the context; and

(ii)

when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa

The term ''delegate,'' in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner

The term ''Commissioner'' means the Commissioner of Internal Revenue.

(14) Taxpayer

The term ''taxpayer'' means any person subject to any internal revenue tax.

(15) Military or naval forces and armed forces of the United States

The term ''military or naval forces of the United States'' and the term ''Armed Forces of the United States'' each includes all

regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent

The term ''withholding agent'' means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife

As used in sections 152(b)(4), 682, and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term ''wife'' shall be read ''former wife'' and the term ''husband'' shall be read ''former husband''; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term ''husband'' shall be read ''wife'' and the term ''wife'' shall be read ''husband.''

(18) International organization

The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and

immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f).

(19) Domestic building and loan association

The term ''domestic building and loan association'' means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association -

(A)

which either

(i)

is an insured institution within the meaning of section 401(a) [1] of the National Housing Act (12 U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B)

the business of which consists principally of acquiring the savings of the public and investing in loans; and

(C)

at least 60 percent of the amount of the total assets of which (at the close of the

taxable year) consists of -

(i)

cash,

(ii)

obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii)

certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv)

loans secured by a deposit or share of a member,

(v)

loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily

for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi)

loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans made for the improvement of any such real property,

(vii)

loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of

such institutions or facilities,

(viii)

property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix)

loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x)

property used by the association in the conduct of the business described in subparagraph (B), and

(xi)

any regular or residual interest in a REMIC, and any regular interest in a FASIT, but only in the proportion which the assets of such REMIC or FASIT consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC or FASIT are assets described in clauses (i) through (x), the entire interest in the REMIC or FASIT shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the

average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee

For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the

purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term ''employee'' shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

(21) Levy

The term ''levy'' includes the power of distraint and seizure by any means.

(22) Attorney General

The term ''Attorney General'' means the Attorney General of the United States.

(23) Taxable year

The term ''taxable year'' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. ''Taxable year'' means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year

The term ''fiscal year'' means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued

The terms ''paid or incurred'' and ''paid or accrued'' shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business

The term ''trade or business'' includes the performance of the functions of a public office.

(27) Tax Court

The term ''Tax Court'' means the United States Tax Court.

(28) Other terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code

The term ''Internal Revenue Code of 1986'' means this title, and the term ''Internal Revenue Code of 1939'' means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person

The term ''United States person'' means -

(A)

a citizen or resident of the United States,

(B)

a domestic partnership,

(C)

a domestic corporation,

(D)

any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E)

any trust if -

(i)

a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii)

one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust

(A) Foreign estate

The term ''foreign estate'' means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust

The term ''foreign trust'' means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank

The term ''cooperative bank'' means an institution without capital stock organized and operated for mutual purposes and without profit, which -

(A)

either -

(i)

is an insured institution within the meaning of section 401(a) [2] of the National Housing Act (12 U.S.C., sec. 1724(a)), or

(ii)

is subject by law to supervision and examination by State or Federal authority having supervision over such

institutions, and

(B)

meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility

The term ''regulated public utility'' means -

(A)

A corporation engaged in the furnishing or sale of -

(i)

electric energy, gas, water, or sewerage disposal services, or

(ii)

transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii)

transportation (not included in clause (ii)) by motor vehicle - if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B)

A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C)

A corporation engaged as a common carrier

(i)

in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or

(ii)

in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D)

A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E)

A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F)

A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G)

A rail carrier subject to part A of subtitle IV of title 49, if

(i)

substantially all of its railroad properties have been leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954,

(ii)

each lease is for a term of more than 20 years, and

(iii)

at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H)

A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed

without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term ''regulated public utility'' does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that

(i)

its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and

(ii)

the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

(34)

Repealed. Pub. L. 98-369, div. A, title IV, Sec. 4112(b)(11), July 18, 1984, 98 Stat. 792)

(35) Enrolled actuary

The term ''enrolled actuary'' means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Income tax return preparer

(A) In general

The term ''income tax return preparer'' means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions

A person shall not be an ''income tax return preparer'' merely because such person -

(i)

furnishes typing, reproducing, or other mechanical assistance,

(ii)

prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii)

prepares as a fiduciary a return or claim for refund for any person, or

(iv)

prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan

The term ''individual retirement plan''

means -

(A)

an individual retirement account described in section 408(a), and

(B)

an individual retirement annuity described in section 408(b).

(38) Joint return

The term ''joint return'' means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States

If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to -

(A)

jurisdiction of courts, or

(B)

enforcement of summons.

(40) Indian tribal government

(A) In general

The term ''Indian tribal government'' means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives

No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN

The term ''TIN'' means the identifying number assigned to a person under section 6109.

(42) Substituted basis property

The term ''substituted basis property'' means property which is -

(A)

transferred basis property, or

(B)

exchanged basis property.

(43) Transferred basis property

The term ''transferred basis property'' means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property

The term ''exchanged basis property'' means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction

The term ''nonrecognition transaction'' means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement

In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term ''employee representatives'' shall not include any organization more than one-half of the members of which are employees

who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

(b) Definition of resident alien and nonresident alien

(1) In general

For purposes of this title (other than subtitle B) -

(A) Resident alien

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence

Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test

Such individual meets the substantial presence test of paragraph (3).

(iii) First year election

Such individual makes the election provided in paragraph (4).

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency

(A) First year of residency

(i) In general

If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence

In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test

In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election

In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be the 1st day during such calendar year on which the individual is treated as a resident of the United States under that paragraph.

(B) Last year of residency

An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if -

(i)

such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii)

during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii)

the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded

(i) In general

For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded

Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test

(A) In general

Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the ''current year'') if -

(i)

such individual was present in the United States on at least 31 days during the calendar year, and

(ii)

the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days: The applicable In the case of days in: multiplier is: Current year 1 1st preceding year 1/3 2nd preceding year 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if -

(i)

such individual is present in the United States on fewer than 183 days during the current year, and

(ii)

it is established that for the current year such individual has a tax home (as

defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases

Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year -

(i)

such individual had an application for adjustment of status pending, or

(ii)

such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions

An individual shall not be treated as being present in the United States on any day if -

(i)

such individual is an exempt individual for such day, or

(ii)

such individual was unable to leave the United States on such day because of a

medical condition which arose while such individual was present in the United States.

(4) First-year election

(A)

An alien individual shall be deemed to meet the requirements of this subparagraph if such individual -

(i)

is not a resident of the United States under clause (i) or (ii) of paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the ''election year''),

(ii)

was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii)

is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv)

is both -

(I)

present in the United States for a period of at least 31 consecutive days in the election year, and

(II)

present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the ''testing period'') for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B)

An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C)

An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day

of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D)

The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E)

An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F)

An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined

For purposes of this subsection -

(A) In general

An individual is an exempt individual for any day if, for such day, such individual is -

(i)

a foreign government-related individual,

(ii)

a teacher or trainee,

(iii)

a student, or

(iv)

a professional athlete who is temporarily in the United States to compete in a charitable sports event described in section 274(l)(1)(B).

(B) Foreign government-related individual

The term ''foreign government-related individual'' means any individual temporarily present in the United States by reason of -

(i)

diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii)

being a full-time employee of an international organization, or

(iii)

being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee

The term ''teacher or trainee'' means any individual -

(i)

who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii)

who substantially complies with the requirements for being so present.

(D) Student

The term ''student'' means any individual -

(i)

who is temporarily present in the United States -

(I)

under subparagraph (F) or (M) of section 101(15) of the Immigration and Nationality Act, or

(II)

as a student under subparagraph (J) or (Q) of such section 101(15), and (ii) who substantially complies with the requirements for being so present.

(E) Special rules for teachers, trainees, and students

(i) Limitation on teachers and trainees

An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872(b)(3), the preceding sentence shall be applied by substituting ''4 calendar years'' for ''2 calendar years''.

(ii) Limitation on students

For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual does not intend to permanently reside in the United States and that such individual meets the requirements of

subparagraph (D)(ii).

(6) Lawful permanent resident

For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if -

(A)

such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B)

such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

(7) Presence in the United States

For purposes of this subsection -

(A) In general

Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico

If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in

Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points

If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present

An individual who is temporarily present in the United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages in any trade or business in the United States on such day.

(8) Annual statements

The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year

(A) In general

For purposes of this title, an alien individual who has not established a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer

If -

(i)

an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii)

after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877

If -

(A)

an alien individual was treated as a resident of the United States during any

period which includes at least 3 consecutive calendar years (hereinafter referred to as the ''initial residency period''), and

(B)

such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877(b). The preceding sentence shall apply only if the tax imposed pursuant to section 877(b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including

The terms ''includes'' and ''including'' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico

Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1 -

(1) In general

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not -

(A)

the service recipient is in physical possession of the property,

(B)

the service recipient controls the property,

(C)

the service recipient has a significant economic or possessory interest in the property,

(D)

the service provider does not bear any

risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E)

the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F)

the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities

(A) In general

Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient -

(i)

with respect to -

(I)

the operation of a qualified solid waste disposal facility,

(II)

the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III)

the operation of a water treatment works facility, and

(ii)

which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility

For purposes of subparagraph (A), the term ''qualified solid waste disposal facility'' means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility

For purposes of subparagraph (A), the term ''cogeneration facility'' means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility

For purposes of subparagraph (A), the term ''alternative energy facility'' means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility

For purposes of subparagraph (A), the term ''water treatment works facility'' means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases

(A) In general

Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if -

(i)

the service recipient (or a related entity) operates such facility,

(ii)

the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii)

the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv)

the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term ''related entity'' has the same meaning as when used in section 168(h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract

For purposes of subparagraph (A), there shall not be taken into account -

(i)

any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii)

any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events

(i) Temporary shut-downs, etc.

For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs

For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing

This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B) (relating to low-income housing) if -

(A)

such property is operated by or for an organization described in paragraph (3) or (4) of section 501(c), and

(B)

at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167(k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconcilation [3] Act of 1990). ''Reconciliation''.

(6) Regulations

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities

The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with -

(1)

the linking of borrowing to investment, or

(2)

diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness

For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases

(1) In general

For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause -

(A)

such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B)

the lessee shall not be treated as the owner of the property subject to an

agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined

For purposes of this subsection -

(A) In general

The term ''qualified motor vehicle operating agreement'' means any agreement with respect to a motor vehicle (including a trailer) which meets the requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor

An agreement meets the requirements of this subparagraph if under such agreement the sum of -

(i)

the amount the lessor is personally liable to repay, and

(ii)

the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property

subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership

An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee -

(i)

under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii)

which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false

An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined

(A) In general

For purposes of this subsection, the term ''terminal rental adjustment clause'' means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers

The term ''terminal rental adjustment clause'' also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools

(1) Treated as separate corporations

A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined

For purposes of this title -

(A) In general

Except as otherwise provided in this

paragraph, a taxable mortgage pool is any entity (other than a REMIC or a FASIT) if -

(i)

substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii)

such entity is the obligor under debt obligations with 2 or more maturities, and

(iii)

under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools

Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan

Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests

To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's

If -

(A)

a real estate investment trust is a taxable mortgage pool, or

(B)

a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E(d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund

(1) In general

For purposes of this title -

(A)

the Thrift Savings Fund shall be treated

as a trust described in section 401(a) which is exempt from taxation under section 501(a);

(B)

any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C)

subject to section 401(k)(4)(B) and any dollar limitation on the application of section 402(e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements

Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401(k) or to matching contributions (as described in section 401(m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act

Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term ''wages'' for the purposes of section 209 of the Social Security Act or section 3121(a) of this title.

(4) Definitions

For purposes of this subsection, the terms ''Member'', ''employee'', and ''Thrift Savings Fund'' shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law

No provision of law not contained in this title shall apply for purposes of determining the treatment under this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity

In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c) -

(1)

such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of

any tax law of a State or political subdivision thereof, and

(2)

no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements

The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets

Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Cross references

(1) Other definitions For other definitions, see the following sections of Title 1

For other definitions, see the following sections of Title 1 of the United States Code:

(1)

Singular as including plural, section 1.

(2)

Plural as including singular, section 1.

(3)

Masculine as including feminine, section 1.

(4)

Officer, section 1.

(5)

Oath as including affirmation, section 1.

(6)

County as including parish, section 2.

(7)

Vessel as including all means of water transportation, section 3.

(8)

Vehicle as including all means of land transportation, section 4.

(9)

Company or association as including successors and assigns, section 5.

(2) Effect of cross references For effect of cross references in this title, see section

For effect of cross references in this title, see section 7806(a)

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be

Next

United States v. Cruikshank
92 U.S. 542

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF LOUISIANA

Syllabus

1. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual, as well as their collective, rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

2. There is in our political system a government of each of the several States, and a Government of the United States. Each is distinct from the others, and has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of those governments will be different from those he has under the other.

3. The Government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.

4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution. The First Amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the National Government alone. It left the authority of the States unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against Congressional interference. The people, for their protection in the enjoyment of it, must therefore look to the States, where the power for that purpose was originally placed.

5. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.

6. The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The Second Amendments means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the National Government.

7. Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.

8. The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, and from denying to [92 U.S. 543] any person within its jurisdiction the equal protection of the laws, but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.

9. In *Minor v. Hoppersett,* 21 Wall. 178, this Court decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al., supra,* p. 214, it held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

10. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States of African descent, therein named, and which, in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the Constitution and law of the United States, to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes, deprive them of their respective several lives and liberty of person without due process of law, prevent and hinder them in the free exercise and enjoyment of their several rights to the full and equal benefit of the law, prevent and hinder them in the free exercise and enjoyment of their several and respective rights to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm and to injure and oppress them because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law by the people of said State -- do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the alleged offence is not indictable under any act of Congress.

11. The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them [92 U.S. 544] respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law.

12. In criminal cases prosecuted under the laws of the United

States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species -- it must descend to particulars. The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

13. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should therefore state the particulars to inform the court as well as the accused. It must appear from the indictment that the acts

charged will, if proved, support a conviction for the offence alleged.

This was an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement Act (16 Stat. 140), and consisted of thirty-two counts.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten, and intimidate" two citizens of the United States, "of African descent and persons of color," "with the unlawful and felonious intent thereby" them

> to hinder and prevent in their respective free [92 U.S. 545] exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose.

The *second* avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person, without due process of law."

The *fourth* avers an intent to deprive the same persons of the

> free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property

enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons

> in the exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color

of the said persons.

The *sixth* avers an intent to hinder and prevent the same persons in

> the free exercise and enjoyment of the several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana.

The *seventh* avers an intent "to put in great fear of bodily harm, injure, and oppress" the same persons, "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons

> in their several and respective free exercise and enjoyment of every, each, all, and singular and several rights and privileges granted and secured

to them "by the Constitution and laws of the United States."

The next eight counts are a repetition of the first eight, except that, instead of the words "band together," the words "combine, conspire, and confederate together" are used. Three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts. [92 U.S. 546]

The parties thus convicted moved in arrest of judgment on the following grounds:

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not

constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st May, 1870, entitled "*An Act to enforce the right of citizens of the United States,*" &c.

2. Because the matters and things in the said indictment set forth and charged do not constitute offences cognizable in the Circuit Court, and do not come within its power and jurisdiction.

3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutionally reserved rights of the several States.

4. Because the said act, in so far as it creates offences and imposes penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.

5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.

6. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion, the opinions of the judges were divided, that of the presiding judge being that the several counts in question are not sufficient in law, and do not contain charges of criminal matter indictable under the laws of the United States, and that the motion in arrest of judgment should be granted. The case comes up at the instance of the United States, on certificate of this division of opinion.

Sect. 1 of the Enforcement Act declares that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections, without distinction of race, color, or previous servitude. [92 U.S. 547]

Sect. 2 provides that if, by the law of any State or Territory, a prerequisite to voting is necessary, equal opportunity for it shall be given to all, without distinction, &c., and any person charged with the duty of furnishing the prerequisite who refuses or knowingly omits to give full effect to this section shall be guilty of misdemeanor.

Sect. 3 provides that an offer of performance in respect to the prerequisite, when proved by affidavit of the claimant, shall be equivalent to performance, and any judge or inspector of election who refuses to accept it shall be guilty, &c.

Sect. 4 provides that any person who, by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs any citizen from qualifying himself to vote, or combines with others to do so, shall be guilty, &c.

Sect. 5 provides that any person who prevents, hinders, controls, or intimidates any person from exercising the right of suffrage, to whom it is secured by the Fifteenth Amendment, or attempts to do so, by bribery or threats of violence, or deprivation of property or employment, shall be guilty, &c.

The sixth section is as follows:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court – the fine not to exceed $5,000 and the imprisonment not to exceed ten years – and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States. [92 U.S. 548]

WAITE, J., lead opinion

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:--

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court – the fine not to exceed $5,000, and the imprisonment not to exceed ten years – and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be whether

> the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.

The general charge in the first eight counts is that of "banding," and in the second eight that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or [92 U.S. 549] more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases,* 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for

their complete protection as citizens of the confederated States. For this reason, the people of the United States,

> in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for [92 U.S. 550] the common defence, promote the general welfare, and secure the blessings of liberty

to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme, and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments -- one State and the other National -- but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together, they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States because it discredits the coin, and the State because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship [92 U.S. 551] which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and, within their respective spheres, must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their

> lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1, 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden, id.,* 203, subject to State jurisdiction. [92 U.S. 552] Only such existing rights were committed by the people to the protection of Congress as

came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone. *Barron v. The City of Baltimore,* 7 Pet. 250; *Lessee of Livingston v. Moore, id.,* 551; *Fox v. Ohio,* 5 How. 434; *Smith v. Maryland,* 18 *id.* 76; *Withers v. Buckley,* 20 *id.* 90; *Pervear v. The Commonwealth,* 5 Wall. 479; *Twitchell v. The Commonwealth,* 7 *id.* 321; *Edwards v. Elliott,* 21 *id.* 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth,* 7 Wall. 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in [92 U.S. 553] these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln,* 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy [92 U.S. 554] to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely,* 4 Wheat. 244, it secures

> the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in

> the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States, and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens.

There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything [92 U.S. 555] to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored,

> in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid.

In *Minor v. Happersett,* 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al., supra,* p. 214, we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this, it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on [92 U.S. 556] account of race, &c., is. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these

parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted

> at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to-wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law.

There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duly in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4), but it applies to no case like this.

We are therefore of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, [92 U.S. 557] and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is

> to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana . . . for the reason that they, . . . being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;

and in the eighth and sixteenth, to hinder and prevent them

> in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States.

The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire

> to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.

These counts in the indictment charge, in substance that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed [92 U.S. 558] of the nature and cause of the accusation." Amend. VI. In *United States v. Mills,* 7 Pet. 142, this was construed to mean that the indictment must set forth the offence "with clearness and all necessary certainty, to

apprise the accused of the crime with which he stands charged;" and in *United States v. Cook,* 17 Wall. 174 that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that, where the definition of an offence, whether it be at common law or by statute,

> includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species – it must descend to particulars.

1 Arch.Cr.Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property, but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court [92 U.S. 559] may see that they are in fact illegal. *State v. Parker,* 43 N. H. 83; *State v. Keach,* 40 Vt. 118; *Alderman v. The People,* 4 Mich. 414; *State v. Roberts,* 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State v. Roberts*), but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea, and the court that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear -- that is to say, appears from the indictment, without going further -- that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

CLIFFORD, J., dissenting

MR. JUSTICE CLIFFORD dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court. [92 U.S. 560]

Power is vested in Congress to enforce by appropriate legislation the prohibition contained in the Fourteenth

Amendment of the Constitution, and the fifth section of the Enforcement Act provides to the effect that persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by that amendment, from exercising or in exercising such right by means of bribery or threats; of depriving such person of employment or occupation; or of ejecting such person from rented house, lands, or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family -- such person so offending shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided. 16 Stat. 141.

Provision is also made, by sect. 6 of the same act that if two or more persons shall band or conspire together, or go in disguise, upon the public highway, or upon the premises of another, with intent to violate any provision of that act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, and be further punished as therein provided.

More than one hundred persons were jointly indicted at the April Term, 1873, of the Circuit Court of the United States for the District of Louisiana, charged with offences in violation of the provisions of the Enforcement Act. By the record, it appears that the indictment contained thirty-two counts, in two series of sixteen counts each; that the first series were drawn under the fifth and sixth sections of the act; and that the second series were drawn under the seventh section of the same act; and that the latter series charged that the prisoners are guilty of murder committed by them in the act of violating some of the provisions of the two preceding sections of that act.

Eight of the persons named in the indictment appeared on [92 U.S. 561] the 10th of June, 1874, and went to trial under the plea of not guilty, previously entered at the time of their arraignment. Three of those who went to trial -- to-wit, the three defendants named in the transcript -- were found guilty by the jury on the first series of the counts of the indictment, and not guilty on the second series of the counts in the same indictment.

Subsequently, the convicted defendants filed a motion for a new trial, which motion being overruled, they filed a motion in arrest of judgment. Hearing was had upon that motion and, the opinions of the judges of the Circuit Court being opposed, the matter in difference was duly certified to this Court, the question being whether the motion in arrest of judgment ought to be granted or denied.

Two only of the causes of arrest assigned in the motion will be considered in answering the questions certified: (1) because the matters and things set forth and charged in the several counts in question do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the Enforcement Act; (2) because the several counts of the indictment in question are too vague, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and do not set forth any offence defined by the Enforcement Act.

Four other causes of arrest were assigned, but, in the view taken of the case, it will be sufficient to examine the two causes above set forth.

Since the questions were certified into this Court, the parties have been fully heard in respect to all the questions presented for decision in the transcript. Questions not pressed at the argument will not be considered, and, inasmuch as the counsel in behalf of the United States confined their arguments entirely to the thirteenth, fourteenth, and sixteenth counts of the first series in the indictment, the answers may well be limited to these counts, the others being virtually abandoned. Mere introductory allegations will be omitted as unimportant, for the reason that the questions to be answered relate to the allegations of the respective counts describing the offence.

As described in the thirteenth count, the charge is that the [92 U.S. 562] defendants did, at the time and place mentioned, combine, conspire, and confederated together, between and among themselves, for and with the unlawful and felonious intent and purpose one Levi Nelson and one Alexander Tillman, each of whom being then and there a citizen of the United States, of African descent, and a person of color, unlawfully and feloniously to injure, oppress, threaten, and intimidate, with the unlawful and felonious intent thereby the said persons of color, respectively, then and

there to hinder and prevent in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection, granted and secured to them respectively as citizens of the United States and citizens of the State, by reason of their race and color; and because that they, the said persons of color, being then and there citizens of the State and of the United States, were then and there persons of African descent and race, and persons of color, and not white citizens thereof, the same being a right or privilege granted or secured to the said persons of color respectively, in common with all other good citizens of the United States, by the Federal Constitution and the laws of Congress.

Matters of law conceded, in the opinion of the Court, may be assumed to be correct without argument, and, if so, then discussion is not necessary to show that every ingredient of which an offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States v. Cook,* 17 Wall. 174.

Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and, if the offence cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true intent and meaning of the statute defining the offence. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read, [92 U.S. 563] may be found in support of that proposition. 2 East, P.C. 1124; *Dord v. People,* 9 Barb. 675; *Ike v. State,* 23 Miss. 525; *State v. Eldridge,* 7 Eng. 608.

Every offence consists of certain acts done or omitted under certain circumstances, and, in the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth. Arch.Cr.Pl., 15th ed., 43.

Persons born on naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof, and the Fourteenth Amendment also provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Congress may, doubtless, prohibit any violation of that provision, and may provide that any person convicted of violating the same shall be guilty of an offence and be subject to such reasonable punishment as Congress may prescribe.

Conspiracies of the kind described in the introductory clause of the sixth section of the Enforcement Act are explicitly forbidden by the subsequent clauses of the same section, and it may be that, if the indictment was for a conspiracy at common law, and was pending in a tribunal having jurisdiction of common law offences, the indictment in its present form might be sufficient even though it contains no definite allegation whatever of any particular overt act committed by the defendants in pursuance of the alleged conspiracy.

Decided cases may doubtless be found in which it is held that an indictment for a conspiracy at common law may be sustained where there is an unlawful agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means, and authorities may be referred to which support the proposition that the indictment, if the conspiracy is well pleaded, is sufficient even though it be not alleged that any overt act had been done in pursuance of the unlawful combination.

Suffice it to say, however that the authorities to that effect are opposed by another class of authorities equally respectable, and even more numerous, which decide that the indictment is [92 U.S. 564] bad unless it is alleged that some overt act was committed in pursuance of the intent and purpose of the alleged conspiracy; and in all the latter class of cases, it is held that the overt act, as well as the unlawful combination, must be clearly and accurately alleged.

Two reasons of a conclusive nature, however, may be assigned which show beyond all doubt that it is not necessary to enter into the inquiry which class of those decisions is correct.

1. Because the common law *is not a source of jurisdiction* in the circuit courts, nor in any other Federal court.

Circuit Courts have no common law jurisdiction of offences of any grade or description, and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal courts. *State v. Wheeling Bridge Co.,* 13 How. 503; *United States v. Hudson et al.,* 7 Cranch 32.

2. Because it is conceded that the offence described in the indictment is an offence created and defined by an act of Congress.

Indictments for offences created and defined by statute must in all cases follow the words of the statute, and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical or where, by necessary implication, other constituents are component parts of the offence, as where the words of the statute defining the offence have a compound signification or are enlarged by what immediately precedes or follows the words describing the offence, and in the same connection. Cases of the kind do arise, as where, in the dissenting opinion in *United States v. Reese et al., supra,* p. 222, it was held that the words *offer to pay a capitation tax* were so expanded by a succeeding clause of the same sentence that the word "offer" necessarily included readiness to perform what was offered, the provision being that the offer should be equivalent to actual performance if the offer failed to be carried into execution by the wrongful act or omission of the party to whom the offer was made.

Two offences are in fact created and defined by the sixth section of the Enforcement Act, both of which consist of a [92 U.S. 565] conspiracy with an intent to perpetrate a forbidden act. They are alike in respect to the conspiracy, but differ very widely in respect to the act embraced in the prohibition.

1. Persons, two or more, are forbidden to band or conspire together, or go in disguise upon the public highway, or on the premises of another, *with intent to violate* any provision of the Enforcement Act, which is an act of twenty-three sections.

Much discussion of that clause is certainly unnecessary, as no one of the counts under consideration is founded on it, or contains any allegations describing such an offence. Such a conspiracy with intent to injure, oppress, threaten, or intimidate any person is also forbidden by the succeeding clause of that section, if it be done with intent to prevent or hinder his free exercise and enjoyment of *any right or privilege* granted or secured to him by the Constitution or laws of the United States, or because of having exercised the same. Sufficient appears in the thirteenth count to warrant the conclusion that the grand jury intended to charge the defendants with the second offence created and defined in the sixth section of the Enforcement Act.

Indefinite and vague as the description of the offence there defined, is, it is obvious that it is greatly more so as described in the allegations of the thirteenth count. By the act of Congress, the prohibition is extended to any *right or privilege* granted or secured by the Constitution or laws of Congress, leaving it to the pleader to specify the particular right or privilege which had been invaded in order to give the accusation that certainty which the rules of criminal pleading everywhere require in an indictment; but the pleader in this case, overlooking any necessity for any such specification, and making no attempt to comply with the rules of criminal pleading in that regard, describes the supposed offence in terms much more vague and indefinite than those employed in the act of Congress.

Instead of specifying the particular right or privilege which had been invaded, the pleader proceeds to allege that the defendants, with all the others named in the indictment, did combine, conspire, and confederate together, with the unlawful intent and purpose the said persons of African descent and [92 U.S. 566] persons of color then and there to injure, oppress, threaten, and intimidate, and thereby then and there to hinder and prevent them in the free exercise and enjoyment of the *rights, privileges, and immunities and protection* granted and secured to them as citizens of the United States and citizens of the State, without any other specification of the rights, privileges, immunities, and protection which had been violated or invaded, or which were threatened except what follows -- to-wit, the same being a right or privilege granted or secured in common with all other good citizens by the Constitution and laws of the United States.

Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the

nature and cause of the accusation against him within the meaning of the sixth amendment of the Constitution.

Valuable rights and privileges almost without number are granted and secured to citizens by the Constitution and laws of Congress, none of which may be with impunity invaded in violation of the prohibition contained in that section. Congress intended by that provision to protect citizens in the enjoyment of all such rights and privileges, but, in affording such protection in the mode there provided, Congress never intended to open the door to the invasion of the rule requiring certainty in criminal pleading, which for ages has been regarded as one of the great safeguards of the citizen against oppressive and groundless prosecutions.

Judge Story says the indictment must charge the time and place and nature and circumstances of the offence with clearness and certainty, so that the party may have full notice of the charge and be able to make his defence with all reasonable knowledge and ability. 2 Story, Const., sect. 1785.

Nothing need be added to show that the fourteenth count is founded upon the same clause in the sixth section of the Enforcement Act as the thirteenth count, which will supersede the necessity of any extended remarks to explain the nature and character of the offence there created and defined. Enough has already been remarked to show that that particular clause of the section was passed to protect citizens in the free exercise and enjoyment of every right or privilege granted [92 U.S. 567] or secured to them by the Constitution and laws of Congress, and to provide for the punishment of those who band or conspire together, in the manner described, to injure, oppress, or intimidate any citizen, to prevent or hinder him from the free exercise and enjoyment of all such rights or privileges, or because of his having exercised any such right or privilege so granted or secured.

What is charged in the fourteenth count is that the defendants did combine, conspire, and confederate the said citizens of African descent and persons of color to injure, oppress, threaten, and intimidate, with intent the said citizens thereby to prevent and hinder in the free exercise and enjoyment of the right and privilege to vote *at any election to be thereafter had and held* according to law by the people of the State, or by the people of the parish, they, the defendants, well knowing that the said citizens were lawfully qualified to vote at any such election thereafter to be had and held.

Confessedly, some of the defects existing in the preceding count are avoided in the count in question -- as, for example, the description of the particular right or privilege of the said citizens which it was the intent of the defendants to invade is clearly alleged; but the difficulty in the count is that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be had and held. All that is alleged upon the subject is that it was the intent of the defendants to prevent and hinder the said citizens of African descent and persons of color in the free exercise and enjoyment of the right and privilege to vote *at any election thereafter to be had and held,* according to law, by the people of the State, or by the people of the parish, without any other allegation whatever as to the purpose of the election, or any allegation as to the time and place when and where the election was to be had and held.

Elections thereafter to be held must mean something different from pending elections; but whether the pleader means to charge that the intent and purpose of the alleged conspiracy extended *only* to the next succeeding elections to be held in the State or parish, or to all future elections to be held in the State or parish during the lifetime of the parties, may admit of [92 U.S. 568] a serious question which cannot be easily solved by anything contained in the allegations of the count.

Reasonable certainty, all will agree, is required in criminal pleading; and, if so, it must be conceded, we think, that the allegation in question fails to comply with that requirement. Accused persons, as matter of common justice, ought to have the charge against them set forth in such terms that they may readily understand the nature and character of the accusation in order that they, when arraigned, may know what answer to make to it, and that they may not be embarrassed in conducting their defence; and the charge ought also to be laid in such terms that, if the party accused is put to trial, the verdict and judgment may be pleaded in bar of a second accusation for the same offence.

Tested by these considerations, it is quite clear that the fourteenth count is not sufficient to warrant the conviction and sentence of the accused.

Defects and imperfections of the same kind as those pointed out in the thirteenth count also exist in the sixteenth count, and of a more decided character in the latter count than in the former, conclusive proof of which will appear by a brief examination of a few of the most material allegations of the charge against the defendants. Suffice it to say without entering into details that the introductory allegations of the count are in all respects the same as in the thirteenth and fourteenth counts. None of the introductory allegations alleges that any overt act was perpetrated in pursuance of the alleged conspiracy, but the jurors proceed to present that the unlawful and felonious intent and purpose of the defendants were to prevent and hinder the said citizens of African descent and persons of color, by the means therein described, in the free exercise and enjoyment *of each, every, all, and singular the several rights and privileges* granted and secured to them by the Constitution and laws of the United States in common with all other good citizens, without any attempt to describe or designate any particular right or privilege which it was the purpose and intent of the defendants to invade, abridge, or deny.

Descriptive allegations in criminal pleading are required to be reasonably definite and certain, as a necessary safeguard [92 U.S. 569] to the accused against surprise, misconception, and error in conducting his defence, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of the kind are entitled to respect, but it is obvious that, if such a description of the ingredient of an offence created and defined by an act of Congress is held to be sufficient, the indictment must become a snare to the accused, as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the universal rule that every ingredient of the offence must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offence. Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer or in arrest of judgment.

Certain other causes for arresting the judgment are assigned in the record which deny the constitutionality of the Enforcement Act; but, having come to the conclusion that the indictment is insufficient, it is not necessary to consider that question.

Voir dire /vwár dír/. L. Fr. To speak the truth. This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. Peremptory challenges or challenges for cause may result from such examination. *See* Challenge.

Voiture /vwotyúr/. Fr. Carriage; transportation by carriage.

Volens /vówlènz/. Lat. Willing. He is said to be willing who either expressly consents or tacitly makes no opposition.

Volenti non fit injuria /vowléntay nón fit injúriyə/. The maxim "volenti non fit injuria" means that if one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Munson v. Bishop Clarkson Memorial Hospital, 186 Neb. 778, 186 N.W.2d 492, 494. This is an affirmative defense that should be pleaded under Fed.R.Civil P. 8. Tyler v. Dowell, Inc., C.A.N.M., 274 F.2d 890. *See also* Assumption of risk.

Volstead Act. A now repealed Federal law prohibiting the manufacture, sale, or transportation of liquor. The law was passed under the Eighteenth Amendment to the U.S. Constitution which was repealed by Twenty-First Amendment.

Voluit, sed non dixit /vól(y)uwət, sèd nòn díksət/. He willed, but he did not say. He may have intended so, but he did not say so. A maxim frequently used in the construction of wills; an answer to arguments based upon the supposed intention of a testator.

Volumen /volyúwmən/. Lat. In the civil law, a volume; so called from its form, being *rolled* up.

Volumus /vóləməs/. Lat. We will; it is our will. The first word of a clause in the royal writs of protection and letters patent.

Voluntarily. Done by design or intention, intentional, proposed, intended, or not accidental. Intentionally and without coercion. Young v. Young, 148 Kan. 876, 84 P.2d 916, 917.

Voluntariness. The quality of being voluntary or free as opposed to being forced or given under duress, as a confession of one arrested for a crime. *See also* Voluntary.

Voluntarius dæmon /vòləntériyəs díymən/. A voluntary madman. A term applied by Lord Coke to a drunkard, who has voluntarily contracted madness by intoxication. 4 Bl.Comm. 25.

Voluntary. Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. Coker v. State, 199 Ga. 20, 33 S.E.2d 171, 174. Done by design or intention. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation. The word, especially in statutes, often implies knowledge of essential facts. Without valuable consideration; gratuitous, as a *voluntary* conveyance. Also, having a merely nominal consideration; as, a *voluntary* deed.

As to *voluntary* Answer; Assignment; Confession; Conveyance; Deposit; Dismissal; Escape; Indebtedness; Intoxication; Manslaughter; Nonsuit; Oath; Payment; Redemption; Sale; Search; Settlement; Trust, and Waste, see those titles. For *voluntary* bankruptcy, *see* Bankruptcy proceedings.

Voluntary abandonment. As statutory ground for divorce, exists if there is a final departure, without consent of other party, without sufficient reason and without intent to return. As used in adoption statute, the term "voluntarily abandoned" means a willful act or course of conduct such as would imply a conscious disregard or indifference to such child in respect to the parental obligation owed to the child. Elliott v. Maddox, Tex.Civ.App., 510 S.W.2d 105, 107. *See also* Abandonment; Desertion.

Voluntary bankruptcy. A bankruptcy proceeding that is initiated by the debtor. *See* Bankruptcy proceedings.

Voluntary courtesy. A voluntary act of kindness. An act of kindness performed by one man towards another, of the free will and inclination of the doer, without any previous request or promise of reward made by him who is the object of the courtesy; from which the law will not imply a promise of remuneration.

Voluntary discontinuance. Voluntary action on part of plaintiff, whereby his case is dismissed without decision on merits. Ferber v. Brueckl, 322 Mo. 892, 17 S.W.2d 524, 527. Fed.R.Civil P. 41(a). *See* Dismissal.

Voluntary dismissal. *See* Dismissal.

Voluntary exposure to unnecessary danger. An intentional act which reasonable and ordinary prudence would pronounce dangerous. Intentional exposure to unnecessary danger, implying a conscious knowledge of the danger. The voluntary doing of an act which is not necessary to be done, but which requires exposure to known danger to which one would not be exposed if unnecessary act is not done. The term implies a conscious, intentional exposure, something of which one is conscious but willing to take the risk. *See* Assumption of risk.

Voluntary ignorance. This exists where a party might, by taking reasonable pains, have acquired the necessary knowledge, but has neglected to do so.

Voluntary jurisdiction. In old English law, a jurisdiction exercised by certain ecclesiastical courts, in matters where there is no opposition. 3 Bl.Comm. 66. The opposite of *contentious* jurisdiction *(q.v.)*.

Voluntary statement. A statement made that is free from duress, coercion or inducement. Metigoruk v. Municipality of Anchorage, Alaska App., 655 P.2d 1317, 1318.

Voluntas /vəlántæs/. Lat. Properly, volition, purpose, or intention, or a design or the feeling or impulse which prompts the commission of an act. However, in old English law the term was often used to denote a will,

Afroyim v. Rusk
No. 456
Argued February 20, 1967
Decided May 29, 1967
387 U.S. 253

CERTIORARI TO THE UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

Syllabus

Petitioner, of Polish birth, became a naturalized American citizen in 1926. He went to Israel in 1950, and in 1951 voted in an Israeli legislative election. The State Department subsequently refused to renew his passport, maintaining that petitioner had lost his citizenship by virtue of § 401(e) of the Nationality Act of 1940 which provides that a United States citizen shall "lose" his citizenship if he votes in a foreign political election. Petitioner then brought this declaratory judgment action alleging the unconstitutionality of § 401(e). On the basis of *Perez v. Brownell,* 356 U.S. 44, the District Court and Court of Appeals held that Congress, under its implied power to regulate foreign affairs, can strip an American citizen of his citizenship.

Held: Congress has no power under the Constitution to divest a person of his United States citizenship absent his voluntary renunciation thereof. *Perez v. Brownell, supra,* overruled. Pp. 256-268.

(a) Congress has no express power under the Constitution to strip a person of citizenship, and no such power can be sustained as an implied attribute of sovereignty, as was recognized by Congress before the passage of the Fourteenth Amendment, and a mature and well considered dictum in *Osborn v. Bank of the United States,* 9 Wheat. 738, 827, is to the same effect. Pp. 257-261.

(b) The Fourteenth Amendment's provision that "All persons born or naturalized in the United States . . . are citizens of the United States . . ." completely controls the status of citizenship, and prevents the cancellation of petitioner's citizenship. Pp. 262-268.

361 F.2d 102, reversed. [387 U.S. 254]

BLACK, J., lead opinion

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, born in Poland in 1893, immigrated to this country in 1912 and became a naturalized American citizen in 1926. He went to Israel in 1950, and in 1951, he voluntarily voted in an election for the Israeli Knesset, the legislative body of Israel. In 1960, when he applied for renewal of his United States passport, the Department of State refused to grant it on the sole ground that he had lost his American citizenship by virtue of § 401(e) of the Nationality Act of 1940, which provides that a United States citizen shall "lose" his citizenship if he votes "in a political election in a foreign state."{1} Petitioner then brought this declaratory judgment action in federal district court alleging that § 401(e) violates both the Due Process Clause of the Fifth Amendment and § 1, cl. 1, of the Fourteenth Amendment,{2} which grants American citizenship to persons like petitioner. Because neither the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to [387 U.S. 255] take away that citizenship once it has been acquired, petitioner contended that the only way he could lose his citizenship was by his own voluntary renunciation of it. Since the Government took the position that § 401(e) empowers it to terminate citizenship without the citizen's voluntary renunciation, petitioner argued that this section is prohibited by the Constitution. The District Court and the Court of Appeals, rejecting this argument, held that Congress has constitutional authority forcibly to take

away citizenship for voting in a foreign country based on its implied power to regulate foreign affairs. Consequently, petitioner was held to have lost his American citizenship regardless of his intention not to give it up. This is precisely what this Court held in *Perez v. Brownell,* 356 U.S. 44.

Petitioner, relying on the same contentions about voluntary renunciation of citizenship which this Court rejected in upholding § 401(e) in *Perez,* urges us to reconsider that case, adopt the view of the minority there, and overrule it. That case, decided by a 5-4 vote almost 10 years ago, has been a source of controversy and confusion ever since, as was emphatically recognized in the opinions of all the judges who participated in this case below.{3} Moreover, in the other cases decided with{4} and since{5} *Perez,* this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on various grounds, and has refused to hold that citizens can be expatriated without their voluntary renunciation of [387 U.S. 256] citizenship. These cases, as well as many commentators,{6} have cast great doubt upon the soundness of *Perez.* Under these circumstances, we granted certiorari to reconsider it, 385 U.S. 917. In view of the many recent opinions and dissents comprehensively discussing all the issues involved,{7} we deem it unnecessary to treat this subject at great length.

The fundamental issue before this Court here, as it was in *Perez,* is whether Congress can, consistently with the Fourteenth Amendment, enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. The majority in *Perez* held that Congress could do this because withdrawal of citizenship is "reasonably calculated to effect the end that is within the power of Congress to achieve." 356 U.S. at 60. That conclusion was reached by this chain of reasoning: Congress has an implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the Necessary and Proper Clause, empowers Congress to regulate voting by American citizens in foreign elections; involuntary expatriation is within the "ample scope" of "appropriate modes" Congress can adopt to effectuate its general regulatory power. *Id.* at [387 U.S. 257] 57-60. Then, upon summarily concluding that

> there is nothing in the . . . Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship,

id. at 58, n. 3, the majority specifically rejected the "notion that the power of Congress to terminate citizenship depends upon the citizen's assent," *id.* at 61.

First, we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether, in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that, under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship. On three occasions, in 1794, 1797, and 1818, Congress considered and rejected proposals to enact laws which would describe certain conduct as resulting in expatriation.{8} On each occasion [387 U.S. 258] Congress was considering bills that were concerned with recognizing the right of voluntary expatriation and with providing some means of exercising that right. In 1794 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship.{9} By 1818, however, almost no one doubted the existence of the right of voluntary expatriation, but several judicial decisions had indicated that the right could not be exercised by the citizen without the consent of the Federal Government in the form of enabling legislation.{10} Therefore, a bill was introduced to provide that a person could voluntarily relinquish his citizenship by declaring such relinquishment in writing before a district court and then departing from the country.{11} The opponents of the bill argued that Congress had no constitutional authority, either express or implied, under either the Naturalization Clause or the Necessary and Proper Clause, to provide that a certain act would constitute expatriation.{12} They pointed to a

proposed Thirteenth [387 U.S. 259] Amendment, subsequently not ratified, which would have provided that a person would lose his citizenship by accepting an office or emolument from a foreign government.{13} Congressman Anderson of Kentucky argued:

> The introduction of this article declares the opinion . . . that Congress could not declare the acts which should amount to a renunciation of citizenship; otherwise there would have been no necessity for this last resort. When it was settled that Congress could not declare that the acceptance of a pension or an office from a foreign Emperor amounted to a disfranchisement of the citizen, it must surely be conceded that they could not declare that any other act did. The cases to which their powers before this amendment confessedly did not extend are very strong, and induce a belief that Congress could not in any case declare the acts which should cause "a person to cease to be a citizen." The want of power in a case like this, where the individual has given the strongest evidence of attachment to a foreign potentate and an entire renunciation of the feelings and principles of an American citizen, certainly establishes the absence of all power to pass a bill like the present one. Although the intention with which it was introduced, and the title of the bill declare that it is to insure and foster the right of the citizen, the direct and inevitable effect of the bill, is an assumption of power by Congress to declare that certain acts when committed shall amount to a renunciation of citizenship.

31 Annals of Cong. 1038-1039 (1818). [387 U.S. 260] Congressman Pindall of Virginia rejected the notion, later accepted by the majority in *Perez,* that the nature of sovereignty gives Congress a right to expatriate citizens:

> [A]llegiance imports an obligation on the citizen or subject, the correlative right to which resides in the sovereign power: allegiance in this country is not due to Congress, but to the people, with whom the sovereign power is found; it is, therefore, by the people only that any alteration can be made of the existing institutions with respect to allegiance.

Id. at 1045. Although he recognized that the bill merely sought to provide a means of voluntary expatriation, Congressman Lowndes of South Carolina argued:

> But, if the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted. That it was a delicate power, and ought not to be loosely inferred, . . . appeared in a strong light, when it was said, and could not be denied, that to determine the manner in which a citizen may relinquish his right of citizenship, is equivalent to determining how he shall be divested of that right. The effect of assuming the exercise of these powers will be, that, by acts of Congress a man may not only be released from all the liabilities, but from all the privileges of a citizen. If you pass this bill, . . . you have only one step further to go, and say that such and such acts shall be considered as presumption of the intention of the citizen to expatriate, and thus take from him the privileges of a citizen. . . . [Q]uestions affecting the right of the citizen were questions to be regulated, not by the laws of the General or State Governments, but by Constitutional provisions. If there was anything [387 U.S. 261] essential to our notion of a Constitution, . . . it was this: that, while the employment of the physical force of the country is in the hands of the Legislature, those rules which determine what constitutes the rights of the citizen, shall be a matter of Constitutional provision.

Id. at 1050-1051. The bill was finally defeated.{14} It is in this setting that six years later, in *Osborn v. Bank of the United States,* 9 Wheat. 738, 827, this Court, speaking through Chief Justice Marshall, declared in what appears to be a mature and well considered dictum that Congress, once a person becomes a citizen, cannot deprive him of that status:

> [The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.

Although these legislative and judicial statements may be regarded as inconclusive and must be considered in the historical context in which they were made,{15} any doubt [387 U.S. 262] as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship, once obtained, should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship: "All persons born or naturalized in the United States . . . are citizens of the United States. . . ." There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. The *Dred Scott* decision, 19 How. 393, had shortly before greatly disturbed many people about the status of Negro citizenship. But the Civil Rights Act of 1866, 14 Stat. 27, had already attempted to confer citizenship on all persons born or naturalized in the United States. Nevertheless, when the

Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily taken away from them by subsequent Congresses, and it was to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship that the first clause was added to the Fourteenth Amendment.{16} [387 U.S. 263] Senator Howard, who sponsored the Amendment in the Senate, thus explained the purpose of the clause:

> It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power. . . .

Cong.Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy. In 1868, two years after the Fourteenth Amendment had been proposed, Congress specifically considered the subject of expatriation. Several bills were introduced to impose involuntary expatriation on citizens who committed certain acts.{17} With little [387 U.S. 264] discussion, these proposals were defeated. Other bills, like the one proposed but defeated in 1818, provided merely a means by which the citizen could himself voluntarily renounce his citizenship. {18} Representative Van Trump of Ohio, who proposed such a bill, vehemently denied in supporting it that his measure would make the Government

> a party to the act dissolving the tie between the citizen and his country . . . where the statute simply prescribes the manner in which the citizen shall proceed to perpetuate the evidence of his intention, or election, to renounce his citizenship by expatriation.

Cong.Globe, 40th Cong., 2d Sess., 1804 (1868). He insisted that "inasmuch as the act of expatriation depends almost entirely upon a question of intention on the part of the citizen," *id.* at 1801,

> the true question is, that not only the right of expatriation, but the whole power of its exercise, rests solely and exclusively in the will of the individual,

id. at 1804.{19} In strongest of terms, not contradicted by any during the debates, he concluded:

> To enforce expatriation or exile against a citizen without his consent is not a power anywhere belonging to this Government. No conservative-minded [387 U.S. 265] statesman, no intelligent legislator, no sound lawyer has ever maintained any such power in any branch of the Government. The lawless precedents created in the delirium of war . . . of sending men by force into exile, as a punishment for political opinion, were violations of this great law . . . of the Constitution. . . . The men who debated the question in 1818 failed to see the true distinction. . . . They failed to comprehend that it is not the Government, but that it is the individual, who has the right and the only power of expatriation. . . . [I]t belongs and appertains to the citizen, and not to the Government, and it is the evidence of his election to exercise his right, and not the power to control either the election or the right itself, which is the legitimate subject matter of legislation. There has been, and there can be, no legislation under our Constitution to control in any manner the right itself.

Ibid. But even Van Trump's proposal, which went no further than to provide a means of evidencing a citizen's intent to renounce his citizenship, was defeated.{20} The Act, [387 U.S. 266] as finally passed, merely recognized the "right of expatriation" as an inherent right of all people.{21}

The entire legislative history of the 1868 Act makes it abundantly clear that there was a strong feeling in the Congress that the only way the citizenship it conferred could be lost was by the voluntary renunciation or abandonment by the citizen himself. And this was the unequivocal statement of the Court in the case of *United States v. Wong Kim Ark,* 169 U.S. 649. The issues in that case were whether a person born in the United States to Chinese aliens was a citizen of the United States and whether, nevertheless, he could be excluded under the Chinese Exclusion Act, 22 Stat. 58. The Court first held that, within the terms of the Fourteenth Amendment, *Wong Kim Ark* was a citizen of the United States, and then pointed out that, though he might "renounce this citizenship, and become a citizen of . . . any other country," he had never done so. *Id.* at 704-705. The Court then held{22} that Congress could not do anything to

abridge or affect his citizenship conferred by the Fourteenth Amendment. Quoting Chief Justice Marshall's well considered and oft-repeated dictum in *Osborn* to the effect that Congress, under the power of naturalization, has "a power to confer citizenship, not a power to take it away," the Court said:

> Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act . . . of Congress . . . [387 U.S. 267] can affect citizenship acquired as a birthright, by virtue of the Constitution itself. . . . The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

Id. at 703.

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of § 401(e) would be equivalent to holding that Congress has the power to "abridge," "affect," "restrict the effect of," and "take . . . away" citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with THE CHIEF JUSTICE's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401(e).{23}

Because the legislative history of the Fourteenth Amendment, and of the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding, we think, is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle [387 U.S. 268] to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world -- as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country, and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Perez v. Brownell is overruled. The judgment is

Reversed.

HARLAN, J., dissenting

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join, dissenting.

Almost 10 years ago, in *Perez v. Brownell,* 356 U.S. 44, the Court upheld the constitutionality of § 401(e) of the Nationality Act of 1940, 54 Stat. 1169. The section deprives of his nationality any citizen who has voted in a foreign political election. The Court reasoned that Congress derived from its power to regulate foreign affairs authority to expatriate any citizen who intentionally commits acts which may be prejudicial to the foreign relations of the United States, and which reasonably may be deemed to indicate a dilution of his allegiance to this country. Congress, it was held, could appropriately consider [387 U.S. 269] purposeful voting in a foreign political election to be such an act.

The Court today overrules *Perez,* and declares § 401(e) unconstitutional, by a remarkable process of circumlocution. First, the Court fails almost entirely to dispute the reasoning in *Perez;* it is essentially content with the conclusory and quite unsubstantiated assertion that Congress is without "any general power, express or implied," to expatriate a citizen "without his assent."{1} Next, the Court embarks upon a lengthy, albeit incomplete, survey of the

historical background of the congressional power at stake here, and yet, at the end, concedes that the history is susceptible of "conflicting inferences." The Court acknowledges that its conclusions might not be warranted by that history alone, and disclaims that the decision today relies, even "principally," upon it. Finally, the Court declares that its result is bottomed upon the "language [387 U.S. 270] and the purpose" of the Citizenship Clause of the Fourteenth Amendment; in explanation, the Court offers only the terms of the clause itself, the contention that any other result would be "completely incongruous," and the essentially arcane observation that the "citizenry is the country and the country is its citizenry."

I can find nothing in this extraordinary series of circumventions which permits, still less compels, the imposition of this constitutional constraint upon the authority of Congress. I must respectfully dissent.

There is no need here to rehearse Mr. Justice Frankfurter's opinion for the Court in *Perez;* it then proved and still proves to my satisfaction that § 401(e) is within the power of Congress.{2} It suffices simply to supplement *Perez* with an examination of the historical evidence which the Court in part recites, and which provides the only apparent basis for many of the Court's conclusions. As will be seen, the available historical evidence is not only inadequate to support the Court's abandonment of *Perez,* but, with due regard for the [387 U.S. 271] restraints that should surround the judicial invalidation of an Act of Congress, even seems to confirm *Perez'* soundness.

I

Not much evidence is available from the period prior to the adoption of the Fourteenth Amendment through which the then-prevailing attitudes on these constitutional questions can now be determined. The questions pertinent here were only tangentially debated; controversy centered instead upon the wider issues of whether a citizen might under any circumstances *renounce* his citizenship, and, if he might, whether that right should be conditioned upon any formal prerequisites.{3} Even the discussion of these issues was seriously clouded by the widely accepted view that authority to regulate the incidents of citizenship had been retained, at least in part, by the several States.{4} It should therefore be remembered that the evidence which is now available may not necessarily represent any carefully considered, still less prevailing, viewpoint upon the present issues.

Measured even within these limitations, the Court's evidence for this period is remarkably inconclusive; the Court relies simply upon the rejection by Congress of [387 U.S. 272] legislation proposed in 1794, 1797, and 1818, and upon an isolated dictum from the opinion of Chief Justice Marshall in *Osborn v. Bank of the United States,* 9 Wheat. 738. This, as will appear, is entirely inadequate to support the Court's conclusion, particularly in light of other and more pertinent evidence which the Court does not notice.

The expatriation of unwilling citizens was apparently first discussed in the lengthy congressional debates of 1794 and 1795, which culminated eventually in the Uniform Naturalization Act of 1795.{5} 1 Stat. 414. Little contained in those debates is pertinent here. The present question was considered only in connection with an amendment, offered by Congressman Hillhouse of Connecticut, which provided that any American who acquired a foreign citizenship should not subsequently be permitted to repatriate in the United States. Although this obscure proposal scarcely seems relevant to the present issues, it was apparently understood, at least by some members, to require the automatic expatriation of an American who acquired a second citizenship. Its discussion in the House consumed substantially less than one day, and, of this debate, only the views of two Congressmen, other than Hillhouse, were recorded by the Annals.{6} Murray of Maryland, for reasons immaterial here, supported the proposal. In response, Baldwin of Georgia urged that foreign citizenship was often conferred only as a mark of esteem, and that it would be unfair to deprive of his domestic citizenship an American honored in this fashion. There is no indication that any member believed the proposal to be forbidden by the Constitution. The measure was rejected by the House without a reported [387 U.S. 273] vote, and no analogous proposal was offered in the Senate. Insofar as this brief exchange is pertinent here, it establishes, at most, that two or more members believed the proposal both constitutional and desirable, and that some larger number determined, for reasons that are utterly obscure, that it should not be adopted.

The Court next relies upon the rejection of proposed legislation in 1797. The bill there at issue would have forbidden the entry of American citizens into the service of any foreign state in time of war; its sixth section included

machinery by which a citizen might voluntarily expatriate himself.{7} The bill contained nothing which would have expatriated unwilling citizens, and the debates do not include any pronouncements relevant to that issue. It is difficult to see how the failure of that bill might be probative here.

The debates in 1817 and 1818, upon which the Court so heavily relies, are scarcely more revealing. Debate centered upon a brief bill{8} which provided merely that any citizen who wished to renounce his citizenship must first declare his intention in open court, and thereafter depart the United States. His citizenship would have terminated at the moment of his renunciation. The bill was debated only in the House; no proposal permitting the involuntary expatriation of any citizen was made or considered there or in the Senate. Nonetheless, the Court selects portions of statements made by three individual Congressmen, who apparently denied that Congress had authority to enact legislation to deprive unwilling citizens of their citizenship. These brief dicta are, by the most generous standard, inadequate to warrant the Court's broad constitutional conclusion. Moreover, it must be observed that they were in great part deductions from [387 U.S. 274] constitutional premises which have subsequently been entirely abandoned. They stemmed principally from the Jeffersonian contention that allegiance is owed by a citizen first to his State, and only through the State to the Federal Government. The spokesmen upon whom the Court now relies supposed that Congress was without authority to dissolve citizenship, since "we have no control" over "allegiance to the State. . . ."{9} The bill's opponents urged that

> The relation to the State government was the basis of the relation to the General Government, and therefore, as long as a man continues a citizen of a State, he must be considered a citizen of the United States.{10}

Any statute, it was thought, which dissolved federal citizenship while a man remained a citizen of a State "would be inoperative."{11} Surely the Court does not revive this entirely discredited doctrine, and yet, so long as it does not, it is difficult to see that any significant support for the ruling made today may be derived from the statements on which the Court relies. To sever the statements from their constitutional premises, as the Court has apparently done, is to transform the meaning these expressions were intended to convey. Finally, it must be remembered that these were merely the views of three Congressmen; nothing in the debates indicates that their constitutional doubts were shared by any substantial number of the other 67 members who eventually opposed the bill. They were plainly not accepted by the 58 members who voted in the bill's favor. The bill's opponents repeatedly urged that, whatever its constitutional validity, the bill was imprudent [387 U.S. 275] and undesirable. Pindall of Virginia, for example, asserted that a citizen who employed its provisions would have "motives of idleness or criminality,"{12} and that the bill would thus cause "much evil."{13} McLane of Delaware feared that citizens would use the bill to escape service in the armed forces in time of war; he warned that the bill would, moreover, weaken "the love of country so necessary to individual happiness and national prosperity."{14} He even urged that "The commission of treason, and the objects of plunder and spoil, are equally legalized by this bill."{15} Lowndes of South Carolina cautioned the House that difficulties might again arise with foreign governments over the rights of seamen if the bill were passed.{16} Given these vigorous and repeated arguments, it is quite impossible to assume, as the Court apparently has, that any substantial portion of the House was motivated wholly, or even in part, by any particular set of constitutional assumptions. These three statements must, instead, be taken as representative only of the beliefs of three members, premised chiefly upon constitutional doctrines which have subsequently been rejected, and expressed in a debate in which the present issues were not directly involved.

The last piece of evidence upon which the Court relies for this period is a brief *obiter dictum* from the lengthy opinion for the Court in *Osborn v. Bank of the United States,* 9 Wheat. 738, 827, written by Mr. Chief Justice Marshall. This use of the dictum is entirely unpersuasive, for its terms and context make quite plain that it cannot have been intended to reach the questions presented [387 U.S. 276] here. The central issue before the Court in *Osborn* was the right of the bank to bring its suit for equitable relief in the courts of the United States. In argument, counsel for Osborn had asserted that, although the bank had been created by the laws of the United States, it did not necessarily follow that any cause involving the bank had arisen under those laws. Counsel urged by analogy that the naturalization of an alien might as readily be said to confer upon the new citizen a right to bring all his actions in the federal courts. *Id.* at 813-814 [argument of counsel omitted from electronic version]. Not surprisingly, the Court rejected the analogy, and remarked that an act of naturalization "does not proceed to give, to regulate, or to prescribe his capacities," since the Constitution demands that a naturalized citizen must in all respects stand "on the footing of a native." *Id.* at 827. The Court plainly meant no more than that counsel's analogy is broken by Congress' inability to offer a naturalized citizen

rights or capacities which differ in any particular from those given to a native-born citizen by birth. Mr. Justice Johnson's discussion of the analogy in dissent confirms the Court's purpose. *Id.* at 875-876.

Any wider meaning, so as to reach the questions here, wrenches the dictum from its context and attributes to the Court an observation extraneous even to the analogy before it. Moreover, the construction given to the dictum by the Court today requires the assumption that the Court in *Osborn* meant to decide an issue which had to that moment scarcely been debated, to which counsel in *Osborn* had never referred, and upon which no case had ever reached the Court. All this, it must be recalled, is in an area of the law in which the Court had steadfastly avoided unnecessary comment. *See, e.g., M'Ilvaine v. Coxe's Lessee,* 4 Cranch 209, 212-213; *The Santissima Trinidad,* 7 Wheat. 283, 347-348. By any [387 U.S. 277] standard, the dictum cannot provide material assistance to the Court's position in the present case.{17}

Before turning to the evidence from this period which has been overlooked by the Court, attention must be given an incident to which the Court refers, but upon which it apparently places relatively little reliance. In 1810, a proposed thirteenth amendment to the Constitution [387 U.S. 278] was introduced into the Senate by Senator Reed of Maryland; the amendment, as subsequently modified, provided that any citizen who accepted a title of nobility, pension, or emolument from a foreign state, or who married a person of royal blood, should "cease to be a citizen of the United States."{18} The proposed amendment was, in a modified form, accepted by both Houses, and subsequently obtained the approval of all but one of the requisite number of States.{19} I have found nothing which indicates with any certainty why such a provision should then have been thought necessary,{20} but two reasons suggest themselves for the use of a constitutional amendment. First, the provisions may have been intended in part as a sanction for Art. I, § 9, cl. 8;{21} it may therefore have been thought more appropriate that it be placed within the Constitution itself. Second, a student of expatriation issues in this period has dismissed the preference for an amendment with the explanation that

> the dominant Jeffersonian view held that citizenship was within the jurisdiction of the states; a statute would thus have been a federal usurpation of state power.{22}

This second explanation is fully substantiated by the debate in [387 U.S. 279] 1818; the statements from that debate set out in the opinion for the Court were, as I have noted, bottomed on the reasoning that, since allegiance given by an individual to a State could not be dissolved by Congress, a federal statute could not regulate expatriation. It surely follows that this "obscure enterprise"{23} in 1810, motivated by now discredited constitutional premises, cannot offer any significant guidance for solution of the important issues now before us.

The most pertinent evidence from this period upon these questions has been virtually overlooked by the Court. Twice in the two years immediately prior to its passage of the Fourteenth Amendment, Congress exercised the very authority which the Court now suggests that it should have recognized was entirely lacking. In each case, a bill was debated and adopted by both Houses which included provisions to expatriate unwilling citizens.

In the spring and summer of 1864, both Houses debated intensively the Wade-Davis bill to provide reconstruction governments for the States which had seceded to form the Confederacy. Among the bill's provisions was § 14, by which

> every person who shall hereafter hold or exercise any office . . . in the rebel service . . . is hereby declared not to be a citizen of .the United States.{24}

Much of the debate upon the bill did not, of course, center on the expatriation provision, although it certainly did not escape critical attention.{25} Nonetheless, I have not found any indication in the debates in either House that it was supposed that Congress was without authority to deprive an unwilling citizen of his citizenship. The bill was not signed by President Lincoln before the adjournment [387 U.S. 280] of Congress, and thus failed to become law, but a subsequent statement issued by Lincoln makes quite plain that he was not troubled by any doubts of the constitutionality of § 14.{26} Passage of the Wade-Davis bill of itself "suffices to destroy the notion that the men who drafted the Fourteenth Amendment felt that citizenship was an `absolute.'"{27}

Twelve months later, and less than a year before its passage of the Fourteenth Amendment, Congress adopted a second measure which included provisions that permitted the expatriation of unwilling citizens. Section 21 of the Enrollment Act of 1865 provided that deserters from the military service of the United States "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens. . . ."{28} The same section extended these disabilities to persons who departed the United States with intent to avoid "draft into the military or naval service. . . ."{29} The bitterness of war did not cause Congress here to neglect the requirements of the Constitution, for it was urged in both Houses that § 21 as written was *ex post facto,* and thus was constitutionally [387 U.S. 281] impermissible.{30} Significantly, however, it was never suggested in either debate that expatriation without a citizen's consent lay beyond Congress' authority. Members of both Houses had apparently examined intensively the section's constitutional validity, and yet had been undisturbed by the matters upon which the Court now relies.

Some doubt, based on the phrase "rights of citizenship," has since been expressed{31} that § 21 was intended to require any more than disfranchisement, but this is, for several reasons, unconvincing. First, § 21 also explicitly provided that persons subject to its provisions should not thereafter exercise various "rights of citizens";{32} if the section had not been intended to cause expatriation, it is difficult to see why these additional provisions would have been thought necessary. Second, the executive authorities of the United States afterwards consistently construed the section as causing expatriation.{33} Third, the section was apparently understood by various courts to result in expatriation; in particular, Mr. Justice Strong, while a member of the Supreme Court of Pennsylvania, construed the section to cause a "forfeiture of citizenship," *Huber v. Reily,* 53 Pa. 112, 118, and although this point was not expressly reached, his general understanding of the statute was approved by this Court in *Kurtz v. Moffitt,* 115 U.S. 487, 501. Finally, Congress in 1867 approved an exemption from the section's provisions for those who had deserted after the termination of general hostilities, and the statute as adopted specifically described the disability from which exemption was given as a "loss of his citizenship." [387 U.S. 282] 15 Stat. 14. The same choice of phrase occurs in the pertinent debates.{34}

It thus appears that Congress had twice, immediately before its passage of the Fourteenth Amendment, unequivocally affirmed its belief that it had authority to expatriate an unwilling citizen.

The pertinent evidence for the period prior to the adoption of the Fourteenth Amendment can therefore be summarized as follows. The Court's conclusion today is supported only by the statements, associated at least in part with a now abandoned view of citizenship, of three individual Congressmen, and by the ambiguous and inapposite dictum from *Osborn.* Inconsistent with the Court's position are statements from individual Congressmen in 1794, and Congress' passage in 1864 and 1865 of legislation which expressly authorized the expatriation of unwilling citizens. It may be that legislation adopted in the heat of war should be discounted in part by its origins, but, even if this is done, it is surely plain that the Court's conclusion is entirely unwarranted by the available historical evidence for the period prior to the passage of the Fourteenth Amendment. The evidence suggests, to the contrary, that Congress in 1865 understood that it had authority, at least in some circumstances, to deprive a citizen of his nationality.

II

The evidence with which the Court supports its thesis that the Citizenship Clause of the Fourteenth Amendment was intended to lay at rest any doubts of Congress' inability to expatriate without the citizen's consent is no more persuasive. The evidence consists almost exclusively of two brief and general quotations from Howard [387 U.S. 283] of Michigan, the sponsor of the Citizenship Clause in the Senate, and of a statement made in a debate in the House of Representatives in 1868 by Van Trump of Ohio. Measured most generously, this evidence would be inadequate to support the important constitutional conclusion presumably drawn in large part from it by the Court; but, as will be shown, other relevant evidence indicates that the Court plainly has mistaken the purposes of the clause's draftsmen.

The Amendment as initially approved by the House contained nothing which described or defined citizenship.{35} The issue did not as such even arise in the House debates; it was apparently assumed that Negroes were citizens, and that it was necessary only to guarantee to them the rights which sprang from citizenship. It is quite impossible to derive from these debates any indication that the House wished to deny itself the authority it had exercised in 1864 and

1865; so far as the House is concerned, it seems that no issues of citizenship were "at all involved."{36}

In the Senate, however, it was evidently feared that, unless citizenship were defined, or some more general classification substituted, freedmen might, on the premise that they were not citizens, be excluded from the Amendment's protection. Senator Stewart thus offered an amendment which would have inserted into § 1 a definition of citizenship,{37} and Senator Wade urged as an alternative the elimination of the term "citizen" from the Amendment's first section.{38} After a caucus of the [387 U.S. 284] chief supporters of the Amendment, Senator Howard announced on their behalf that they favored the addition of the present Citizenship Clause.{39}

The debate upon the clause was essentially cursory in both Houses, but there are several clear indications of its intended effect. Its sponsors evidently shared the fears of Senators Stewart and Wade that, unless citizenship were defined, freedmen might, under the reasoning of the *Dred Scott* decision,{40} be excluded by the courts from the scope of the Amendment. It was agreed that, since the "courts have stumbled on the subject," it would be prudent to remove the "doubt thrown over" it.{41} The clause would essentially overrule *Dred Scott* and place beyond question the freedmen's right of citizenship because of birth. It was suggested, moreover, that it would, by creating a basis for federal citizenship which was indisputably independent of state citizenship, preclude any effort by state legislatures to circumvent the Amendment by denying freedmen state citizenship.{42} Nothing in the debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens. The evidence indicates that its draftsmen instead expected the clause only to declare unreservedly to [387 U.S. 285] whom citizenship initially adhered, thus overturning the restrictions both of *Dred Scott* and of the doctrine of primary state citizenship, while preserving Congress' authority to prescribe the methods and terms of expatriation.

The narrow, essentially definitional purpose of the Citizenship Clause is reflected in the clear declarations in the debates that the clause would not revise the prevailing incidents of citizenship. Senator Henderson of Missouri thus stated specifically his understanding that the "section will leave citizenship where it now is."{43} Senator Howard, in the first of the statements relied upon, in part, by the Court, said quite unreservedly that

> This amendment [the Citizenship Clause] which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States.{44}

Henderson had been present at the Senate's consideration both of the Wade-Davis bill and of the Enrollment Act, and had voted at least for the Wade-Davis bill.{45} [387 U.S. 286] Howard was a member of the Senate when both bills were passed, and had actively participated in the debates upon the Enrollment Act.{46} Although his views of the two expatriation measures were not specifically recorded, Howard certainly never expressed to the Senate any doubt either of their wisdom or of their constitutionality. It would be extraordinary if these prominent supporters of the Citizenship Clause could have imagined, as the Court's construction of the clause now demands, that the clause was only "declaratory" of the law "where it now is," and yet that it would entirely withdraw a power twice recently exercised by Congress in their presence.

There is, however, even more positive evidence that the Court's construction of the clause is not that intended by its draftsmen. Between the two brief statements from Senator Howard relied upon by the Court, Howard, in response to a question, said the following:

> I take it for granted that, after a man becomes a citizen of the United States under the Constitution, he cannot cease to be citizen *except by* expatriation or *the commission of some crime by which his citizenship shall be forfeited.*{47}

(Emphasis added.) It would be difficult to imagine a more unqualified rejection of the Court's position; Senator Howard, the clause's sponsor, very plainly believed that it would leave unimpaired Congress' power to deprive unwilling citizens of their citizenship.{48} [387 U.S. 287]

Additional confirmation of the expectations of the clause's draftsmen may be found in the legislative history, wholly overlooked by the Court, of the Act for the Relief of certain Soldiers and Sailors, adopted in 1867. 15 Stat. 14. The Act, debated by Congress within 12 months of its passage of the Fourteenth Amendment, provided an exception from the provisions of 21 of the Enrollment Act of 1865 for those who had deserted from the Union forces after the

termination of general hostilities. Had the Citizenship Clause been understood to have the effect now given it by the Court, surely this would have been clearly reflected in the debates; members would at least have noted that, upon final approval of the Amendment, which had already obtained the approval of 21 States, § 21 would necessarily be invalid. Nothing of the sort occurred; it was argued by some members that § 21 was imprudent, and even unfair,{49} but Congress evidently did not suppose that it was, or would be, unconstitutional. Congress simply failed to attribute to the Citizenship [387 U.S. 288] Clause the constitutional consequences now discovered by the Court.{50}

Nonetheless, the Court urges that the debates which culminated in the Expatriation Act of 1868 materially support its understanding of the purposes of the Citizenship Clause. This is, for several reasons, wholly unconvincing. Initially, it should be remembered that discussion of the Act began in committee some six months after the passage of the Relief Act of 1867, by the Second Session of the Congress which had approved the Relief Act; the Court's interpretation of the history of the Expatriation Act thus demands, at the outset, the supposition that a view of the Citizenship Clause entirely absent in July had appeared vividly by the following January. Further, the purposes and background of the Act should not be forgotten. The debates were stimulated by repeated requests both from President Andrew Johnson and from the public that Congress assert the rights of naturalized Americans against the demands of their former countries.{51} The Act as finally adopted was thus intended

> primarily to assail the conduct of the British Government [chiefly for its acts toward naturalized Americans resident in Ireland] and to declare the right of naturalized Americans to renounce their native allegiance; {52}

accordingly, very little of the lengthy debate was in the least pertinent to the present issues. Several members did make plain, through their proposed amendments to the bill or their [387 U.S. 289] interstitial comments, that they understood Congress to have authority to expatriate unwilling citizens,{53} but ,in general, both the issues now before the Court and questions of the implications of the Citizenship Clause were virtually untouched in the debates.

Nevertheless, the Court, in order to establish that Congress understood that the Citizenship Clause denied it such authority, fastens principally upon the speeches of Congressman Van Trump of Ohio. Van Trump sponsored, as one of many similar amendments offered to the bill by various members, a proposal to create formal machinery by which a citizen might voluntarily renounce his citizenship.{54} Van Trump himself spoke at length in support of his proposal; his principal speech consisted chiefly of a detailed examination of the debates and judicial decisions pertinent to the issues of voluntary renunciation of citizenship.{55} Never in his catalog of relevant materials did Van Trump even mention the Citizenship Clause of the Fourteenth Amendment;{56} so far as may be seen from his comments on the House floor, Van Trump evidently supposed the clause to be entirely immaterial to the issues of expatriation. This is completely characteristic of the debate in both Houses; even its draftsmen and principal supporters, such as Senator Howard, permitted the Citizenship Clause to [387 U.S. 290] pass unnoticed. The conclusion seems inescapable that the discussions surrounding the Act of 1868 cast only the most minimal light, if indeed any, upon the purposes of the clause, and that the Court's evidence from the debates is, by any standard, exceedingly slight.{57}

There is, moreover, still further evidence, overlooked by the Court, which confirms yet again that the Court's view of the intended purposes of the Citizenship Clause is mistaken. While the debate on the Act of 1868 was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties, which "initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations." *Perez v. Brownell, supra,* at 48. Seven such treaties were negotiated in 1868 and 1869 alone;{58} each was ratified by the Senate. If, as the Court now suggests, it was "abundantly clear" to Congress in 1868 that the Citizenship Clause had taken from its hands the power of expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once negotiated, [387 U.S. 291] they were not immediately repudiated by the Senate.{59}

Further, the executive authorities of the United States repeatedly acted, in the 40 years following 1868, upon the premise that a citizen might automatically be deemed to have expatriated himself by conduct short of a voluntary renunciation of citizenship; individual citizens were, as the Court indicated in *Perez,* regularly held on this basis to have lost their citizenship. Interested Members of Congress, and others, could scarcely have been unaware of the practice; as early as 1874, President Grant urged Congress in his Sixth Annual Message to supplement the Act of 1868 with a statutory declaration of the acts by which a citizen might "be deemed to have renounced or to have lost his citizenship."{60} It was the necessity to provide a more satisfactory basis for this practice that led first to the

appointment of the Citizenship Board of 1906, and subsequently to the Nationality Acts of 1907 and 1940. The administrative practice in this period was described by the Court in *Perez;* it suffices here merely to emphasize that the Court today has not ventured to explain why the Citizenship Clause should, so shortly after its adoption, have been, under the Court's construction, so seriously misunderstood.

It seems to me apparent that the historical evidence which the Court in part recites is wholly inconclusive, [387 U.S. 292] as indeed the Court recognizes; the evidence, to the contrary, irresistibly suggests that the draftsmen of the Fourteenth Amendment did not intend, and could not have expected, that the Citizenship Clause would deprive Congress of authority which it had, to their knowledge, only recently twice exercised. The construction demanded by the pertinent historical evidence, and entirely consistent with the clause's terms and purposes, is instead that it declares to whom citizenship, as a consequence either of birth or of naturalization, initially attaches. The clause thus served at the time of its passage both to overturn *Dred Scott* and to provide a foundation for federal citizenship entirely independent of state citizenship; in this fashion it effectively guaranteed that the Amendment's protection would not subsequently be withheld from those for whom it was principally intended. But nothing in the history, purposes, or language of the clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty to expatriate a citizen if the expatriation is an appropriate exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

The Citizenship Clause thus neither denies nor provides to Congress any power of expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is, of course, protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restriction [387 U.S. 293] upon legislative authority. The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's *ipse dixit,* evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power.

I believe that *Perez* was rightly decided, and on its authority would affirm the judgment of the Court of Appeals.

Footnotes

BLACK, J., lead opinion (Footnotes)

1. 54 Stat. 1168, as amended, 58 Stat. 746, 8 U.S.C. § 801 (1946 ed.):

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision was reenacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U.S.C. § 1481(a)(5).

2. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States. . . ."

3. 250 F.Supp. 686; 361 F.2d 102, 105.

4. *Trop v. Dulles,* 356 U.S. 86; *Nishikawa v. Dulles,* 356 U.S. 129.

5. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144; *Schneider v. Rusk,* 377 U.S. 163. In his concurring opinion

in *Mendoza-Martinez,* MR. JUSTICE BRENNAN expressed "felt doubts of the correctness of *Perez.* . . ." 372 U.S. at 187

6. *See, e.g.,* Agata, Involuntary Expatriation and *Schneider v. Rusk,* 27 U.Pitt.L.Rev. 1 (1965); Hurst, Can Congress Take Away Citizenship?, 29 Rocky Mt.L.Rev. 62 (1956); Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv.L.Rev. 143, 169-175 (1964); Comment, 56 Mich.L.Rev. 1142 (1958); Note, Forfeiture of Citizenship Through Congressional Enactments, 21 U.Cin.L.Rev. 59 (1952); 40 Cornell L.Q. 365 (1955); 25 S.Cal.L.Rev.196 (1952). *But see, e.g.,* Comment, The Expatriation Act of 1954, 64 Yale L.J. 1164 (1955).

7. *See Perez v. Brownell, supra,* at 62 (dissenting opinion of THE CHIEF JUSTICE), 79 (dissenting opinion of MR. JUSTICE DOUGLAS); *Trop v. Dulles, supra,* at 91-93 (part I of opinion of Court); *Nishikawa v. Dulles, supra,* at 138 (concurring opinion of MR. JUSTICE BLACK).

8. For a history of the early American view of the right of expatriation, including these congressional proposals, *see generally* Roche, The Early Development of United States Citizenship (1949); Tsiang, The Question of Expatriation in America Prior to 1907 (1942); Dutcher, The Right of Expatriation, 11 Am.L.Rev. 447 (1877); Roche, The Loss of American Nationality -- The Development of Statutory Expatriation, 99 U.Pa.L.Rev. 25 (1950); Slaymaker, The Right of the American Citizen to Expatriate, 37 Am.L.Rev.191 (1903).

9. 4 Annals of Cong. 1005, 102-1030 (1794); 7 Annals of Cong. 349 *et seq.* (1797).

10. *See, e.g., Talbot v. Janson,* 3 Dall. 133.

11. 31 Annals of Cong. 495 (1817).

12. *Id.* at 1036-1037, 1058 (1818). Although some of the opponents, believing that citizenship was derived from the States, argued that any power to prescribe the mode for its relinquishment rested in the States, they were careful to point out that "the absence of all power from the State Legislatures would not vest it in us." *Id.* at 1039.

13. The amendment had been proposed by the 11th Cong., 2d Sess. *See* The Constitution of the United States of America, S.Doc. No. 39, 88th Cong., 1st Sess., 77-78 (1964).

14. *Id.* at 1071. It is interesting to note that the proponents of the bill, such as Congressman Cobb of Georgia, considered it to be "the simple declaration of the manner in which a voluntary act, in the exercise of a natural right, may be performed" and denied that it created or could lead to the creation of "a presumption of relinquishment of the right of citizenship." *Id.* at 1068.

15. The dissenting opinion here points to the fact that a Civil War Congress passed two Acts designed to deprive military deserters to the Southern side of the rights of citizenship. Measures of this kind passed in those days of emotional stress and hostility are by no means the most reliable criteria for determining what the Constitution means.

16. Cong.Globe, 39th Cong., 1st Sess., 2768-2769, 2869, 2890 *et seq.* (1866). *See generally,* Flack, Adoption of the Fourteenth Amendment 88-94 (1908).

17. Representative Jenckes of Rhode Island introduced an amendment that would expatriate those citizens who became naturalized by a foreign government, performed public duties for a foreign government, or took up domicile in a foreign country without intent to return. Cong.Globe, 40th Cong., 2d Sess., 968, 1129, 2311 (1868). Although he characterized his proposal as covering "cases where citizens may voluntarily renounce their allegiance to this country," *id.* at 1159, it was opposed by Representative Chanler of New York, who said,

> So long as a citizen does not expressly dissolve his allegiance and does not swear allegiance to another country his citizenship remains *in statu quo,* unaltered and unimpaired.

Id. at 1016.

18. Proposals of Representatives Pruyn of New York (*id.* at 1130) and Van Trump of Ohio (*id.* at 1801, 2311).

19. While Van Trump disagreed with the 1818 opponents as to whether Congress had power to prescribe a means of voluntary renunciation of citizenship, he wholeheartedly agreed with their premise that the right of expatriation belongs to the citizen, not to the Government, and that the Constitution forbids the Government from being party to the act of expatriation. Van Trump simply thought that the opponents of the 1818 proposal failed to recognize that their mutual premise would not be violated by an Act which merely prescribed "how . . . [the rights of citizenship] might be relinquished at the option of the person in whom they were vested." Cong.Globe, 40th Cong., 2d Sess., 1804 (1868).

20. *Id.* at 2317. Representative Banks of Massachusetts, the Chairman of the House Committee on Foreign Affairs which drafted the bill eventually enacted into law, explained why Congress refrained from providing a means of expatriation:

> It is a subject which, in our opinion, ought not to be legislated upon. . . . [T]his comes within the scope and character of natural rights which no Government has the right to control and which no Government can confer. And wherever this subject is alluded to in the Constitution – . . . it is in the declaration that Congress shall have no power whatever to legislate upon these matters.

Id. at 2316.

21. 15 Stat. 223, R.S. § 1999.

22. Some have referred to this part. of the decision as a holding, *see, e.g.,* Hurst, *supra,* 29 Rocky Mt.L.Rev. at 779; Comment, 56 Mich.L.Rev. at 1153-1154; while others have referred to it as *obiter dictum, see, e.g.,* Roche, *supra,* 99 U.Pa.L.Rev. at 26-27. Whichever it was, the statement was evidently the result of serious consideration, and is entitled to great weight.

23. Of course, as THE CHIEF JUSTICE said in his dissent, 356 U.S. at 66, naturalization unlawfully procured can be set aside. *See, e.g.,* *Knauer v. United States,* 328 U.S. 654; *Baumgartner v. United States,* 322 U.S. 665; *Schneiderman v. United States,* 320 U.S. 118.

HARLAN, J., dissenting (Footnotes)

1. It is appropriate to note at the outset what appears to be a fundamental ambiguity in the opinion for the Court. The Court at one point intimates, but does not expressly declare, that it adopts the reasoning of the dissent of THE CHIEF JUSTICE in *Perez.* THE CHIEF JUSTICE there acknowledged that "actions in derogation of undivided allegiance to this country" had "long been recognized" to result in expatriation, *id.* at 68; he argued, however, that the connection between voting in a foreign political election and abandonment of citizenship was logically insufficient to support a presumption that a citizen had renounced his nationality. *Id.* at 76. It is difficult to find any semblance of this reasoning, beyond the momentary reference to the opinion of THE CHIEF JUSTICE, in the approach taken by the Court today; it seems instead to adopt a substantially wider view of the restrictions upon Congress' authority in this area. Whatever the Court's position, it has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by "assent," today's opinion will surely cause still greater confusion in this area of the law.

2. It is useful, however, to reiterate the essential facts of this case, for the Court's very summary statement might unfortunately cause confusion about the situation to which § 401(e) was here applied. Petitioner emigrated from the United States to Israel in 1950, and, although the issue was not argued at any stage of these proceedings, it was assumed by the District Court that he "has acquired Israeli citizenship." 250 F.Supp. 686, 687. He voted in the election for the Israeli Knesset in 1951, and, as his Israeli Identification Booklet indicates, in various political elections which followed. Transcript of Record 1-2. In 1960, after 10 years in Israel, petitioner determined to return to the United

States, and applied to the United States Consulate in Haifa for a passport. The application was rejected, and a Certificate of Loss of Nationality, based entirely on his participation in the 1951 election, was issued. Petitioner's action for declaratory judgment followed. There is, as the District Court noted, "no claim by the [petitioner] that the deprivation of his American citizenship will render him a stateless person." *Ibid.*

3. *See generally* Tsiang, The Question of Expatriation in America Prior to 1907, 25-70; Roche, The Expatriation Cases, 1963 Sup.Ct.Rev. 325, 327-330; Roche, Loss of American Nationality, 4 West.Pol.Q. 268.

4. Roche, The Expatriation Cases, 1963 Sup.Ct.Rev. 325, 329. Although the evidence, which consists principally of a letter to Albert Gallatin, is rather ambiguous, Jefferson apparently believed even that a state expatriation statute could deprive a citizen of his federal citizenship. 1 Writings of Albert Gallatin 301-302 (Adams ed. 1879). His premise was presumably that state citizenship was primary, and that federal citizenship attached only through it. *See* Tsiang, *supra,* at 25. Gallatin's own views have been described as essentially "states' rights"; *see* Roche, Loss of American Nationality, 4 West.Pol.Q. 268, 271.

5. *See* 4 Annals of Cong. 1004 *et seq.*

6. The discussion and rejection of the amendment are cursorily reported at 4 Annals of Cong. 1028-1030.

7. The sixth section is set out at 7 Annals of Cong. 349.

8. The bill is summarized at 31 Annals of Cong. 495.

9. 31 Annals of Cong. 1046.

10. 31 Annals of Cong. 1057.

11. *Ibid.* Roche describes the Congressmen upon whom the Court chiefly relies as "the states' rights opposition." Loss of American Nationality, 4 West.Pol.Q. 268, 276.

12. 31 Annals of Cong. 1047.

13. 31 Annals of Cong. 1050.

14. 31 Annals of Cong. 1059.

15. *Ibid.*

16. 31 Annals of Cong. 1051.

17. Similarly, the Court can obtain little support from its invocation of the dictum from the opinion for the Court in *United States v. Wong Kim Ark,* 169 U.S. 649, 703. The central issue there was whether a child born of Chinese nationals domiciled in the United States is an American citizen if its birth occurs in this country. The dictum upon which the Court relies, which consists essentially of a reiteration of the dictum from *Osborn,* can therefore scarcely be considered a reasoned consideration of the issues now before the Court. Moreover, the dictum could conceivably be read to hold only that no power to expatriate an unwilling citizen was conferred either by the Naturalization Clause or by the Fourteenth Amendment; if the dictum means no more, it would, of course, not even reach the holding in *Perez.* Finally, the dictum must be read in light of the subsequent opinion for the Court, written by Mr. Justice McKenna, in *Mackenzie v. Hare,* 239 U.S. 299. Despite counsel's invocation of *Wong Kim Ark, id.* at 302 and 303 [argument of counsel -- omitted], the Court held in *Mackenzie* that marriage between an American citizen and an alien, unaccompanied by any intention of the citizen to renounce her citizenship, nonetheless permitted Congress to withdraw her nationality. It is immaterial for these purposes that Mrs. Mackenzie's citizenship might, under the statute there, have

been restored upon termination of the marital relationship; she did not consent to the loss, even temporarily, of her citizenship, and, under the proposition apparently urged by the Court today, it can therefore scarcely matter that her expatriation was subject to some condition subsequent. It seems that neither Mr. Justice McKenna, who became a member of the Court after the argument but before the decision of *Wong Kim Ark, supra,* at 732, nor Mr. Chief Justice White, who joined the Court's opinions in both *Wong Kim Ark* and *Mackenzie,* thought that *Wong Kim Ark* required the result reached by the Court today. Nor, it must be supposed, did the other six members of the Court who joined *Mackenzie,* despite *Wong Kim Ark.*

18. The various revisions of the proposed amendment may be traced through 20 Annals of Cong. 530, 549, 572-573, 635, 671.

19. Ames, The Proposed Amendments to the Constitution of the United States during the First Century of Its History, 2 Ann.Rep.Am.Hist.Assn. for the Year 1896, 188.

20. Ames, *supra,* at 187, speculates that the presence of Jerome Bonaparte in this country some few years earlier might have caused apprehension, and concludes that the amendment was merely an expression of "animosity against foreigners." *Id.*. at 188.

21. The clause provides that

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

22. Roche, The Expatriation Cases, 1963 Sup.Ct.Rev. 325, 335.

23. *Ibid.*

24. 6 Richardson, Messages and Papers of the Presidents 226.

25. *See, e.g.,* the comments of Senator Brown of Missouri, Cong.Globe, 38th Cong., 1st Sess., 3460.

26. Lincoln indicated that, although he was "unprepared" to be "inflexibly committed" to "any single plan of restoration," he was "fully satisfied" with the bill's provisions. 6 Richardson, Messages and Papers of the Presidents 222-223.

27. Roche, The Expatriation Cases, 1963 Sup.Ct.Rev. 325, 343.

28. 13 Stat. 490. It was this provision that, after various recodifications, was held unconstitutional by this Court in *Trop v. Dulles,* 356 U.S. 86. A majority of the Court did not there hold that the provision was invalid because Congress lacked all power to expatriate an unwilling citizen. In any event, a judgment by this Court 90 years after the Act's passage can scarcely reduce the Act's evidentiary value for determining whether Congress understood in 1865, as the Court now intimates that it did, that it lacked such power.

29. 13 Stat. 491

30. Cong.Globe, 38th Cong., 2d Sess., 642-643, 1155-1156.

31. Roche, The Expatriation Cases, 1963 Sup.Ct.Rev. 325, 336.

32. 13 Stat. 490

33. Hearings before House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess., 38.

34. *See, e.g.,* the remarks of Senator Hendricks, Cong.Globe, 40th Cong., 1st Sess., 661.

35. The pertinent events are described in Flack, Adoption of the Fourteenth Amendment 83-94.

36. *Id.* at 84

37. Cong.Globe, 39th cong., 1st Sess., 2560.

38. Wade would have employed the formula "persons born in the United States or naturalized under the laws thereof" to measure the sections protection. Cong.Globe, 39th Cong., 1st Sess., 2768-2769.

39. 81 Cong.Globe, 39th Cong., 1st Sess., 2869. The precise terms of the discussion in the caucus were, and have remained, unknown. For contemporary comment, *see* Cong.Globe, 39th Cong., 1st Sess., 2939.

40. *Scott v. Sandford,* 19 How. 393.

41. Cong.Globe, 39th Cong., 1st Sess., 2768.

42. *See, e.g.,* the comments of Senator Johnson of Maryland, Cong.Globe, 39th Cong., 1st Sess., 2893. It was subsequently acknowledged by several members of this Court that a central purpose of the Citizenship Clause was to create an independent basis of federal citizenship, and thus to overturn the doctrine of primary state citizenship. *The Slaughter-House Cases,* 16 Wall. 36, 74, 95, 112. The background of this issue is traced in tenBroek, The Anti-slavery Origins of the Fourteenth Amendment 71-93.

43. Cong.Globe, 39th Cong., 1st Sess., 3031. *See also* Flack, The Adoption of the Fourteenth Amendment 93. In the same fashion, tenBroek, *supra,* at 215-217, concludes that the whole of § 1 was "declaratory and confirmatory." *Id.* at 217.

44. Cong.Globe, 39th Cong., 1st Sess., 2890. *See also* the statement of Congressman Baker, Cong.Globe, 39th Cong., 1st Sess., App. 255, 256. Similarly, two months after the Amendment's passage through Congress, Senator Lane of Indiana remarked that the clause was "simply a re-affirmation" of the declaratory citizenship section of the Civil Rights Bill. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan.L.Rev. 5, 74.

45. Senator Henderson participated in the debates upon the Enrollment Act and expressed no doubts about the constitutionality of § 21, Cong.Globe, 38th Cong., 2d Sess., 641, but the final vote upon the measure in the Senate was not recorded. Cong.Globe, 38th Cong., 2d Sess., 643.

46. *See, e.g.,* Cong.Globe, 38th Cong., 2d Sess., 632.

47. Cong.Globe, 39th Cong., 1st Sess., 2895.

48. The issues pertinent here were not, of course, matters of great consequence in the ratification debates in the several state legislatures, but some additional evidence is nonetheless available from them. The Committee on Federal Relations of the Texas House of Representatives thus reported to the House that the Amendment's first section "proposes to deprive the States of the right . . . to determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government." Its "object" was, they thought, "to declare negroes to be citizens of the United States." Tex. House J. 578 (1866). The Governor of Georgia reported to the legislature that the

> prominent feature of the first [section] is, that it settles definitely the right of citizenship in the several States, . . . thereby depriving them in the future of all discretionary power over the subject within their respective limits, and with reference to their State Governments proper.

Ga.Sen. J. 6 (1866). *See also* the message of Governor Cox to the Ohio Legislature, Fairman, *supra,* 2 Stan.L.Rev. at 96, and the message of Governor Fletcher to the Missouri Legislature, Mo.Sen.J. 14 (1867). In combination, this

evidence again suggests that the Citizenship Clause was expected merely to declare to whom citizenship initially attaches, and to overturn the doctrine of primary state citizenship.

49. Senator Hendricks, for example, lamented its unfairness, declared that its presence was an "embarrassment" to the country, and asserted that it "is not required any longer." Cong.Globe, 40th Cong., 1st Sess., 660-661.

50. Similarly, in 1885, this Court construed § 21 without any apparent indication that the section was, or had ever been thought to be, beyond Congress' authority. *Kurtz v. Moffitt,* 115 U.S. 487, 501-502.

51. Tsiang, *supra,* n. 3, at 95. President Johnson emphasized in his Third Annual Message the difficulties which were then prevalent. 6 Richardson, Messages and Papers of the Presidents 558, 580-581.

52. Tsiang, *supra,* at 95. *See also* 3 Moore, Digest of International Law 579-580.

53. *See, e.g.,* Cong.Globe, 40th Cong., 2d Sess., 968, 1129-1131.

54. Van Trump's proposal contained nothing which would have expatriated any unwilling citizen, *see* Cong.Globe, 40th Cong., 2d Sess., 1801; its ultimate failure therefore cannot, despite the Court's apparent suggestion, help to establish that the House supposed that legislation similar to that at issue here was impermissible under the Constitution.

55. Cong.Globe, 40th Cong., 2d Sess., 1800-1805.

56. It should be noted that Van Trump, far from a "framer" of the Amendment, had not even been a member of the Congress which adopted it. Biographical Directory of the American Congress 1774-1961, H.R.Doc. No. 442, 85th Cong., 2d Sess., 1750.

57. As General Banks, the Chairman of the House Committee on Foreign Affairs, carefully emphasized, the debates were intended simply to produce a declaration of the obligation of the United States to compel other countries "to consider the rights of our citizens and to bring the matter to negotiation and settlement"; the bill's proponents stood "for that and nothing more." Cong.Globe, 40th Cong., 2d Sess., 2315.

58. The first such treaty was that with the North German Union, concluded February 22, 1868, and ratified by the Senate on March 26, 1868. 2 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers 1298. Similar treaties were reached in 1868 with Bavaria, Baden, Belgium, Hesse, and Wurttemberg; a treaty was reached in 1869 with Norway and Sweden. An analogous treaty was made with Mexico in 1868, but, significantly, it permitted rebuttal of the presumption of renunciation of citizenship. *See generally* Tsiang, *supra,* at 88.

59. The relevance of these treaties was certainly not overlooked in the debates in the Senate upon the Act of 1868. *See, e.g.,* Cong.Globe, 40th Cong., 2d Sess., 4205, 4211, 4329, 4331. Senator Howard attacked the treaties, but employed none of the reasons which might be suggested by the opinion for the Court today. *Id.* at 4211.

60. 7 Richardson, Messages and Papers of the Presidents 284, 291. *See* further Borchard, Diplomatic Protection of Citizens Abroad §§ 319, 324, 325.

U.S. Code collection

TITLE 8

TITLE 8—ALIENS AND NATIONALITY

How Current is This?

§ 1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions

How Current is This?

(a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality—

(1) obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or

(3) entering, or serving in, the armed forces of a foreign state if

(A) such armed forces are engaged in hostilities against the United States, or

(B) such persons serve as a commissioned or non-commissioned officer; or

(4)

(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state; or

(B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which

office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

(b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

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Sec. 1481. - Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions

(a)

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -

(1)

obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years; or

(2)

taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or

(3)

entering, or serving in, the armed forces of a foreign state if

(A)

such armed forces are engaged in hostilities against the United States, or

(B)

such persons serve as a commissioned or non-commissioned officer; or

(4)

(A)

accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state; or

(B)

accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

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(5)

making a formal renunciation of nationality

before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6)

making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7)

committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

(b)

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be

upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily

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§ 1452. Certificates of citizenship or U.S. non-citizen national status; procedure

(a) Application to Attorney General for certificate of citizenship; proof; oath of allegiance

A person who claims to have derived United States citizenship through the naturalization of a parent or through the naturalization or citizenship of a husband, or who is a citizen of the United States by virtue of the provisions of section 1993 of the United States Revised Statutes, or of section 1993 of the United States Revised Statutes, as amended by section 1 of the Act of May 24, 1934 (48 Stat. 797), or who is a citizen of the United States by virtue of the provisions of subsection (c), (d), (e), (g), or (i) of section 201 of the Nationality Act of 1940, as amended (54 Stat. 1138), or of the Act of May 7, 1934 (48 Stat. 667), or of paragraph (c), (d), (e), or (g) of section 1401 of this title, or under the provisions of the Act of August 4, 1937 (50 Stat. 558), or under the provisions of section 203 or 205 of the Nationality Act of 1940 (54 Stat. 1139), or under the provisions of section 1403 of this title, may apply to the Attorney General for a certificate of citizenship. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this chapter of an applicant for naturalization, such individual shall be furnished by the Attorney General with a certificate of citizenship, but only if such individual is at the time within the United States.

(b) Application to Secretary of State for certificate of non-citizen national status; proof; oath of allegiance

A person who claims to be a national, but not a citizen, of the United States may apply to the Secretary of State for a certificate of non-citizen national status. Upon—

(1) proof to the satisfaction of the Secretary of State that the applicant is a national, but not a citizen, of the United States, and

(2) in the case of such a person born outside of the United States or its outlying possessions, taking and subscribing, before an immigration officer within the United States or its outlying possessions, to the oath of allegiance required by this chapter of a petitioner for naturalization,

the individual shall be furnished by the Secretary of State with a certificate of non-citizen national status, but only if the individual is at the time within the United States or its outlying possessions.

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Sec. 1452. - Certificates of citizenship or U.S. non-citizen national status; procedure

(a) Application to Attorney General for certificate of citizenship; proof; oath of allegiance

A person who claims to have derived United States citizenship through the naturalization of a parent or through the naturalization or citizenship of a husband, or who is a citizen of the United States by virtue of the provisions of section 1993 of the United States Revised Statutes, or of section 1993 of the United States Revised Statutes, as amended by section 1 of the Act of May 24, 1934 (48 Stat. 797), or who is a citizen of the United States by virtue of the provisions of subsection (c), (d), (e), (g), or (i) of section 201 of the Nationality Act of 1940, as amended (54 Stat. 1138), or of the Act of May 7, 1934 (48 Stat. 667), or of paragraph (c), (d), (e), or (g) of section 1401 of this title, or under the provisions of the Act of August 4, 1937 (50 Stat. 558), or under the provisions of section 203 or 205 of the Nationality Act of 1940 (54 Stat. 1139), or under the provisions of section 1403 of this title, may apply to the Attorney General for a certificate of citizenship. Upon proof to the satisfaction of the Attorney

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(b) Application to Secretary of State for certificate of non-citizen national status; proof; oath of allegiance

A person who claims to be a national, but not a citizen, of the United States may apply to the Secretary of State for a certificate of non-citizen national status. Upon -

(1)

proof to the satisfaction of the Secretary of State that the applicant is a national, but not a citizen, of the United States, and

(2)

in the case of such a person born outside of the United States or its outlying possessions, taking and subscribing, before an immigration officer within the United States or its outlying possessions, to the oath of allegiance required by this chapter of a petitioner for naturalization,

the individual shall be furnished by the Secretary of State with a certificate of non-citizen national status, but only if the

individual is at the time within the United States or its outlying possessions

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U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0009

Application for Naturalization

Print clearly or type your answers using CAPITAL letters. Failure to print clearly may delay your application. Use black or blue ink.

Part 1. Your Name *(The person applying for naturalization)*

Write your INS "A"- number here:
A ___ ___ ___ ___ ___ ___ ___ ___ ___

A. Your current legal name.

Family Name *(Last Name)*

Given Name *(First Name)*

Full Middle Name *(If applicable)*

B. Your name exactly as it appears on your Permanent Resident Card.

Family Name *(Last Name)*

Given Name *(First Name)*

Full Middle Name *(If applicable)*

C. If you have ever used other names, provide them below.

Family Name *(Last Name)*	Given Name *(First Name)*	Middle Name

D. Name change *(optional)*

Please read the Instructions before you decide whether to change your name.

1. Would you like to legally change your name? ☐ Yes ☐ No
2. If "Yes," print the new name you would like to use. Do not use initials or abbreviations when writing your new name.

Family Name *(Last Name)*

Given Name *(First Name)*

Full Middle Name

FOR INS USE ONLY

Bar Code

Date Stamp

Remarks

Action

Part 2. Information About Your Eligibility *(Check Only One)*

I am at least 18 years old **AND**

A. ☐ I have been a Lawful Permanent Resident of the United States for at least 5 years.

B. ☐ I have been a Lawful Permanent Resident of the United States for at least 3 years, AND I have been married to and living with the same U.S. citizen for the last 3 years, AND my spouse has been a U.S. citizen for the last 3 years.

C. ☐ I am applying on the basis of qualifying military service.

D. ☐ Other *(Please explain)* _____

Part 3. Information About You

Write your INS "A"- number here:
A___ ___ ___ ___ ___ ___ ___ ___ ___

A. Social Security Number
__ __ __ - __ __ - __ __ __ __

B. Date of Birth *(Month/Day/Year)*
__ __/__ __/__ __ __ __

C. Date You Became a Permanent Resident *(Month/Day/Year)*
__ __/__ __/__ __ __ __

D. Country of Birth

E. Country of Nationality

F. Are either of your parents U.S. citizens? *(if yes, see Instructions)* ☐ Yes ☐ No

G. What is your current marital status? ☐ Single, Never Married ☐ Married ☐ Divorced ☐ Widowed

☐ Marriage Annulled or Other *(Explain)* _____

H. Are you requesting a waiver of the English and/or U.S. History and Government requirements based on a disability or impairment and attaching a Form N-648 with your application? ☐ Yes ☐ No

I. Are you requesting an accommodation to the naturalization process because of a disability or impairment? *(See Instructions for some examples of accommodations.)* ☐ Yes ☐ No

If you answered "Yes", check the box below that applies:

☐ I am deaf or hearing impaired and need a sign language interpreter who uses the following language: _____

☐ I use a wheelchair.

☐ I am blind or sight impaired.

☐ I will need another type of accommodation. Please explain: _____

_____

_____

Part 4. Addresses and Telephone Numbers

A. Home Address - Street Number and Name *(Do NOT write a P.O. Box in this space)*

Apartment Number

City | County | State | ZIP Code | Country

B. Care of | Mailing Address - Street Number and Name *(If different from home address)* | Apartment Number

City | State | ZIP Code | Country

C. Daytime Phone Number *(If any)*
( )

Evening Phone Number *(If any)*
( )

E-mail Address *(If any)*

Part 5. Information for Criminal Records Search

Write your INS "A"- number here:
A ___ ___ ___ ___ ___ ___ ___ ___ ___

Note: The categories below are those required by the FBI. See Instructions for more information.

A. Gender

☐ Male ☐ Female

B. Height

Feet Inches

C. Weight

Pounds

D. Race

☐ White ☐ Asian or Pacific Islander ☐ Black ☐ American Indian or Alaskan Native ☐ Unknown

E. Hair color

☐ Black ☐ Brown ☐ Blonde ☐ Gray ☐ White ☐ Red ☐ Sandy ☐ Bald (No Hair)

F. Eye color

☐ Brown ☐ Blue ☐ Green ☐ Hazel ☐ Gray ☐ Black ☐ Pink ☐ Maroon ☐ Other

Part 6. Information About Your Residence and Employment

A. Where have you lived during the last 5 years? Begin with where you live now and then list every place you lived for the last 5 years. If you need more space, use a separate sheet of paper.

Street Number and Name, Apartment Number, City, State, Zip Code and Country	Dates *(Month/Year)*	
	From	To
Current Home Address - Same as Part 4.A	__ __/__ __ __ __	Present
	__ __/__ __ __ __	__ __/__ __ __ __
	__ __/__ __ __ __	__ __/__ __ __ __
	__ __/__ __ __ __	__ __/__ __ __ __
	__ __/__ __ __ __	__ __/__ __ __ __

B. Where have you worked (or, if you were a student, what schools did you attend) during the last 5 years? Include military service. Begin with your current or latest employer and then list every place you have worked or studied for the last 5 years. If you need more space, use a separate sheet of paper.

Employer or School Name	Employer or School Address *(Street, City and State)*	Dates *(Month/Year)*		Your Occupation
		From	To	
		__ __/__ __ __ __	__ __/__ __ __ __	
		__ __/__ __ __ __	__ __/__ __ __ __	
		__ __/__ __ __ __	__ __/__ __ __ __	
		__ __/__ __ __ __	__ __/__ __ __ __	
		__ __/__ __ __ __	__ __/__ __ __ __	

Part 7. Time Outside the United States
(Including Trips to Canada, Mexico, and the Caribbean Islands)

Write your INS "A"- number here:
A ___ ___ ___ ___ ___ ___ ___ ___ ___

A. How many total days did you spend outside of the United States during the past 5 years? [ ] days

B. How many trips of 24 hours or more have you taken outside of the United States during the past 5 years? [ ] trips

C. List below all the trips of 24 hours or more that you have taken outside of the United States since becoming a Lawful Permanent Resident. Begin with your most recent trip. If you need more space, use a separate sheet of paper.

Date You Left the United States *(Month/Day/Year)*	Date You Returned to the United States *(Month/Day/Year)*	Did Trip Last 6 Months or More?		Countries to Which You Traveled	Total Days Out of the United States
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		
___/___/_____	___/___/_____	☐ Yes	☐ No		

Part 8. Information About Your Marital History

A. How many times have you been married (including annulled marriages)? [ ] If you have NEVER been married, go to Part 9.

B. If you are now married, give the following information about your spouse:

1. Spouse's Family Name *(Last Name)* [ ] Given Name *(First Name)* [ ] Full Middle Name *(If applicable)* [ ]

2. Date of Birth *(Month/Day/Year)* ___/___/_____

3. Date of Marriage *(Month/Day/Year)* ___/___/_____

4. Spouse's Social Security Number ___-__-____

5. Home Address - Street Number and Name [ ] Apartment Number [ ]

City [ ] State [ ] ZIP Code [ ]

Part 8. Information About Your Marital History *(Continued)*

Write your INS "A"- number here:
A __ __ __ __ __ __ __ __ __

C. Is your spouse a U.S. citizen? ☐ Yes ☐ No

D. If your spouse is a U.S. citizen, give the following information:

1. When did your spouse become a U.S. citizen? ☐ At Birth ☐ Other

If "Other," give the following information:

2. Date your spouse became a U.S. citizen
__ __/__ __/__ __ __ __

3. Place your spouse became a U.S. citizen *(Please see Instructions)*

City and State

E. If your spouse is NOT a U.S. citizen, give the following information :

1. Spouse's Country of Citizenship

2. Spouse's INS "A"- Number *(If applicable)*
A __ __ __ __ __ __ __ __ __

3. Spouse's Immigration Status
☐ Lawful Permanent Resident ☐ Other _____

F. If you were married before, provide the following information about your prior spouse. If you have more than one previous marriage, use a separate sheet of paper to provide the information requested in questions 1-5 below.

1. Prior Spouse's Family Name *(Last Name)* | Given Name *(First Name)* | Full Middle Name *(If applicable)*

2. Prior Spouse's Immigration Status
☐ U.S. Citizen
☐ Lawful Permanent Resident
☐ Other _____

3. Date of Marriage *(Month/Day/Year)*
__ __/__ __/__ __ __ __

4. Date Marriage Ended *(Month/Day/Year)*
__ __/__ __/__ __ __ __

5. How Marriage Ended
☐ Divorce ☐ Spouse Died ☐ Other _____

G. How many times has your current spouse been married (including annulled marriages)? ☐

If your spouse has EVER been married before, give the following information about your spouse's prior marriage.
If your spouse has more than one previous marriage, use a separate sheet of paper to provide the information requested in questions 1 - 5 below.

1. Prior Spouse's Family Name *(Last Name)* | Given Name *(First Name)* | Full Middle Name *(If applicable)*

2. Prior Spouse's Immigration Status
☐ U.S. Citizen
☐ Lawful Permanent Resident
☐ Other _____

3. Date of Marriage *(Month/Day/Year)*
__ __/__ __/__ __ __ __

4. Date Marriage Ended *(Month/Day/Year)*
__ __/__ __/__ __ __ __

5. How Marriage Ended
☐ Divorce ☐ Spouse Died ☐ Other _____

Part 9. Information About Your Children

Write your INS "A"- number here:
A __ __ __ __ __ __ __ __ __

A. How many sons and daughters have you had? For more information on which sons and daughters you should include and how to complete this section, see the Instructions. ☐

B. Provide the following information about all of your sons and daughters. If you need more space, use a separate sheet of paper.

Full Name of Son or Daughter	Date of Birth *(Month/Day/Year)*	INS "A"- number *(if child has one)*	Country of Birth	Current Address *(Street, City, State & Country)*
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		
	__/__/____	A_ _ _ _ _ _ _ _ _		

Part 10. Additional Questions

Please answer questions 1 through 14. If you answer "Yes" to any of these questions, include a written explanation with this form. Your written explanation should (1) explain why your answer was "Yes," and (2) provide any additional information that helps to explain your answer.

A. General Questions

1. Have you **EVER** claimed to be a U.S. citizen *(in writing or any other way)*? ☐ Yes ☐ No
2. Have you **EVER** registered to vote in any Federal, state, or local election in the United States? ☐ Yes ☐ No
3. Have you **EVER** voted in any Federal, state, or local election in the United States? ☐ Yes ☐ No
4. Since becoming a Lawful Permanent Resident, have you **EVER** failed to file a required Federal, state, or local tax return? ☐ Yes ☐ No
5. Do you owe any Federal, state, or local taxes that are overdue? ☐ Yes ☐ No
6. Do you have any title of nobility in any foreign country? ☐ Yes ☐ No
7. Have you ever been declared legally incompetent or been confined to a mental institution within the last 5 years? ☐ Yes ☐ No

Part 10. Additional Questions *(Continued)*

Write your INS "A"- number here:
A ___ ___ ___ ___ ___ ___ ___ ___ ___

B. Affiliations

8. a. Have you **EVER** been a member of or associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place? ☐ Yes ☐ No

b. If you answered "Yes," list the name of each group below. If you need more space, attach the names of the other group(s) on a separate sheet of paper.

Name of Group	Name of Group
1.	6.
2.	7.
3.	8.
4.	9.
5.	10.

9. Have you **EVER** been a member of or in any way associated *(either directly or indirectly)* with:

a. The Communist Party? ☐ Yes ☐ No

b. Any other totalitarian party? ☐ Yes ☐ No

c. A terrorist organization? ☐ Yes ☐ No

10. Have you **EVER** advocated *(either directly or indirectly)* the overthrow of any government by force or violence? ☐ Yes ☐ No

11. Have you **EVER** persecuted *(either directly or indirectly)* any person because of race, religion, national origin, membership in a particular social group, or political opinion? ☐ Yes ☐ No

12. Between March 23, 1933, and May 8, 1945, did you work for or associate in any way *(either directly or indirectly)* with:

a. The Nazi government of Germany? ☐ Yes ☐ No

b. Any government in any area (1) occupied by, (2) allied with, or (3) established with the help of the Nazi government of Germany? ☐ Yes ☐ No

c. Any German, Nazi, or S.S. military unit, paramilitary unit, self-defense unit, vigilante unit, citizen unit, police unit, government agency or office, extermination camp, concentration camp, prisoner of war camp, prison, labor camp, or transit camp? ☐ Yes ☐ No

C. Continuous Residence

Since becoming a Lawful Permanent Resident of the United States:

13. Have you **EVER** called yourself a "nonresident" on a Federal, state, or local tax return? ☐ Yes ☐ No

14. Have you **EVER** failed to file a Federal, state, or local tax return because you considered yourself to be a "nonresident"? ☐ Yes ☐ No

Part 10. Additional Questions *(Continued)*

Write your INS "A"- number here:
A __ __ __ __ __ __ __ __ __

D. Good Moral Character

For the purposes of this application, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.

15. Have you **EVER** committed a crime or offense for which you were NOT arrested? ☐ Yes ☐ No

16. Have you **EVER** been arrested, cited, or detained by any law enforcement officer (including INS and military officers) for any reason? ☐ Yes ☐ No

17. Have you **EVER** been charged with committing any crime or offense? ☐ Yes ☐ No

18. Have you **EVER** been convicted of a crime or offense? ☐ Yes ☐ No

19. Have you **EVER** been placed in an alternative sentencing or a rehabilitative program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication)? ☐ Yes ☐ No

20. Have you **EVER** received a suspended sentence, been placed on probation, or been paroled? ☐ Yes ☐ No

21. Have you **EVER** been in jail or prison? ☐ Yes ☐ No

If you answered "Yes" to any of questions 15 through 21, complete the following table. If you need more space, use a separate sheet of paper to give the same information.

Why were you arrested, cited, detained, or charged?	Date arrested, cited, detained, or charged *(Month/Day/Year)*	Where were you arrested, cited, detained or charged? *(City, State, Country)*	Outcome or disposition of the arrest, citation, detention or charge *(No charges filed, charges dismissed, jail, probation, etc.)*

Answer questions 22 through 33. If you answer "Yes" to any of these questions, attach (1) your written explanation why your answer was "Yes," and (2) any additional information or documentation that helps explain your answer.

22. Have you **EVER:**

a. been a habitual drunkard? ☐ Yes ☐ No

b. been a prostitute, or procured anyone for prostitution? ☐ Yes ☐ No

c. sold or smuggled controlled substances, illegal drugs or narcotics? ☐ Yes ☐ No

d. been married to more than one person at the same time? ☐ Yes ☐ No

e. helped anyone enter or try to enter the United States illegally? ☐ Yes ☐ No

f. gambled illegally or received income from illegal gambling? ☐ Yes ☐ No

g. failed to support your dependents or to pay alimony? ☐ Yes ☐ No

23. Have you **EVER** given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion, or removal? ☐ Yes ☐ No

24. Have you **EVER** lied to any U.S. government official to gain entry or admission into the United States? ☐ Yes ☐ No

Part 10. Additional Questions *(Continued)*

Write your INS "A"- number here:
A __ __ __ __ __ __ __ __ __

E. Removal, Exclusion, and Deportation Proceedings

25. Are removal, exclusion, rescission or deportation proceedings pending against you? ☐ Yes ☐ No

26. Have you **EVER** been removed, excluded, or deported from the United States? ☐ Yes ☐ No

27. Have you **EVER** been ordered to be removed, excluded, or deported from the United States? ☐ Yes ☐ No

28. Have you **EVER** applied for any kind of relief from removal, exclusion, or deportation? ☐ Yes ☐ No

F. Military Service

29. Have you **EVER** served in the U.S. Armed Forces? ☐ Yes ☐ No

30. Have you **EVER** left the United States to avoid being drafted into the U.S. Armed Forces? ☐ Yes ☐ No

31. Have you **EVER** applied for any kind of exemption from military service in the U.S. Armed Forces? ☐ Yes ☐ No

32. Have you **EVER** deserted from the U.S. Armed Forces? ☐ Yes ☐ No

G. Selective Service Registration

33. Are you a male who lived in the United States at any time between your 18th and 26th birthdays in any status except as a lawful nonimmigrant? ☐ Yes ☐ No

If you answered "NO", go on to question 34.

If you answered "YES", provide the information below.

If you answered "YES", but you did NOT register with the Selective Service System and are still under 26 years of age, you must register before you apply for naturalization, so that you can complete the information below:

Date Registered (Month/Day/Year) ☐ Selective Service Number __/__/____

If you answered "YES", but you did NOT register with the Selective Service and you are now 26 years old or older, attach a statement explaining why you did not register.

H. Oath Requirements *(See Part 14 for the text of the oath)*

Answer questions 34 through 39. If you answer "No" to any of these questions, attach (1) your written explanation why the answer was "No" and (2) any additional information or documentation that helps to explain your answer.

34. Do you support the Constitution and form of government of the United States? ☐ Yes ☐ No

35. Do you understand the full Oath of Allegiance to the United States? ☐ Yes ☐ No

36. Are you willing to take the full Oath of Allegiance to the United States? ☐ Yes ☐ No

37. If the law requires it, are you willing to bear arms on behalf of the United States? ☐ Yes ☐ No

38. If the law requires it, are you willing to perform noncombatant services in the U.S. Armed Forces? ☐ Yes ☐ No

39. If the law requires it, are you willing to perform work of national importance under civilian direction? ☐ Yes ☐ No

Part 11. Your Signature

Write your INS "A"- number here:
A __ __ __ __ __ __ __ __ __

I certify, under penalty of perjury under the laws of the United States of America, that this application, and the evidence submitted with it, are all true and correct. I authorize the release of any information which INS needs to determine my eligibility for naturalization.

Your Signature

Date *(Month/Day/Year)*

__ __/__ __/__ __ __ __

Part 12. Signature of Person Who Prepared This Application for You *(if applicable)*

I declare under penalty of perjury that I prepared this application at the request of the above person. The answers provided are based on information of which I have personal knowledge and/or were provided to me by the above named person in response to the *exact questions* contained on this form.

Preparer's Printed Name

Preparer's Signature

Date *(Month/Day/Year)*

__ __/__ __/__ __ __ __

Preparer's Firm or Organization Name *(If applicable)*

Preparer's Daytime Phone Number

( )

Preparer's Address - Street Number and Name

City

State

ZIP Code

Do Not Complete Parts 13 and 14 Until an INS Officer Instructs You To Do So

Part 13. Signature at Interview

I swear (affirm) and certify under penalty of perjury under the laws of the United States of America that I know that the contents of this application for naturalization subscribed by me, including corrections numbered 1 through ____ and the evidence submitted by me numbered pages 1 through ____, are true and correct to the best of my knowledge and belief.

Subscribed to and sworn to (affirmed) before me

Officer's Printed Name or Stamp

Date *(Month/Day/Year)*

Complete Signature of Applicant

Officer's Signature

Part 14. Oath of Allegiance

If your application is approved, you will be scheduled for a public oath ceremony at which time you will be required to take the following oath of allegiance immediately prior to becoming a naturalized citizen. By signing below, you acknowledge your willingness and ability to take this oath:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which which I have heretofore been a subject or citizen;

that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic;
that I will bear true faith and allegiance to the same;
that I will bear arms on behalf of the United States when required by the law;
that I will perform noncombatant service in the Armed Forces of the United States when required by the law;
that I will perform work of national importance under civilian direction when required by the law; and
that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Printed Name of Applicant

Complete Signature of Applicant

CITES BY TOPIC: naturalization

Black's Law Dictionary, Sixth Edition, page 1026:

Naturalization. The process by which a person acquires nationality after birth and becomes entitled to the privileges of U. S. citizenship. 8 U.S.C.A. §1401 et seq..

In the United States collective naturalization occurs when designated groups are made citizens by treaty (as Louisiana Purchase), or by a law of Congress (as in annexation of Texas and Hawaii). Individual naturalization must follow certain steps: (a) petition for naturalization by a person of lawful age who has been a lawful resident of the United States for 5 years; (b) investigation by the Immigration and Naturalization Service to determine whether the applicant can speak and write the English language, has a knowledge of the fundamentals of American government and history, is attached to the principles of the Constitution and is of good moral character; (c) hearing before a U.S. District Court or certain State courts of record; and (d) after a lapse of at least 30 days a second appearance in court when the oath of allegiance is administered.

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8 U.S.C. §1101(a)(23) naturalization defined

(a)(23) The term "naturalization" means the conferring of **nationality** [NOT "citizenship" or "U.S. citizenship", but "nationality", which means "U.S. national"] of a state upon a person after birth, by any means whatsoever.

[***NOTE***: Compare with the definition of "expatriation"]

Elk v. Wilkins, 112 U.S. 94 (1884):

But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.

U.S. v. Wong Kim Ark, 160 U.S. 649 (1898):

The power, granted to congress by the constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in congress. Chirac v. Chirac (1817) 2 Wheat. 259. For many years after the establishment of the original constitution, and until two years after the adoption of the fourteenth amendment, congress never authorized the naturalization of any one but 'free white persons.' Acts March 26, 1790, c. 3, and Jan. 29, 1795, c. 20 (1 Stat. 103, 414); April 14, 1802, c. 28, and March 26, 1804, c. 47 (2 Stat. 153, 292); March 22, 1816, c. 32 (3 Stat. 258); May 26, 1824, c. 186, and May 24, 1828, c. 116 (4 Stat. 69, 310). By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that 'nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.' 16 Stat. 740. By the act of July 14, 1870, c. 254, 7, for the first time, the naturalization laws were 'extended to aliens of African nativity and to persons of African descent.' Id . 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should 'apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent'; and it was amended by the act of Feb. [169 U.S. 649, 702] 18, 1875, c. 80, by inserting

the words above printed in brackets. Rev. St . (2d Ed.) 2169 (18 Stat. 318). Those statutes were held, by the circuit court of the United States in California, not to embrace Chinese aliens. In re Ah Yup (1878) 5 Sawy. 155, Fed. Cas. No. 104. And by the act of May 6, 1882, c. 126, 14, it was expressly enacted that, 'hereafter no state court or court of the United States shall admit Chinese to citizenship.' 22 Stat. 61.

Collet v. Collet, 2 U.S. 294; 1 L.Ed. 387 (1792):

The question, now agitated, depends upon another question; whether the State of Pennsylvania, since the 26th of March, 1790, (when the act of Congress was passed) has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the constitution of the United States, the authority to naturalize is exclusive, or concurrent? We are of the opinion, then, that the States individually, still enjoy a concurrent authority upon this subject; but their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union."

The true reason for investing Congress with the power of naturalization has been assigned at the Bar: -- It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual States cannot exclude those citizens, who have been adopted by the United States; but they can adopt citizens upon easier terms, than those which Congress may deem it expedient to impose.

But the act of Congress itself, furnishes a strong proof that the power of naturalization is concurrent. In the concluding proviso, it is declared, "that no person heretofore proscribed by any State, shall be admitted a citizen as aforesaid, except by an act of the Legislature of the State, in which such person was proscribed." Here, we find, that Congress has not only circumscribed the exercise of its own authority, but has recognized the authority of a State Legislature, in one case, to admit a citizen of the United States; which could not be done in any case, if the power of naturalization, either by its own nature, or by the manner of its being vested in the Federal Government, was an exclusive power. [Collet v. Collet, 2 U. S. 294; 1 L.Ed. 387 (1792)]

United States Code Annotated, Constitution of the United States, Article I-The Congress:

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
ARTICLE I--THE CONGRESS
Current through P.L. 106-73, approved 10-19-1999

Section 8, Clause 4. Naturalization and Bankruptcy

Citizenship by naturalization can only be acquired pursuant to regulations and forms prescribed by Congress. > In re Fabbri, E.D.Mich.1966, 254 F.Supp. 858.
Equal protection was violated by former statute granting citizenship to foreign-born offspring of male United States citizens and foreign mothers but not to those of female United States citizens and foreign fathers; having allowed parents to transmit citizenship to their children, Congress could not permit only male parents to do so without at least some rationale. > Elias v. U.S. Dept. of State, N.D.Cal.1989, 721 F.Supp. 243.

Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent constitutional limitations placed upon federal jurisdiction. > In re Martinez, D.Puerto Rico 1996, 196 B.R. 225.
This clause authorizes Congress to establish a uniform rule of naturalization, and, when Congress establishes such

uniform rule, those who come within its provisions are entitled to the benefit thereof as matter of right. > Schwab v. Coleman, C.C.A.4 (Md.) 1944, 145 F.2d 672. See, also, > Maicantonio v. U.S., C.A.Md.1950, 185 F.2d 934.
When a naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one state from another. > Darling v. Berry, C.C.Iowa 1882, 13 F. 659, 4 McCrary 470.
The federal acts on naturalization are to be uniformly enforced in view of the express requirement that the rule of naturalization shall be uniform. > Petition of Schulz, Pa.1956, 121 A.2d 164, 384 Pa. 558.

The power of naturalization is exclusively in Congress. > Chirac v. Chirac's Lessee, U.S.Md.1817, 15 U.S. 259, 4 L.Ed. 234, 2 Wheat. 259. See, also, remarks of Woodbury, J., in > Norris v. Boston, Mass.1849, 48 U.S. 283, 7 How. 283, 12 L.Ed. 702; Golden v. Prince, C.C.Pa.1814, 3 Wash., U.S., 313, 10 Fed.Cas. No. 5,509.
Congress is vested with authority over naturalization, but executive's wide discretion in foreign affairs may affect national policy toward noncitizens. > Olegario v. U. S., C.A.2 (N.Y.) 1980, 629 F.2d 204, certiorari denied > 101 S.Ct. 1513, 450 U.S. 980, 67 L.Ed.2d 814.
Under constitutional provisions, Congress has plenary, unqualified authority to determine which aliens shall be admitted to the country, period they may remain, and terms and conditions of their naturalization. > U. S. v. Gordon-Nikkar, C.A.5 (Fla.) 1975, 518 F.2d 972.
The prescribing of rules to be followed in granting of naturalization is a matter for Congress and not for the courts, and, while courts may exercise a discretion as to granting of continuances, such discretion must be exercised within framework of the law, not to add to or subtract from its provisions. > Schwab v. Coleman, C.C.A.4 (Md.) 1944, 145 F.2d 672.
The power to declare who may become citizens of the United States rests with the Congress, and not with the courts, and neither the courts nor any administrative agency may extend or restrict the requirements established by Congress. Ex parte > Fillibertie, E.D.S.C.1945, 62 F.Supp. 744.
Congress possesses exclusive right to regulate immigration and naturalization. > Purdy and Fitzpatrick v. State, Cal.1969, 456 P.2d 645, 79 Cal.Rptr. 77, 71 Cal.2d 566.
Although aliens are entitled to due process protection, Congress has broad authority in setting requirements for naturalization. > Trujillo-Hernandez v. Farrell, C.A.5 (Tex.) 1974, 503 F.2d 954, certiorari denied > 95 S.Ct. 1976, 421 U. S. 977, 44 L.Ed.2d 468.
Aliens enjoy certain fundamental constitutional rights while in United States but Congress has broad powers, subject only to very limited judicial review, in legislating on matter of immigration laws and naturalization policies. > Pedroza-Sandoval v. Immigration and Naturalization Service, C.A.7 1974, 498 F.2d 899.
Congress, in regulating immigration, may use any appropriate means to reach desired ends, including performing functions that are normally performed by the state. > Royalton College, Inc. v. Clark, D.C.Vt.1969, 295 F.Supp. 365.
Traditional caution about plenary authority of Congress to act with respect to naturalization does not mandate unusual deference to be shown classification embodied in V.T.C.A., Education Code § 21.031 which withheld from local school districts any state funds for education of children who were not "legally admitted" into United States and which authorized local school districts to deny enrollment to such children. > Plyler v. Doe, U.S.Tex.1982, 102 S.Ct. 2382, 457 U.S. 202, 72 L.Ed.2d 786, rehearing denied > 103 S.Ct. 14, 458 U.S. 1131, 73 L.Ed.2d 1401.
Any incentive provided by McKinney's N.Y. Education Law § 661, subd. 3, limiting certain scholarships and loans for higher education to United States citizens or aliens who have applied for citizenship or intend to do so as soon as they qualify which encourages an alien to become naturalized is not a proper state concern since control over immigration and naturalization is exclusively a federal function. > Nyquist v. Mauclet, U.S.N.Y.1977, 97 S.Ct. 2120, 432 U.S. 1, 53 L.Ed.2d 63.

It is peculiarly the general government's power to determine who are entitled to the privileges of American citizens and the protection of the American government; states may not enact their own laws of naturalization. > Ogden v. Saunders, U. S.La.1827, 25 U.S. 213, 6 L.Ed. 606, 12 Wheat. 213.

State naturalization laws are superseded and annulled by an Act of Congress on the subject, as the jurisdiction of Congress upon the subject is exclusive. Collet v. Collet, Pa.1792, 2 U.S. 294, 2 Dall. 294, 1 L.Ed. 387. See, also, Matthew v. Rae, C.C.Dist.Col.1829, 3 Cranch, C.C., 699, 16 Fed.Cas. No. 9,284.

It is not in the power of a state to denationalize a foreign subject who has not complied with the federal naturalization laws, and constitute him a citizen of the United States or of a state, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a state, conferred upon them by Art. III, sec. 2, and the Acts of Congress. > City of Minneapolis v. Reum, C.C.A.8 (Minn.) 1893, 56 F. 576, 6 C.C.A. 31.

A state cannot make the subject of a foreign government a citizen of the United States. Lanz v. Randall, C.C.Minn.1876, 14 F.Cas. 1131, 24 Pitts.L.J. 68, No. 8080. See, also, > Minneapolis v. Reum, C.C.A.Minn.1893, 56 F. 576.

Congress had power to impose duty upon clerk of state court exercising jurisdiction to naturalize alien, to collect and account for naturalization fees, as against contention that the power of state to govern its own officers by means of its own laws was exclusive. State of Indiana ex rel. U.S. v. Killigrew, C.C.A.7 (> Ind.) 1941, 117 F.2d 863.

Congress has authority to vest in the courts of the states having common-law jurisdiction the judicial power to admit qualified aliens to citizenship, and in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power. > Levin v. U.S., C.C.A.8 (Mo.) 1904, 128 F. 826, 63 C.C.A. 476. See, also, > Holmgren v. U.S., Cal.1910, 30 S.Ct. 588, 217 U.S. 509, 54 L.Ed. 861, 19 Ann.Cas. 778; > State v. Quill, 1913, 102 N. E. 106, 53 Ind.App. 495; > Hampden County v. Morris, 1911, 93 N.E. 579, 207 Mass. 167, Ann.Cas.1912A, 815; > State v. Superior Court, 1913, 134 P. 916, 75 Wash. 239, Ann.Cas.1915C, 425.

The power to naturalize by virtue of acts of Congress is a judicial one, and Congress has no power to confer jurisdiction upon the courts of a state, but the power may be exercised by these courts when state legislation has so provided under the uniform rule established by the various Acts of Congress. Ex parte Knowles, 1855, 5 Cal. 302.

Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous. > Boyd v. State of Nebraska, U.S.Neb.1892, 12 S.Ct. 375, 143 U.S. 135, 36 L.Ed. 103. See, also, > State v. Boyd, 1892, 51 N.W. 602, 31 Neb. 682.

Status of citizenship of United States is privilege, and Congress is free to attach any preconditions to its attainment that it deems fit and proper. > In re Thanner, D.C.Colo.1966, 253 F.Supp. 283. See, also, > Boyd v. Nebraska, Neb.1892, 12 S. Ct. 375, 143 U.S. 162, 36 L.Ed. 103; > Application of Bernasconi, D.C.Cal.1953, 113 F.Supp. 71; > In re Martinez, D. C.Pa.1947, 73 F.Supp. 101; > U.S. v. Morelli, D.C.Cal.1943, 55 F.Supp. 181; In re De Mayo, D.C.Mo.1938, 26 F.Supp. 696; > State v. Boyd, 1892, 51 N.W. 602, 31 Neb. 682.

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which "no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;" and "the Congress shall have power to establish an uniform rule of naturalization". > Elk v. Wilkins, Neb.1884, 5 S.Ct. 41, 112 U.S. 101, 28 L.Ed. 643. > Luria v. U.S., U.S. N.Y.1913, 34 S.Ct. 10, 231 U.S. 9, 58 L.Ed. 101.

Members of Congress were not entitled to preliminary injunction directed to the President to prevent him from initiating war against Iraq without first securing a declaration of war or other explicit congressional authorization, as controversy was not ripe for judicial decision; controversy would not be ripe until majority of Congress sought relief from infringement on constitutional war-declaration power, and the Executive Branch had shown a commitment to a definitive course of action. > Dellums v. Bush, D.D.C.1990, 752 F.Supp. 1141.

Under the plenary power of Congress over naturalization, Congress can deny citizenship to aliens entirely and may prescribe any conditions for granting the privilege it sees fit and may delegate application of its power to the courts. > In re Taran, D.C.Minn.1943, 52 F.Supp. 535.

Aside from limitation of Amend. 14, Congress has no general power, express or implied, to take away an American citizen's citizenship without his consent. > Afroyim v. Rusk, U.S.N.Y.1967, 87 S.Ct. 1660, 387 U.S. 253, 18 L.Ed.2d 757.

The power of Congress to provide for denaturalization comes from this clause and the "necessary and proper" clause of Art. I, § 8, cl. 18. > Knauer v. U. S., U.S.Wis.1946, 66 S.Ct. 1304, 328 U.S. 654, 90 L.Ed. 1500, rehearing denied > 67 S.Ct. 25, 329 U.S. 818, 91 L.Ed. 697.

The power of naturalization vested in Congress by this clause is a power to confer citizenship, and not a power to take it away. > U.S. v. Wong Kim Ark, U.S.Cal.1898, 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890. See, also, > Terada v. Dulles, D. C.Hawaii 1954, 121 F.Supp. 6.

The power of naturalization, vested in Congress by this clause, is power to confer citizenship, not to take it away, and change of citizenship cannot be arbitrarily imposed by Congress without citizen's concurrence. > Perri v. Dulles, C.A.3 (N. J.) 1953, 206 F.2d 586.

This clause and clause 18 granting Congress power to establish a uniform rule of naturalization and power to make all laws necessary and proper to carry into execution granted powers empower Congress to provide for cancellation of certificates of naturalization. > U S v. Jerome, S.D.N.Y.1953, 115 F.Supp. 818.

A Filipino's status as a national of the United States prior to July 4, 1946 gave him no vested right in that status; and the alteration of his nationality by the creation of the Republic of the Philippines, of which he became a citizen by operation of law, was not in excess of congressional power over naturalization. > Cabebe v. Acheson, D.C.Hawai'i 1949, 84 F. Supp. 639, affirmed > 183 F.2d 795.

If right of exit from the United States, which is a personal right, is to be regulated it must be pursuant to lawmaking function of Congress. > Kent v. Dulles, U.S.Dist.Col.1958, 78 S.Ct. 1113, 357 U.S. 116, 2 L.Ed.2d 1204.

The Constitution is silent on the subject of expatriation, and that department which can nationalize must be held to have authority to expatriate. > Comitis v. Parkerson, C.C.E.D.La.1893, 56 F. 556, error dismissed > 16 S.Ct. 1200, 163 U. S. 681, 41 L.Ed. 307.

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§ 6039E. Information concerning resident status

(a) General rule

Notwithstanding any other provision of law, any individual who—

(1) applies for a United States passport (or a renewal thereof), or

(2) applies to be lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws,

shall include with any such application a statement which includes the information described in subsection (b).

(b) Information to be provided

Information required under subsection (a) shall include—

(1) the taxpayer's TIN (if any),

(2) in the case of a passport applicant, any foreign country in which such individual is residing,

(3) in the case of an individual seeking permanent residence, information with respect to whether such individual is required to file a return of the tax imposed by chapter 1 for such individual's most recent 3 taxable years, and

(4) such other information as the Secretary may prescribe.

(c) Penalty

Any individual failing to provide a statement required under subsection (a) shall be subject to a penalty equal to $500 for each such failure, unless it is shown that such failure is due to reasonable cause and not to willful neglect.

(d) Information to be provided to Secretary

Notwithstanding any other provision of law, any agency of the United States which collects (or is required to collect) the statement under subsection (a) shall—

(1) provide any such statement to the Secretary, and

(2) provide to the Secretary the name (and any other identifying information) of any individual refusing to comply with the provisions of subsection (a).

Nothing in the preceding sentence shall be construed to require the disclosure of information which is subject to section 245A of the Immigration and Nationality Act (as in effect on the date of the enactment of this sentence).

(e) Exemption

The Secretary may by regulations exempt any class of individuals from the requirements of this section if he determines that applying this section to such individuals is not necessary to carry out the purposes of this section.

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Sec. 7805. - Rules and regulations

(a) Authorization

Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations

(1) In general

Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:

(A)

The date on which such regulation is filed with the Federal Register.

(B)

In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.

(C)

The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

(2) Exception for promptly issued regulations

Paragraph (1) shall not apply to regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates.

(3) Prevention of abuse

The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse.

(4) Correction of procedural defects

The Secretary may provide that any regulation may apply retroactively to correct a procedural defect in the issuance of any prior regulation.

(5) Internal regulations

The limitation of paragraph (1) shall not apply to any regulation relating to internal Treasury Department policies, practices, or procedures.

(6) Congressional authorization

The limitation of paragraph (1) may be superseded by a legislative grant from Congress authorizing the Secretary to prescribe the effective date with respect to any regulation.

(7) Election to apply retroactively

The Secretary may provide for any taxpayer to elect to apply any regulation before the dates specified in paragraph (1).

(8) Application to rulings

The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

(c) Preparation and distribution of regulations, forms, stamps, and other matters

The Secretary shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

(d) Manner of making elections prescribed by Secretary

Except to the extent otherwise provided by this title, any election under this title shall be made at such time and in such manner as the Secretary shall prescribe.

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(e) Temporary regulations

(1) Issuance

Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.

(2) 3-year duration

Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.

(f) Review of impact of regulations on small business

(1) Submissions to Small Business Administration

After publication of any proposed or temporary regulation by the Secretary, the Secretary shall submit such regulation to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of such regulation on small business. Not later than the date 4 weeks after the date of such submission, the Chief Counsel for Advocacy shall submit comments on such regulation to the Secretary.

(2) Consideration of comments

In prescribing any final regulation which supersedes a proposed or temporary regulation which had been submitted under this subsection to the Chief Counsel for Advocacy of the Small Business Administration -

(A)

the Secretary shall consider the comments of the Chief Counsel for Advocacy on such proposed or temporary regulation, and

(B)

the Secretary shall discuss any response to such comments in the preamble of such final regulation.

(3) Submission of certain final regulations

In the case of the promulgation by the Secretary of any final regulation (other than a temporary regulation) which does not supersede a proposed regulation, the requirements of paragraphs (1) and (2) shall apply; except that -

(A)

the submission under paragraph (1) shall be made at least 4 weeks before the date of such promulgation, and

(B)

the consideration (and discussion) required under paragraph (2) shall be made in connection with the promulgation of such final regulation

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CITES BY TOPIC: Bill of attainder

Defining Bills of Attainder-Thomas M. Saunders

Black's Law Dictionary, Sixth Edition, page 165:

> **Bill of attainder**. Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. United States v. Brown, 381 U.S. 437, 448-49, 85 S.Ct. 1707, 1715, 14 L.Ed. 484, 492; United States v. Lovett, 328 U.S. 303, 315, 66 S. Ct. 1073, 1079, 90 L.Ed. 1252. An act is a "bill of attainder" when the punishment is death and a "bill of pains and penalties" when the punishment is less severe; both kinds of punishment fall within the scope of the constitutional prohibition. U.S.Const. Art. I, Sect 9, Cl. 3 (as to Congress);' Art. I, Sec, 10 (as to state legislatures).

IMPLICATIONS OF THE CONSTITUTIONAL PROHIBITION AGAINST BILLS OF ATTAINDER:

> The U.S. Congress cannot pass or impose and the IRS cannot enforce the imposition of financial penalties for not abiding with the tax laws against a natural person without the need for a judicial hearing.

Constitution, Article 1, Section 9, Clause 3:

> "'No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.'" A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

United States v. Brown, 381 U.S. 437 (1965)

"The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature."

[United States v. Brown, 381 U.S. 437 (1965)]

Young v. IRS, 596 F.Supp. 141 (N.D.Inc. 9/25/1984)

2. Bill of Attainder

The complaint also contains allegations that the plaintiff was somehow subject to a bill of attainder. The factual basis for this claim is completely absent from the complaint or any of plaintiff's other numerous documents. It is clear, however, that plaintiff's claim does not fall under the current interpretation of the bill of attainder clause of the constitution. A bill of attainder is generally defined as a legislative act which determines guilt and punishes an identifiable individual or group of individuals. See Nixon v. Administrator of General Services, 433 U.S. 425, 468, 97 S.Ct. 2777, 2802, 53 L.Ed.2d 867 (1977). Here, at least two of these three elements are not present. First, the Internal Revenue Code does not determine guilt. Although it authorizes the assessment of taxes and penalties, those assessments can be challenged in the tax court or in the district court. Thus, an assessment is not a conclusive determination of "guilt." Secondly, the tax laws do not punish. The mere fact that a law is burdensome does not make it punishment for bill of attainder purposes. See Nixon, id. at 470-71, 97 S.Ct. at 2804. An assessment of penalties for failure to file income tax returns may be punishment, but the fact that the penalties can be challenged on appeal means that the punishment is not final. The third element, selection of an individual or group of individuals, is not present, as the tax laws apply to all income earners and the penalty provisions apply to all taxpayers who fail to file. Such a blanket application to the population excludes the possibility of a "selection." It is thus clear that no bill of attainder or bill of pains and penalties (which is simply a lesser form of a bill of attainder) exists here.

Overall, it is abundantly clear that the tax laws apply with full force to plaintiff, and that his arguments are without any basis in the law. It is also clear that the exhibits offered to support his argument (in particular, the Congressional Research Service letter discussed above) undercut his argument, and in fact support the conclusion that the tax laws are positive law which apply to the plaintiff. It is in light of this obvious lack of merit in plaintiff's argument that the court now turns to defendants' motion for fees and costs.

U.S. Constitution: Article I

Article Text | Annotations

Article I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six,

Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if

not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration

herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Annotations

Article I - Legislative Department

- **Section 1. Legislative Powers**
- **Separation of Powers and Checks and Balances**
  - The Theory Elaborated and Implemented
  - Judicial Enforcement

U.S. Constitution: First Amendment

First Amendment - Religion and Expression

Amendment Text | Annotations

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

redress of grievances.

Annotations

- **Religion**
- **An Overview**
  - Scholarly Commentary
  - Court Tests Applied to Legislation Affecting Religion
  - Government Neutrality in Religious Disputes
- **Establishment of Religion**
  - Financial Assistance to Church-Related Institutions
  - Governmental Encouragement of Religion in Public Schools: Released Time
  - Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading
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  - Access of Religious Groups to Public

First Amendment

Freedom of Expression Law

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- **Freedom of Expression: The Philosophical Basis**
- **Freedom of Expression: Is There a Difference Between Speech and Press**
- **The Doctrine of Prior Restraint**
    - Injunctions and the Press in Fair Trial Cases
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- **Subsequent Punishment: Clear and Present Danger and Other Tests**
    - Clear and Present Danger
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    - Contempt of Court and Clear and Present Danger
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    - Balancing
    - The "Absolutist" View of the First Amendment, with a Note on "Preferred Position"
    - Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others
    - Is There a Present

'); } //

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Annotations

Code **Sec. 301.6109-1 Identifying numbers.**

(a) In general.

(1) Taxpayer identifying numbers

(i) Principal types.

There are several types of taxpayer identifying numbers that include the following: social security numbers, Internal Revenue Service (IRS) individual taxpayer identification numbers, IRS adoption taxpayer identification numbers, and employer identification numbers. Social security numbers take the form 000-00-0000. IRS individual taxpayer identification numbers and IRS adoption taxpayer identification numbers also take the form 000-00-0000 but include a specific number or numbers designated by the IRS. Employer identification numbers take the form 00-0000000.

(ii) Uses.

Social security numbers, IRS individual taxpayer identification numbers, and IRS adoption taxpayer identification numbers are used to identify individual persons. Employer identification numbers are used to identify employers. For the definition of social security number and employer identification number, see Secs. 301.7701-11 and 301.7701-12, respectively. For the definition of IRS individual taxpayer identification number, see paragraph (d)(3) of this section. For the definition of IRS adoption taxpayer identification number, see Sec. 301.6109-3(a). Except as otherwise provided in applicable regulations under this chapter or on a return, statement, or other document, and related instructions, taxpayer identifying numbers must be used as follows:

(A) Except as otherwise provided in paragraph (a)(1)(ii)(B) and (D) of this section, and Sec. 301.6109-3, an individual required to furnish a taxpayer identifying number must use a social security number.

(B) Except as otherwise provided in paragraph (a)(1)(ii)(D) of this section and Sec. 301.6109-3, an individual required to furnish a taxpayer identifying number but who is not eligible to obtain a social security number must use an IRS individual taxpayer identification number.

(C) Any person other than an individual (such as corporations, partnerships, nonprofit associations, trusts, estates, and similar nonindividual persons) that is

required to furnish a taxpayer identifying number must use an employer identification number.

(D) An individual, whether U.S. or foreign, who is an employer or who is engaged in a trade or business as a sole proprietor should use an employer identification number as required by returns, statements, or other documents and their related instructions.

(2) A trust all of which is treated as owned by the grantor or another person pursant to sections 671 through 678 --

(i) Obtaining a taxpayer identification number.

If a trust does not have a taxpayer identification number and the trustee furnishes the name and taxpayer identification number of the grantor or other person treated as the owner of the trust and the address of the trust to all payors pursuant to section 1.671-4(b)(2)(i)(A) of this chapter, the trustee need not obtain a taxpayer identification number for the trust until either the first taxable year of the trust in which all of the trust is no longer owned by the grantor or another person, or until the first taxable year of the trust for which the trustee no longer reports pursuant to section 1.671-4(b)(2)(i)(A) of this chapter. If the trustee has not already obtained a taxpayer identification number for the trust, the trustee must obtain a taxpayer identification number for the trust as provided in paragraph (d)(2) of this section in order to report pursuant to section 1.671-4(a), (b)(2)(i)(B), or (b)(3)(i) of this chapter.

(ii) Obligations of persons who make payments to certain trusts.

Any payor that is required to file an information return with respect to payments of income or proceeds to a trust must show the name and taxpayer identification number that the trustee has furnished to the payor on the return. Regardless of whether the trustee furnishes to the payor the name and taxpayer identification number of the grantor or other person treated as an owner of the trust, or the name and taxpayer identification number of the trust, the payor must furnish a statement to recipients to the trustee of the trust, rather than to the grantor or other person treated as the owner of the trust. Under these circumstances, the payor satisfies the obligation to show the name and taxpayer identification number of the payee on the information return and to furnish a statement to recipients to the person whose taxpayer identification number is required to be shown on the form.

(iii) Persons treated as payors.

For purposes of this paragraph (a)(2), the term payor means a person described in section 1.671-4(b)(4) of this chapter.

(b) Requirement to furnish one's own number.

(1) U.S. persons.

Every U.S. person who makes under this title a return, statement, or other document must furnish its own taxpayer identifying number as required by the forms and the accompanying instructions. A U.S. person whose number must be included on a document filed by another person must give the taxpayer identifying number so required to the other person on request. For penalties for failure to supply taxpayer identifying numbers, see sections 6721 through 6724. For provisions dealing specifically with the duty of employees with respect to their social security numbers, see section 31.6011(b)-2(a) and (b) of this chapter (Employment Tax Regulations). For provisions dealing specifically with the duty of employers with respect to employer identification numbers, see section 31.6011(b)-1 of this chapter (Employment Tax Regulations).

(2) Foreign persons.

The provisions of paragraph (b)(1) of this section regarding the furnishing of one's own number shall apply to the following foreign persons--

(i) A foreign person that has income effectively connected with the conduct of a U.S. trade or business at any time during the taxable year;

(ii) A foreign person that has a U.S. office or place of business or a U.S. fiscal or paying agent at any time during the taxable year;

(iii) A nonresident alien treated as a resident under section 6013(g) or (h);

(iv) A foreign person that makes a return of tax (including income, estate, and gift tax returns), an amended return, or a refund claim under this title but excluding information returns, statements, or documents;

(v) A foreign person that makes an election under Sec. 301.7701-3(c); and

(vi) A foreign person that furnishes a withholding certificate described in Sec. 1.1441-1(e)(2) or (3) of this chapter or Sec. 1.1441-5(c)(2)(iv) or (3)(iii) of this

chapter to the extent required under Sec. 1.1441-1(e)(4)(vii) of this chapter.

(c) Requirement to furnish another's number.

Every person required under this title to make a return, statement, or other document must furnish such taxpayer identifying numbers of other U.S. persons and foreign persons that are described in paragraph (b)(2)(i), (ii), (iii), or (vi) of this section as required by the forms and the accompanying instructions. The taxpayer identifying number of any person furnishing a withholding certificate referred to in paragraph (b)(2)(vi) of this section shall also be furnished if it is actually known to the person making a return, statement, or other document described in this paragraph (c). If the person making the return, statement, or other document does not know the taxpayer identifying number of the other person, and such other person is one that is described in paragraph (b)(2)(i), (ii), (iii), or (vi) of this section, such person must request the other person's number. The request should state that the identifying number is required to be furnished under authority of law. When the person making the return, statement, or other document does not know the number of the other person, and has complied with the request provision of this paragraph (c), such person must sign an affidavit on the transmittal document forwarding such returns, statements, or other documents to the Internal Revenue Service, so stating. A person required to file a taxpayer identifying number shall correct any errors in such filing when such person's attention has been drawn to them.

(d) Obtaining a taxpayer identifying number.

(1) Social security number.

Any individual required to furnish a social security number pursuant to paragraph (b) of this section shall apply for one, if he has not done so previously, on Form SS-5, which may be obtained from any Social Security Administration or Internal Revenue Service office. He shall make such application far enough in advance of the first required use of such number to permit issuance of the number in time for compliance with such requirement. The form, together with any supplementary statement, shall be prepared and filed in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. Individuals who are ineligible for or do not wish to participate in the benefits of the social security program shall nevertheless obtain a social security number if they are required to furnish such a number pursuant to paragraph (b) of this section.

(2) Employer identification number.

(i) In general.

Any person required to furnish an employer identification number must apply for one, if

not done so previously, on Form SS-4. A Form SS-4 may be obtained from any office of the Internal Revenue Service, U.S. consular office abroad, or from an acceptance agent described in paragraph (d)(3)(iv) of this section. The person must make such application far enough in advance of the first required use of the employer identification number to permit issuance of the number in time for compliance with such requirement. The form, together with any supplementary statement, must be prepared and filed in accordance with the form, accompanying instructions, and relevant regulations, and must set forth fully and clearly the requested data.

(ii) Reserved.

(iii) Special rule for Section 708(b)(1)(B) terminations.

A new partnership that is formed as a result of the termination of a partnership under section 708(b)(1)(B) will retain the employer identification number of the terminated partnership. This paragraph (d)(2)(iii) applies to terminations of partnerships under section 708(b)(1)(B) occurring on or after May 9, 1997; however, this paragraph (d)(2)(iii) may be applied to terminations occurring on or after May 9, 1996, provided that the partnership and its partners apply this paragraph (d)(2)(iii) to the termination in a consistent manner.

(3) IRS individual taxpayer identification number --

(i) Definition.

The term IRS individual taxpayer identification number means a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title. The term IRS individual taxpayer identification number does not refer to a social security number or an account number for use in employment for wages. For purposes of this section, the term alien individual means an individual who is not a citizen or national of the United States.

(ii) General rule for obtaining number.

Any individual who is not eligible to obtain a social security number and is required to furnish a taxpayer identifying number must apply for an IRS individual taxpayer identification number on Form W-7, Application for IRS Individual Taxpayer Identification Number, or such other form as may be prescribed by the Internal Revenue Service. Form W-7 may be obtained from any office of the Internal Revenue Service, U.S. consular office abroad, or any acceptance agent described in paragraph

(d)(3)(iv) of this section. The individual shall furnish the information required by the form and accompanying instructions, including the individual's name, address, foreign tax identification number (if any), and specific reason for obtaining an IRS individual taxpayer identification number. The individual must make such application far enough in advance of the first required use of the IRS individual taxpayer identification number to permit issuance of the number in time for compliance with such requirement. The application form, together with any supplementary statement and documentation, must be prepared and filed in accordance with the form, accompanying instructions, and relevant regulations, and must set forth fully and clearly the requested data.

(iii) General rule for assigning number.

Under procedures issued by the Internal Revenue Service, an IRS individual taxpayer identification number will be assigned to an individual upon the basis of information reported on Form W-7 (or such other form as may be prescribed by the Internal Revenue Service) and any such accompanying documentation that may be required by the Internal Revenue Service. An applicant for an IRS individual taxpayer identification number must submit such documentary evidence as the Internal Revenue Service may prescribe in order to establish alien status and identity. Examples of acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver's license, birth certificate, identity card, or immigration documentation.

(iv) Acceptance agents.

(A) Agreements with acceptance agents.

A person described in paragraph (d)(3)(iv)(B) of this section will be accepted by the Internal Revenue Service to act as an acceptance agent for purposes of the regulations under this section upon entering into an agreement with the Internal Revenue Service, under which the acceptance agent will be authorized to act on behalf of taxpayers seeking to obtain a taxpayer identifying number from the Internal Revenue Service. The agreement must contain such terms and conditions as are necessary to insure proper administration of the process by which the Internal Revenue Service issues taxpayer identifying numbers to foreign persons, including proof of their identity and foreign status. In particular, the agreement may contain --

(1) Procedures for providing Form SS-4 and Form W-7, or such other

necessary form to applicants for obtaining a taxpayer identifying number;

(2) Procedures for providing assistance to applicants in completing the application form or completing it for them;

(3) Procedures for collecting, reviewing, and maintaining, in the normal course of business, a record of the required documentation for assignment of a taxpayer identifying number;

(4) Procedures for submitting the application form and required documentation to the Internal Revenue Service, or if permitted under the agreement, submitting the application form together with a certification that the acceptance agent has reviewed the required documentation and that it has no actual knowledge or reason to know that the documentation is not complete or accurate;

(5) Procedures for assisting taxpayers with notification procedures described in paragraph (g)(2) of this section in the event of change of foreign status;

(6) Procedures for making all documentation or other records furnished by persons applying for a taxpayer identifying number promptly available for review by the Internal Revenue Service, upon request; and

(7) Provisions that the agreement may be terminated in the event of a material failure to comply with the agreement, including failure to exercise due diligence under the agreement.

(B) Persons who may be acceptance agents.

An acceptance agent may include any financial institution as defined in section 265(b)(5) or section 1.165-12(c)(1)(v) of this chapter, any college or university that is an educational organization as defined in section 1.501(c)(3)-1(d)(3)(i) of this chapter, any federal agency as defined in section 6402(f) or any other person or categories of persons that may be authorized by regulations or Internal Revenue Service procedures. A person described in this paragraph (d)(3)(iv)(B) that seeks to qualify as an acceptance agent must have an employer identification number for use in any communication with the Internal Revenue Service. In addition, it must establish to the satisfaction of the Internal

Revenue Service that it has adequate resources and procedures in place to comply with the terms of the agreement described in paragraph (d)(3)(iv)(A) of this section.

(4) Coordination of taxpayer identifying numbers.

(i) Social security number.

Any individual who is duly assigned a social security number or who is entitled to a social security number will not be issued an IRS individual taxpayer identification number. The individual can use the social security number for all tax purposes under this title, even though the individual is, or later becomes, a nonresident alien individual. Further, any individual who has an application pending with the Social Security Administration will be issued an IRS individual taxpayer identification number only after the Social Security Administration has notified the individual that a social security number cannot be issued. Any alien individual duly issued an IRS individual taxpayer identification number who later becomes a U.S. citizen, or an alien lawfully permitted to enter the United States either for permanent residence or under authority of law permitting U.S. employment, will be required to obtain a social security number. Any individual who has an IRS individual taxpayer identification number and a social security number, due to the circumstances described in the preceding sentence, must notify the Internal Revenue Service of the acquisition of the social security number and must use the newly-issued social security number as the taxpayer identifying number on all future returns, statements, or other documents filed under this title.

(ii) Employer identification number.

Any individual with both a social security number (or an IRS individual taxpayer identification number) and an employer identification number may use the social security number (or the IRS individual taxpayer identification number) for individual taxes, and the employer identification number for business taxes as required by returns, statements, and other documents and their related instructions. Any alien individual duly assigned an IRS individual taxpayer identification number who also is required to obtain an employer identification number must furnish the previously-assigned IRS individual taxpayer identification number to the Internal Revenue Service on Form SS-4 at the time of application for the employer identification number. Similarly, where an alien individual has an employer identification number and is required to obtain an IRS individual taxpayer identification number, the individual must furnish the previously-assigned

employer identification number to the Internal Revenue Service on Form W-7, or such other form as may be prescribed by the Internal Revenue Service, at the time of application for the IRS individual taxpayer identification number.

(e) Banks, and brokers and dealers in securities.

For additional requirements relating to deposits, share accounts, and brokerage accounts, see 31 CFR 103.34 and 103.35.

(f) Penalty.

For penalties for failure to supply taxpayer identifying numbers, see sections 6721 through 6724.

(g) Special rules for taxpayer identifying numbers issued to foreign persons.

(1) General rule.

(i) Social security number.

A social security number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. citizen or resident alien individual. A person may establish a different status for the number by providing proof of foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. Upon accepting an individual as a nonresident alien individual, the Internal Revenue Service will assign this status to the individual's social security number.

(ii) Employer identification number.

An employer identification number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. person. However, the Internal Revenue Service may establish a separate class of employer identification numbers solely dedicated to foreign persons which will be identified as such in the records and database of the Internal Revenue Service. A person may establish a different status for the number either at the time of application or subsequently by providing proof of U.S. or foreign status with the Internal Revenue Service under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify. The Internal Revenue Service may require a person to apply for the type of employer identification number that reflects the status

of that person as a U.S. or foreign person.

(iii) IRS individual taxpayer identification number.

An IRS individual taxpayer identification number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a nonresident alien individual. If the Internal Revenue Service determines at the time of application or subsequently, that an individual is not a nonresident alien individual, the Internal Revenue Service may require that the individual apply for a social security number. If a social security number is not available, the Internal Revenue Service may accept that the individual use an IRS individual taxpayer identification number, which the Internal Revenue Service will identify as a number belonging to a U.S. resident alien.

(2) Change of foreign status.

Once a taxpayer identifying number is identified in the records and database of the Internal Revenue Service as a number belonging to a U.S. or foreign person, the status of the number is permanent until the circumstances of the taxpayer change. A taxpayer whose status changes (for example, a nonresident alien individual with a social security number becomes a U.S. resident alien) must notify the Internal Revenue Service of the change of status under such procedures as the Internal Revenue Service shall prescribe, including the use of a form as the Internal Revenue Service may specify.

(3) Waiver of prohibition to disclose taxpayer information when acceptance agent acts.

As part of its request for an IRS individual taxpayer identification number or submission of proof of foreign status with respect to any taxpayer identifying number, where the foreign person acts through an acceptance agent, the foreign person will agree to waive the limitations in section 6103 regarding the disclosure of certain taxpayer information. However, the waiver will apply only for purposes of permitting the Internal Revenue Service and the acceptance agent to communicate with each other regarding matters related to the assignment of a taxpayer identifying number and change of foreign status.

(h) Special rules for certain entities under Sec. 301.7701-3.

(1) General rule.

Any entity that has an employer identification number (EIN) will retain that EIN if its federal tax classification changes under Sec. 301.7701-3.

(2) Special rules for entities that are disregarded as entities separate from their owners.

(i) When an entity becomes disregarded as an entity separate from its owner. Except as otherwise provided in regulations or other guidance, a single owner entity that is disregarded as an entity separate from its owner under Sec. 301.7701-3, must use its owner's taxpayer identifying number (TIN) for federal tax purposes.

(ii) When an entity that was disregarded as an entity separate from its owner becomes recognized as a separate entity. If a single owner entity's classification changes so that it is recognized as a separate entity for federal tax purposes, and that entity had an EIN, then the entity must use that EIN and not the TIN of the single owner. If the entity did not already have its own EIN, then the entity must acquire an EIN and not use the TIN of the single owner.

(3) Effective date.

The rules of this paragraph (h) are applicable as of January 1, 1997.

(i) Special rule for qualified subchapter S subsidiaries (QSubs).

(1) General rule.

Any entity that has an employer identification number (EIN) will retain that EIN if a QSub election is made for the entity under Sec. 1.1361-3 or if a QSub election that was in effect for the entity terminates under Sec. 1.1361-5.

(2) EIN while QSub election in effect.

Except as otherwise provided in regulations or other published guidance, a QSub must use the parent S corporation's EIN for Federal tax purposes.

(3) EIN when QSub election terminates.

If an entity's QSub election terminates, it may not use the EIN of the parent S corporation after the termination. If the entity had an EIN prior to becoming a QSub or obtained an EIN while it was a QSub in accordance with regulations or other published guidance, the entity must use that EIN. If the entity had no EIN, it must obtain an EIN upon termination of the QSub election.

(4) Effective date.

The rules of this paragraph (i) apply on January 20, 2000.

(j) Effective date.

(1) General rule.

Except as otherwise provided in this paragraph (j), the provisions of this section are generally effective for information that must be furnished after April 15, 1974. However, the provisions relating to IRS individual taxpayer identification numbers apply on and after May 29, 1996. An application for an IRS individual taxpayer identification number (Form W-7) may be filed at any time on or after July 1, 1996.

(2) Special rules.

(i) Employer identification number of an estate.

The requirement under paragraph (a)(1)(ii)(C) of this section that an estate obtain an employer identification number applies on and after January 1, 1984.

(ii) Taxpayer identifying numbers of certain foreign persons.

The requirement under paragraph (b)(2)(iv) of this section that certain foreign persons furnish a TIN on a return of tax is effective for tax returns filed after December 31, 1996.

(iii) Paragraphs (a)(1)(i), (a)(1)(ii) introductory text, (a)(1)(ii)(A), and (a)(1)(ii)(B) of this section apply to income tax returns due (without regard to extensions) on or after April 15, 1998.

[T.D. 7306, 39 FR 9946, Mar. 15, 1974 as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7796, 46 FR 57482, Nov. 24, 1981; T.D. 8637, 60 FR 66105-66134, Dec. 21, 1995; T.D. 8633, 60 FR 66085-66091, Dec. 21, 1995; T.D. 8671, 61 FR 26788-26792, May 29, 1996; corrected by 61 FR 33657, June 28, 1996; amended by T.D. 8697, 61 FR 66584-66593, Dec. 18, 1996; T.D. 8717, 62 FR 25498, May 9, 1997; T.D. 8734, 62 FR 53387, October 14, 1997, not effective until January 1, 1999; T.D. 8739, Federal Register: November 24, 1997 (Volume 62, Number 226), Page 62518-62521; T.D. 8839, Federal Register: September 22, 1999 (Volume 64, Number 183), Page 51241-51243; T.D. 8844, Federal Register: November 29, 1999 (Volume 64, Number 228), Page 66580-66585; T.D. 8869, Federal Register: January 25, 2000 (Volume 65, Number 16), Page 3843-3856]

TITLE 26 > Subtitle F

Subtitle F—Procedure and Administration

How Current is This?

U.S. Code collection

TITLE 26 > Subtitle F > CHAPTER 79

CHAPTER 79—DEFINITIONS

CITES BY TOPIC: resident

You're not a "resident" under the Internal Revenue Code

Law of Nations: Definition of "Resident"-HOT! This is the book upon which the writing of our Constitution was based by the Founding Fathers

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Black's Law Dictionary, Sixth Edition, p. 1309:

Resident. "Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature. The word "resident" when used as a noun means a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less, duration; it signifies one having a residence, or one who resides or abides. [**Hanson v. P.A. Peterson Home Ass'n**, 35 Ill.App2d 134, 182 N.E.2d 237, 240] [Underlines added]

Word "resident" has many meanings in law, largely determined by statutory context in which it is used. [**Kelm v. Carlson**, C. A.Ohio, 473, F2d 1267, 1271]
[Black's Law Dictionary, Sixth Edition, p. 1309]

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26 U.S.C. §7701(b)(1)(A) Resident alien

(b) Definition of **resident alien** and nonresident alien

(1) In general
For purposes of this title (other than subtitle B) -

(A) **Resident alien**
An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence
Such individual is a lawful permanent resident of the United States at any time during such calendar year.
(ii) Substantial presence test
Such individual meets the substantial presence test of paragraph (3).
(iii) First year election
Such individual makes the election provided in paragraph (4).

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26 CFR §301.7701(b)-1: Resident alien

Title 26: Internal Revenue
PART 301—PROCEDURE AND ADMINISTRATION
Definitions

§ 301.7701(b)-1 Resident alien.

(a) *Scope.* Section 301.7701(b)–1(b) provides rules for determining whether an alien individual is a lawful permanent resident of the United States. Section 301.7701(b)–1(c) provides rules for determining if an alien individual satisfies the substantial presence test. Section 301.7701(b)–2 provides rules for determining when an alien individual will be considered to maintain a tax home in a foreign country and to have a closer connection to that foreign country. Section 301.7701(b)–3 provides rules for determining if an individual is an exempt individual because of his or her status as a foreign government-related individual, teacher, trainee, student, or professional athlete. Section 301.7701(b)–3 also provides rules for determining whether an individual may exclude days of presence in the United States because the individual was unable to leave the United States because of a medical condition. Section 301.7701(b)–4 provides rules for determining an individual's residency starting and termination dates. Section 301.7701(b)–5 provides rules for applying section 877 to a nonresident alien individual. Section 301.7701(b)–6 provides rules for determining the taxable year of an alien. Section 301.7701(b)–7 provides rules for determining the effect of these regulations on rules in tax conventions to which the United States is a party. Section 301.7701(b)–8 provides procedural rules for establishing that an individual is a nonresident alien. Section 301.7701(b)–9 provides the effective dates of section 7701(b) and the regulations under that section. Unless the context indicates otherwise, the regulations under §§301.7701(b)–1 through 301.7701(b)–9 apply for purposes of determining whether a United States citizen is also a resident of the United States. (This determination may be relevant, for example, to the application of section 861(a)(1) which treats income from interest-bearing obligations of residents as income from sources within the United States.) The regulations do not apply and §§1.871–2 and 1.871–5 of this chapter continue to apply for purposes of the bona fide residence test of section 911. See §1.911–2(c) of this chapter. For purposes of determining whether an individual is a resident of the United States for estate and gift tax purposes, see §20.0–1(b)(1) and (2) and §25.2501–1(b) of this chapter, respectively.

(b) *Lawful permanent resident*—(1) *Green card test.* An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.

(2) *Rescission of resident status.* Resident status is considered to be rescinded if a final administrative or judicial order of exclusion or deportation is issued regarding the alien individual. For purposes of this paragraph, the term “final judicial order” means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

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26 CFR §301.7701-5 Domestic, foreign, resident, and nonresident persons.

A domestic corporation is one organized or created in the United States, including only the States (and during the periods when not States, the Territories of Alaska and Hawaii), and the District of Columbia, or under the law of the United States or of any State or Territory. A foreign corporation is one which is not domestic. A domestic corporation is a resident corporation even though it does no business and owns no property in the United States. **A foreign corporation engaged in trade or business within the United States is referred to in the regulations in this chapter as a resident foreign corporation, and a foreign corporation not engaged in trade or business within the United States, as a nonresident foreign corporation.** A partnership engaged in trade or business within the United States is referred to in the regulations in this chapter as a resident partnership, and a partnership not engaged in trade or business within the United States, as a nonresident partnership. **Whether a partnership is to be regarded as resident or nonresident is not determined by the nationality or residence of its members or by the place in which it was created or organized.** [Amended by T.D. 8813, Federal Register: February 2, 1999 (Volume 64, Number 21), Page 4967-4975]

[**IMPORTANT NOTE!**: Whether a "person" is a "resident" or "nonresident" has NOTHING to do with the nationality or residence, but with whether it is engaged in a "trade or business"]

Merriam-Webster's Dictionary of Law ©1996.

resident: One who has a residence in a particular place but does not necessarily have the status of a citizen.[1] Note that even when a person is not a resident, he or she may *elect* to be treated as a resident with his or her consent. The rules for electing to be treated as a resident are found in IRS Publication 54: *Tax Guide for U.S. Citizens and Resident Aliens Abroad*.

RESIDENCY OF PERSONS V. CORPORATIONS:

We as people are not "resident" or "domiciled" - "within" we are an "inhabitant" and a temporary sojourner upon the land. Our life is for a specific time and once it is over its over on this world. However, an entity such as a corporation has perpetual life and it is a creature of the State under the Municipal Corporations Act of 1871. Prior to that time a corporation could only be formed by an Act of the Legislature of the state where the corporation would operate its business. Now all one needs to do is apply to the Corporate Division of the Secretary of State for the privilege of doing business as a corporation.

CITES BY TOPIC: corporation

United States Code
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART VI - PARTICULAR PROCEEDINGS
CHAPTER 176 - FEDERAL DEBT COLLECTION PROCEDURE
SUBCHAPTER A - DEFINITIONS AND GENERAL PROVISIONS

Sec. 3002. Definitions
(15) **"United States" means** -
(A) **a Federal corporation**;
(B) an agency, department, commission, board, or other entity of the United States; or
(C) an instrumentality of the United States.

New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885):

The court held that the first company's charter was a contract between it and the state, within the protection of the constitution of the United States, and that the charter to the last company was therefore null and void., Mr. Justice DAVIS, delivering the opinion of the court, said that, **if anything was settled by an unbroken chain of decisions in the federal courts, it was that an act of incorporation was a contract between the state and the stockholders, 'a departure from which now would involve dangers to society that cannot be foreseen, whould shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government.'** [New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885)**]**

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19 C.J.S., Corporations §883 [Legal encyclopedia]

"A foreign corporation is one that derives its existence solely from the laws of another state, government, or country, and the term is used indiscriminately, sometimes in statutes, to designate either a corporation created by or under the laws of another state or a corporation created by or under the laws of a foreign country."

"A federal corporation operating within a state is considered a domestic corporation rather than a foreign corporation. **The United States government is a foreign corporation with respect to a state.**"

[19 Corpus Juris Secundum, Corporations, §883]

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19 C.J.S., Corporations §886 [Legal encyclopedia]

"A corporation is a citizen, resident, or inhabitant of the state or country by or under the laws of which it was created, and of that state or country only."

[19 Corpus Juris Secundum, Corporations, §886]

Ngiraingas v. Sanchez, 495 U.S. 182 (1990):

> At common law, a "corporation" was an "artificial perso[n] endowed with the legal capacity of perpetual succession" consisting either of a single individual (termed a "corporation sole") or of a collection of several individuals (a "corporation aggregate"). 3 H. Stephen, Commentaries on the Laws of England 166, 168 (1st Am. ed. 1845). The sovereign was considered a corporation. See id., at 170; see also 1 W. Blackstone, Commentaries *467. Under the definitions supplied by contemporary law dictionaries, Territories would have been classified as "corporations" (and hence as "persons") at the time that 1983 was enacted and the Dictionary Act recodified. See W. Anderson, A Dictionary of Law 261 (1893) ("All corporations were originally modeled upon a state or nation"); 1 J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America 318-319 (11th ed. 1866) ("In this extensive sense the United States may be termed a corporation"); Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) ("`The United States is a . . . great corporation . . . ordained and established by the American people'") (quoting United [495 U.S. 182, 202] States v. Maurice, 26 F. Cas. 1211, 1216 (No. 15,747) (CC Va. 1823) (Marshall, C. J.)); Cotton v. United States, 11 How. 229, 231 (1851) (United States is "a corporation"). See generally Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 561-562 (1819) (explaining history of term "corporation").

Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519; 10 L.Ed. 274 (1839):

> "The States between each other are sovereign and independent. They are distinct separate sovereignties, except so far as they have parted with some of the attributes of sovereignty by the Constitution. They continue to be nations, with all their rights, and under all their national obligations, and with all the rights of nations in every particular; except in the surrender by each to the common purposes and objects of the Union, under the Constitution. The rights of each State, when not so yielded up, remain absolute."
>
> "***It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where the law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.***"

Proprietors of Charles River Bridge v. Proprietors of, 36 U.S. 420 (1837)

> "Corporations are also of all grades, and made for varied objects; **all governments are corporations, created by usage and common consent, or grants and charters which create a body politic for prescribed purposes; but whether they are private, local or general, in their objects, for the enjoyment of property, or the exercise of power, they are all governed by the same rules of law, as to the construction and the obligation of the instrument by which the incorporation is made. One universal rule of law protects persons and property**. It is a fundamental principle of the common law of England, that the term freemen of the kingdom, includes 'all persons,' ecclesiastical and temporal, incorporate, politique or natural; it is a part of their magna charta (2 Inst. 4), and is incorporated into our institutions. The persons of the members of corporations are on the same footing of protection as other persons, and their corporate property secured by the same laws which protect that of individuals. 2 Inst. 46-7. 'No man shall be taken,' 'no man shall be disseised,' without due process of law, is a principle taken from magna charta, infused into all our state constitutions, and is made inviolable by the federal government, by the amendments to the constitution." [Proprietors of Charles River Bridge v. Proprietors of, 36 U.S. 420 (1837)]

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Form **1040NR**
Department of the Treasury
Internal Revenue Service

U.S. Nonresident Alien Income Tax Return

For the year January 1–December 31, 2000, or other tax year
beginning , 2000, and ending , 20

OMB No. 1545-0089

2000

Please print or type.

Your first name and initial	Last name	**Identifying number (see page 5 of inst.)**
Present home address (number, street, and apt. no., or rural route). If you have a P.O. box, see page 5.		Check if: ☐ Individual ☐ Estate or Trust
City, town or post office, state, and ZIP code. If you have a foreign address, see page 5.		**For Disclosure and Paperwork Reduction Act Notice, see page 18.**
Country ▶	Of what country were you a **citizen** or national during the tax year? ▶	
Give address **outside the United States** to which you want any refund check mailed. If same as above, write "Same."	Give address in the country where you are a **permanent resident.** If same as above, write "Same."	

Attach Forms W-2 and W-2G here. Also attach Form(s) 1099-R if tax was withheld.

Filing Status and Exemptions for Individuals (See page 6.)

	7a Yourself	7b Spouse
Filing status. Check only one box (1–6 below).		
1 ☐ Single resident of Canada or Mexico, or a single U.S. national		
2 ☐ Other single nonresident alien		
3 ☐ Married resident of Canada or Mexico, or a married U.S. national		
4 ☐ Married resident of Japan or the Republic of Korea		
5 ☐ Other married nonresident alien		
6 ☐ Qualifying widow(er) with dependent child (year spouse died ▶). (See page 6.)		

If you check box 7b, enter your spouse's identifying number ▶

Caution: ***Do not*** *check box 7a if your parent (or someone else) can claim you as a dependent.*
Do not *check box 7b if your spouse had any U.S. gross income.*

7c Dependents:*

(1) First name / Last name	(2) Dependent's identifying number	(3) Dependent's relationship to you	(4) ✓ if qualifying child for child tax credit (see page 6)
			☐
			☐
			☐
			☐
			☐

No. of boxes checked on 7a and 7b ▶
No. of your children on 7c who:
***lived with you** ▶
****did not live with you due to divorce or separation** ▶
****Dependents on 7c not entered above** ▶
Add numbers entered on lines above ▶

***Applies generally only to residents of Canada, Mexico, Japan, and the Republic of Korea and to U.S. nationals.** (See page 6.)
****Applies generally only to residents of Canada and Mexico and to U.S. nationals.** (See page 6.)

d Total number of exemptions claimed

Enclose, but do not attach, any payment.

Income Effectively Connected With U.S. Trade/Business

8	Wages, salaries, tips, etc. Attach Form(s) W-2		8
9a	**Taxable** interest		9a
b	**Tax-exempt** interest. **Do not** include on line 9a	9b	
10	Ordinary dividends		10
11	Taxable refunds, credits, or offsets of state and local income taxes (see page 7)		11
12	Scholarship and fellowship grants. Attach explanation (see page 7)		12
13	Business income or (loss). Attach Schedule C or C-EZ (Form 1040)		13
14	Capital gain or (loss). Attach Schedule D (Form 1040) if required. If not required, check here ☐		14
15	Other gains or (losses). Attach Form 4797		15
16a	Total IRA distributions — 16a	**16b** Taxable amount (see page 7)	16b
17a	Total pensions and annuities — 17a	**17b** Taxable amount (see page 8)	17b
18	Rental real estate, royalties, partnerships, trusts, etc. Attach Schedule E (Form 1040)		18
19	Farm income or (loss). Attach Schedule F (Form 1040)		19
20	Unemployment compensation		20
21	Other income. List type and amount (see page 9)		21
22	Total income exempt by a treaty from page 5, Item M	22	
23	Add lines 8, 9a, 10–15, 16b, and 17b–21. This is your **total effectively connected income** ▶		23

Adjusted Gross Income

24	IRA deduction (see page 9)	24	
25	Student loan interest deduction (see page 9)	25	
26	Medical savings account deduction. Attach Form 8853	26	
27	Moving expenses. Attach Form 3903	27	
28	Self-employed health insurance deduction (see page 10)	28	
29	Self-employed SEP, SIMPLE, and qualified plans	29	
30	Penalty on early withdrawal of savings	30	
31	Scholarship and fellowship grants excluded	31	
32	Add lines 24 through 31		32
33	Subtract line 32 from line 23. Enter here and on line 34. This is your **adjusted gross income** ▶		33

Tax and Credits

34	Amount from line 33 (adjusted gross income)		34	
35	**Itemized deductions** from page 3, Schedule A, line 17		35	
36	Subtract line 35 from line 34		36	
37	Exemptions (see page 11)		37	
38	**Taxable income.** Subtract line 37 from line 36. If line 37 is more than line 36, enter -0-		38	
39	**Tax** (see page 11). Check if any tax is from **a** ☐ Form(s) 8814 **b** ☐ Form 4972		39	
40	Alternative minimum tax. Attach Form 6251		40	
41	Add lines 39 and 40 ▶		41	
42	Foreign tax credit. Attach Form 1116 if required	42		
43	Credit for child and dependent care expenses. Attach Form 2441	43		
44	Child tax credit (see page 12)	44		
45	Adoption credit. Attach Form 8839	45		
46	Other. Check if from **a** ☐ Form 3800 **b** ☐ Form 8396 **c** ☐ Form 8801 **d** ☐ Form (specify) _____	46		
47	Add lines 42 through 46. These are your **total credits**		47	
48	Subtract line 47 from line 41. If line 47 is more than line 41, enter -0- ▶		48	

Other Taxes

49	Tax on income not effectively connected with a U.S. trade or business from page 4, line 83	49	
50	Social security and Medicare tax on tip income not reported to employer. Attach Form 4137	50	
51	Tax on IRAs, other retirement plans, and MSAs. Attach Form 5329 if required	51	
52	Transportation tax (see page 13)	52	
53	Household employment taxes. Attach Schedule H (Form 1040)	53	
54	Add lines 48 through 53. This is your **total tax** ▶	54	

Payments

55	Federal income tax withheld from Forms W-2, 1099, 1042-S, etc.	55		
56	2000 estimated tax payments and amount applied from 1999 return	56		
57	Excess social security and RRTA tax withheld (see page 13)	57		
58	Additional child tax credit. Attach Form 8812	58		
59	Amount paid with Form 4868 (request for extension)	59		
60	Other payments. Check if from **a** ☐ Form 2439 **b** ☐ Form 4136	60		
61	Credit for amount paid with Form 1040-C	61		
62	U.S. tax withheld at source:			
a	From page 4, line 80	62a		
b	By partnerships under section 1446 (from Form(s) 8805 or 1042-S)	62b		
63	U.S. tax withheld on dispositions of U.S. real property interests:			
a	From Form(s) 8288-A	63a		
b	From Form(s) 1042-S	63b		
64	Add lines 55 through 63b. These are your **total payments** ▶		64	

Refund

65	If line 64 is more than line 54, subtract line 54 from line 64. This is the amount you **overpaid**		65	
66a	Amount of line 65 you want **refunded to you.** If you want it directly deposited, see page 14 and fill in 66b, c, and d ▶		66a	
b	Routing number ☐☐☐☐☐☐☐☐☐ **c** Type: ☐ Checking ☐ Savings			
d	Account number ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐			
67	Amount of line 65 you want **applied to your 2001 estimated tax** ▶	67		

Amount You Owe

68	If line 54 is more than line 64, subtract line 64 from line 54. This is the **amount you owe.** For details on how to pay, including what to write on your payment, see page 14 ▶		68	
69	Estimated tax penalty. Also include on line 68	69		

Sign Here

Keep a copy of this return for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature ▶ | Your occupation in the United States | Date | May the IRS discuss this return with the preparer shown below (see page 17)? ☐ Yes ☐ No

Paid Preparer's Use Only

Preparer's signature ▶ | Date | Check if self-employed ☐ | Preparer's SSN or PTIN

Firm's name (or yours if self-employed), address, and ZIP code ▶ | EIN | Phone no. ( )

Schedule A—Itemized Deductions (See pages 14, 15, and 16.) 07

State and Local Income Taxes

1 State income taxes 1

2 Local income taxes 2

3 Add lines 1 and 2 3

Gifts to U.S. Charities

Caution: *If you made a gift and received a benefit in return, see page 15.*

4 Gifts by cash or check. If you made any gift of $250 or more, see page 15 4

5 Other than by cash or check. If you made any gift of $250 or more, see page 15. You **must** attach Form 8283 if "the amount of your deduction" (see definition on page 15) is more than $500 5

6 Carryover from prior year 6

7 Add lines 4 through 6 7

Casualty and Theft Losses

8 Casualty or theft loss(es). Attach Form 4684 8

Job Expenses and Most Other Miscellaneous Deductions

9 Unreimbursed employee expenses—job travel, union dues, job education, etc. You **must** attach Form 2106 or Form 2106-EZ if required. See page 15 ▶ 9

10 Tax preparation fees 10

11 Other expenses. See page 16 for expenses to deduct here. List type and amount ▶ 11

12 Add lines 9 through 11 12

13 Enter the amount from Form 1040NR, line 34 13

14 Multiply line 13 by 2% (.02) 14

15 Subtract line 14 from line 12. If line 14 is more than line 12, enter -0- 15

Other Miscellaneous Deductions

16 Other—certain expenses of disabled employees, estate tax on income of decedent, etc. List type and amount ▶ 16

Total Itemized Deductions

17 Is Form 1040NR, line 34, over $128,950 (over $64,475 if you checked filing status box 3, 4, or 5 on page 1 of Form 1040NR)?

No. Your deduction is not limited. Add the amounts in the far right column for lines 3 through 16. Also enter this amount on Form 1040NR, line 35. . . ▶ 17

Yes. Your deduction may be limited. See page 16 for the amount to enter here and on Form 1040NR, line 35.

Tax on Income Not Effectively Connected With a U.S. Trade or Business

Attach Forms 1042-S, SSA-1042S, RRB-1042S, 1001 or similar form.

Nature of income		(a) U.S. tax withheld at source	Enter amount of income under the appropriate rate of tax (see pages 16 and 17) (b) 10%	(c) 15%	(d) 30%	(e) Other (specify) ____%	(e) Other (specify) ____%
70 Dividends paid by:							
a U.S. corporations	70a						
b Foreign corporations	70b						
71 Interest:							
a Mortgage	71a						
b Paid by foreign corporations	71b						
c Other	71c						
72 Industrial royalties (patents, trademarks, etc.)	72						
73 Motion picture or T.V. copyright royalties	73						
74 Other royalties (copyrights, recording, publishing, etc.)	74						
75 Real property income and natural resources royalties	75						
76 Pensions and annuities	76						
77 Social security benefits	77						
78 Gains (include capital gain from line 86 below)	78						
79 Other (specify) ▶	79						
80 **Total U.S. tax withheld at source.** Add column (a) of lines 70a through 79. Enter the total here and on Form 1040NR, line 62a ▶	80						
81 Add lines 70a through 79 in columns (b)–(e)	81						
82 **Multiply line 81 by rate of tax at top of each column**	82						
83 **Tax on income not effectively connected with a U.S. trade or business.** Add columns (b)–(e) of line 82. Enter the total here and on Form 1040NR, line 49 ▶	83						

Capital Gains and Losses From Sales or Exchanges of Property

Enter only the capital gains and losses from property sales or exchanges that are from sources within the United States and not effectively connected with a U.S. business. Do not include a gain or loss on disposing of a U.S. real property interest; report these gains and losses on Schedule D (Form 1040).

Report property sales or exchanges that are effectively connected with a U.S. business on Schedule D (Form 1040), Form 4797, or both.

84 **(a)** Kind of property and description (if necessary, attach statement of descriptive details not shown below)	**(b)** Date acquired (mo., day, yr.)	**(c)** Date sold (mo., day, yr.)	**(d)** Sales price	**(e)** Cost or other basis	**(f) LOSS** If (e) is more than (d), subtract (d) from (e)	**(g) GAIN** If (d) is more than (e), subtract (e) from (d)
85 Add columns (f) and (g) of line 84				85	( )	
86 **Capital gain.** Combine columns (f) and (g) of line 85. Enter the net gain here and on line 78 above (if a loss, enter -0-) ▶					86	

Other Information (If an item does not apply to you, enter "N/A.")

A What country issued your passport? .....

B Were you ever a U.S. citizen? . . . . ☐ Yes ☐ No

C Give the purpose of your visit to the United States ► .....

.....

.....

D Type of entry visa and visa number ► ..... and type of current visa and date of change ► .....

E Date you first entered the United States ► .....

F Did you give up your permanent residence as an immigrant in the United States this year? . . . . . ☐ Yes ☐ No

G Dates you entered and left the United States during the year. Residents of Canada or Mexico entering and leaving the United States at frequent intervals, give name of country only. ► .....

.....

H Give number of days (including vacation and nonwork days) you were present in the United States during: 1998 ....., 1999 ....., and 2000 .....

I If you are a resident of Canada, Mexico, Japan, or the Republic of Korea, or a U.S. national, did your spouse contribute to the support of any child claimed on Form 1040NR, line 7c? . . . . . ☐ Yes ☐ No

If "Yes," enter amount ► $.....

If you were a resident of Japan or the Republic of Korea for any part of the tax year, enter in the space below your total foreign source income not effectively connected with a U.S. trade or business. This information is needed so that the exemption for your spouse and dependents residing in the United States (if applicable) may be allowed in accordance with Article 4 of the income tax treaties between the United States and Japan or the United States and the Republic of Korea.

Total foreign source income not effectively connected with a U.S. trade or business ► $.....

J Did you file a U.S. income tax return for any year before 2000? . . . . . ☐ Yes ☐ No

If "Yes," give the latest year and form number ► .....

.....

K To which Internal Revenue office did you pay any amounts claimed on Form 1040NR, lines 56, 59, and 61? .....

.....

L Have you excluded any gross income other than foreign source income not effectively connected with a U.S. trade or business? . ☐ Yes ☐ No

If "Yes," show the amount, nature, and source of the excluded income. Also, give the reason it was excluded. (Do not include amounts shown in item M.) ► .....

.....

M If you are claiming the benefits of a U.S. income tax treaty with a foreign country, give the following information. See page 17 for additional information.

- Country ► .....

- Type and amount of effectively connected income exempt from tax. Also, identify the applicable tax treaty article. Do not enter exempt income on lines 8–15, 16b, and 17b–21 of Form 1040NR:

For 2000 (also, include this exempt income on line 22 of Form 1040NR) ► .....

.....

.....

.....

For 1999 ► .....

.....

.....

- Type and amount of income not effectively connected that is exempt from or subject to a reduced rate of tax. Also, identify the applicable tax treaty article:

For 2000 ► .....

.....

.....

For 1999 ► .....

.....

.....

- Were you subject to tax in that country on any of the income you claim is entitled to the treaty benefits? . . . . . ☐ Yes ☐ No

- Did you have a permanent establishment or fixed base (as defined by the tax treaty) in the United States at any time during 2000? . . . . . ☐ Yes ☐ No

N If you file this return to report community income, give your spouse's name, address, and identifying number.

.....

.....

O If you file this return for a trust, does the trust have a U.S. business? . . . . . ☐ Yes ☐ No

If "Yes," give name and address ► .....

.....

.....

P Is this an "expatriation return" (see page 17)? . . . . . ☐ Yes ☐ No

If "Yes," you must attach Form 8854 **or** attach an explanation as to why you are not submitting that form.

Q During 2000, did you apply for, or take other affirmative steps to apply for, lawful permanent resident status in the United States or have an application pending to adjust your status to that of a lawful permanent resident of the United States? ☐ Yes ☐ No

If "Yes," explain ► .....

.....

TITLE 8 > CHAPTER 12

CHAPTER 12—IMMIGRATION AND NATIONALITY

U.S. Code collection

TITLE 8 > CHAPTER 12 > SUBCHAPTER I

SUBCHAPTER I—GENERAL PROVISIONS

CITES BY TOPIC: continental United States

"Continental United States"-Wikipeida Encylopedia

PDF
Online

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26 U.S.C. 4262: Definition of taxable transportation

TITLE 26 > Subtitle D > CHAPTER 33 > Subchapter C > PART I > § 4262
§ 4262. Definition of taxable transportation
(c) **Definitions** For purposes of this section—
(1) **Continental United States**

The term "**continental United States**" means the District of Columbia and the States other than Alaska and Hawaii.

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8 CFR 215.1: Controls of Aliens Departing from the United States

[Code of Federal Regulations]
[Title 8, Volume 1]
[Revised as of January 1, 2002]
From the U.S. Government Printing Office via GPO Access
[CITE: 8CFR215]
TITLE 8--ALIENS AND NATIONALITY CHAPTER I--IMMIGRATION AND NATURALIZATION
SERVICE, DEPARTMENT OF JUSTICE
PART 215--CONTROLS OF ALIENS DEPARTING FROM THE **UNITED STATES**

Section 215.1: Definitions
(f) The term **continental United States** means the District of Columbia and the several **States**, except Alaska and Hawaii.

NOTE: The above section DOES NOT define the term "State", but the correct definition is found in 4 U.S.C. 110(d), and it means a federal State, not a state of the union!

Sec. 1101. - Definitions

(a)

As used in this chapter -

(1)

The term ''administrator'' means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2)

The term ''advocates'' includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3)

The term ''alien'' means any person not a citizen or national of the United States.

(4)

The term ''application for admission'' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5)

The term ''Attorney General'' means the Attorney General of the United States.

(6)

The term ''border crossing identification card'' means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that

(A)

each such document include a biometric identifier (such as the

fingerprint or handprint of the alien) that is machine readable and

(B)

an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7)

The term ''clerk of court'' means a clerk of a naturalization court.

(8)

The terms ''Commissioner'' and ''Deputy Commissioner'' mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9)

The term ''consular officer'' means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

(10)

The term ''crewman'' means a person serving in any capacity on board a vessel or aircraft.

(11)

The term ''diplomatic visa'' means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12)

The term ''doctrine'' includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)

(A)

The terms ''admission'' and ''admitted'' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B)

An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C)

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien -

(i)

has abandoned or relinquished that status,

(ii)

has been absent from the United States for a continuous period in excess of 180 days,

(iii)

has engaged in illegal activity after having departed the United States,

(iv)

has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v)

has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi)

is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14)

The term ''foreign state'' includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15)

The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens -

(A)

(i)

an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who

is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii)

upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii)

upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under

(i) and (ii) above;

(ii)

above;

(B)

an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C)

an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)

(i)

an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii)

an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing

vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E)

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him;

(i)

solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or

(ii)

solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) [1] of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and

(ii)

the alien spouse and minor children of any such alien if accompanying him or following to join him;

(G)

(i)

a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international

organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) (22 U.S.C. 288 et seq.), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii)

other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii)

an alien able to qualify under

(i)

or

(ii)

above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv)

officers, or employees of such international organizations, and the members of their immediate families;

(v)

attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H)

an alien

(i)

(a)

Repealed. Pub. L. 106-95, Sec. 2(c), Nov. 12, 1999, 113 Stat. 1316)

(b)

subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P))

in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or

(c)

who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or

(ii)

(a)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26 and agriculture as defined in section 203(f) of title 29, of a temporary or seasonal nature, or

(b)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or

(iii)

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I)

upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J)

an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K)

subject to subsections (d) and (p) of section 1184 of this title, an alien who -

(i)

is the fiancAE1ee or fiancAE1e of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii)

has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii)

is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L)

an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and

(ii)

the alien spouse and minor children of any such alien if accompanying him or following to join him;

(N)

(i)

the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii)

a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O)

an alien who -

(i)

has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)

(I)

seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic

or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II)

is an integral part of such actual performance,

(III)

(a)

has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or

(b)

in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV)

has a foreign residence which the alien has no intention of abandoning; or

(iii)

is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P)

an alien having a foreign residence which the alien has no intention of abandoning who -

(i)

(a)

is described in section 1184(c)(4)(A) of this title (relating to athletes), or

(b)

is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)

(I)

performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of

such a group, and

(II)

seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)

(I)

performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II)

seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv)

is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q)

(i)

an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or

(ii)

(I)

an alien 35 years of age or younger having a residence in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 36 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Attorney General under section 2(a) of the Irish

Peace Process Cultural and Training Program Act of 1998 for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and

(II)

the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

(R)

an alien, and the spouse and children of the alien if accompanying or following to join the alien, who -

(i)

for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii)

seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S)

subject to section 1184(k) of this title, an alien -

(i)

who the Attorney General determines -

(I)

is in possession of critical reliable information concerning a criminal organization or enterprise;

(II)

is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III)

whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii)

who the Secretary of State and the Attorney General jointly

determine -

(I)

is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II)

is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III)

will be or has been placed in danger as a result of providing such information; and

(IV)

is eligible to receive a reward under section 2708(a) of title 22, and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)

(i)

subject to section 1184(n) of this title, an alien who the Attorney General determines -

(I)

is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22,

(II)

is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)

(aa)

has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or

(bb)

has not attained 15 years of age, and

(IV)

the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii)

if the Attorney General considers it necessary to avoid extreme hardship -

(I)

in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, and parents of such alien; and

(II)

in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien,

if accompanying, or following to join, the alien described in clause (i);

(U)

(i)

subject to section 1184(o) [2] of this title, an alien who files a petition for status under this subparagraph, if the Attorney General determines that -

(I)

the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II)

the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III)

the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV)

the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States

(including in Indian country and military installations) or the territories and possessions of the United States;

(ii)

if the Attorney General considers it necessary to avoid extreme hardship to the spouse, the child, or, in the case of an alien child, the parent of the alien described in clause (i), the Attorney General may also grant status under this paragraph based upon certification of a government official listed in clause (i)(III) that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien; and

(iii)

the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V)

subject to section 1184(o) [2] of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if -

(i)

such petition has been pending for 3 years or more; or

(ii)

such petition has been approved, 3 years or more have elapsed since such filing date, and -

(I)

an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II)

the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition,

remains pending.

(16)

The term ''immigrant visa'' means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17)

The term ''immigration laws'' includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18)

The term ''immigration officer'' means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19)

The term ''ineligible to citizenship,'' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) (50 App. U.S.C. 454(a)), or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20)

The term ''lawfully admitted for permanent residence'' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21)

The term ''national'' means a person owing permanent allegiance to a state.

(22)

The term ''national of the United States'' means

(A)

a citizen of the United States, or

(B)

a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23)

The term ''naturalization'' means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.

L. 102-232, title III, Sec. 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25)

The term ''noncombatant service'' shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26)

The term ''nonimmigrant visa'' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27)

The term ''special immigrant'' means -

(A)

an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B)

an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C)

an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who -

(i)

for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii)

seeks to enter the United States -

(I)

solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II)

before October 1, 2003, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III)

before October 1, 2003, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of title 26) at the request of the organization in a religious vocation or occupation; and

(iii)

has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D)

an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: Provided, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E)

an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of title 22) enters into force (October 1, 1979), who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty (April 1, 1979), and who has performed faithful service as such an employee for one year or more;

(F)

an immigrant, and his accompanying spouse and children, who is a Panamanian national and

(i)

who, before the date on which such Panama Canal Treaty of

1977 enters into force (October 1, 1979), has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or

(ii)

who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G)

an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 (April 1, 1979), who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H)

an immigrant, and his accompanying spouse and children, who -

(i)

has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii)

was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii)

entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and

(iv)

has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)

(i)

an immigrant who is the unmarried son or daughter of an

officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and

(II)

applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii)

an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and

(II)

files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii)

an immigrant who is a retired officer or employee of such an international organization, and who

(I)

while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and

(II)

files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv)

an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J)

an immigrant who is present in the United States -

(i)

who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(ii)

for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii)

in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that -

(I)

no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and

(II)

no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K)

an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and

after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating -

(i)

12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii)

6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L)

an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause -

(i)

to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii)

to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the ''Protocol on the Status of International Military Headquarters'' set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii)

to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [3]

(M)

subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the

immigrant's accompanying spouse and children.

(28)

The term ''organization'' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29)

The term ''outlying possessions of the United States'' means American Samoa and Swains Island.

(30)

The term ''passport'' means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31)

The term ''permanent'' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32)

The term ''profession'' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33)

The term ''residence'' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34)

The term ''Service'' means the Immigration and Naturalization Service of the Department of Justice.

(35)

The term ''spouse'', ''wife'', or ''husband'' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36)

The term ''State'' includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

(37)

The term ''totalitarian party'' means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms ''totalitarian dictatorship'' and ''totalitarianism'' mean and refer to systems of government not representative in fact, characterized by

(A)

the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and

(B)

the forcible suppression of opposition to such party.

(38)

The term ''United States'', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(39)

The term ''unmarried'', when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40)

The term ''world communism'' means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41)

The term ''graduates of a medical school'' means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42)

The term ''refugee'' means

(A)

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or

unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B)

in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ''refugee'' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43)

The term ''aggravated felony'' means -

(A)

murder, rape, or sexual abuse of a minor;

(B)

illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C)

illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D)

an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E)

an offense described in -

(i)

section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii)

section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii)

section 5861 of title 26 (relating to firearms offenses);

(F)

a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at [4] least one year; ''is''.

(G)

a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at (FOOTNOTE 4) least one year;

(H)

an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I)

an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J)

an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K)

an offense that -

(i)

relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii)

is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii)

is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18 (relating to peonage, slavery, and involuntary servitude);

(L)

an offense described in -

(i)

section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii)

section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii)

section 421 of title 50 (relating to protecting the identity of undercover agents);

(M)

an offense that -

(i)

involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii)

is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N)

an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [5]

(O)

an offense described in section 1325(a) or 1326 of this title

committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P)

an offense

(i)

which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and

(ii)

for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q)

an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R)

an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S)

an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T)

an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U)

an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)

(A)

The term ''managerial capacity'' means an assignment within an organization in which the employee primarily -

(i)

manages the organization, or a department, subdivision, function, or component of the organization;

(ii)

supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii)

if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv)

exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B)

The term ''executive capacity'' means an assignment within an organization in which the employee primarily -

(i)

directs the management of the organization or a major component or function of the organization;

(ii)

establishes the goals and policies of the organization, component, or function;

(iii)

exercises wide latitude in discretionary decision-making; and

(iv)

receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C)

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45)

The term ''substantial'' means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46)

The term ''extraordinary ability'' means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.

(47)

(A)

The term ''order of deportation'' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B)

The order described under subparagraph (A) shall become final upon the earlier of -

(i)

a determination by the Board of Immigration Appeals affirming such order; or

(ii)

the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)

(A)

The term ''conviction'' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

(i)

a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii)

the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B)

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49)

The term ''stowaway'' means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50)

The term ''intended spouse'' means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(b)

As used in subchapters I and II of this chapter -

(1)

The term ''child'' means an unmarried person under twenty-one years of age who is -

(A)

a child born in wedlock;

(B)

a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C)

a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D)

a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)

(i)

a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii)

subject to the same proviso as in clause (i), a child who:

(I)

is a natural sibling of a child described in clause (i) or subparagraph (F)(i);

(II)

was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and

(III)

is otherwise described in clause (i), except that the child was adopted while under the age of 18 years; or

(F)

(i)

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a

United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii)

subject to the same provisos as in clause (i), a child who:

(I)

is a natural sibling of a child described in clause (i) or subparagraph (E)(i);

(II)

has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and

(III)

is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title.

(2)

The terms ''parent'', ''father'', or ''mother'' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term ''parent'' does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3)

The term ''person'' means an individual or an organization.

(4)

The term ''immigration judge'' means an attorney whom the

Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5)

The term ''adjacent islands'' includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c)

As used in subchapter III of this chapter -

(1)

The term ''child'' means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 [6] of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2)

The terms ''parent'', ''father'', and ''mother'' include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub.

L. 100-525, Sec. 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e)

For the purposes of this chapter -

(1)

The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2)

The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be

presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3)

Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f)

For the purposes of this chapter -

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was -

(1)

a habitual drunkard;

(2) Repealed. Pub.

L. 97-116, Sec. 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3)

a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [7] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4)

one whose income is derived principally from illegal gambling activities;

(5)

one who has been convicted of two or more gambling offenses committed during such period;

(6)

one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7)

one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense,

or offenses, for which he has been confined were committed within or without such period;

(8)

one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g)

For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

(h)

For purposes of section 1182(a)(2)(E) of this title, the term ''serious criminal offense'' means -

(1)

any felony;

(2)

any crime of violence, as defined in section 16 of title 18; or

(3)

any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i)

With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i) of this section -

(1)

the Attorney General and other Government officials, where

appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2)

the Attorney General shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an ''employment authorized'' endorsement or other appropriate work permit

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[1] See References in Text note below.

[2] See References in Text note below.

[3] So in original. Probably should be followed by ''; or''.

[4] So in original. Probably should be preceded by

[5] So in original. Probably should be followed by a semicolon.

[6] See References in Text note below.

[7] So in original. The phrase ''of such section'' probably should not appear.

Next

sion. If the defendant has only trespassed on the land, the action is for trespass (*i.e.* damages).

See also Eviction; Forcible entry and detainer; Process (*Summary process*).

Ejectment bill. A bill in equity brought merely for the recovery of real property, together with an account of the rents and profits, without setting out any distinct ground of equity jurisdiction; hence demurrable.

Equitable ejectment. A proceeding brought to enforce specific performance of a contract for the sale of land, and for some other purposes, which is in form an action of ejectment, but is in reality a substitute for a bill in equity.

Justice ejectment. A statutory proceeding for the eviction of a tenant holding over after termination of the lease or breach of its conditions.

Ejector. One who ejects, puts out, or dispossesses another.

Casual ejector. The nominal defendant in an action of ejectment; so called because, by a fiction of law peculiar to that action, he is supposed to come casually or by accident upon the premises and to eject the lawful possessor. 3 Bl.Comm. 203.

Ejectum /əjéktəm/. That which is thrown up by the sea. Also jetsam, wreck, etc.

Ejectus /əjéktəs/. In old English law, a whore-monger.

Ejercitoria /eyhèrsiytóriyə/. In Spanish law, the name of an action lying against a ship's owner, upon the contracts or obligations made by the master for repairs or supplies. It corresponds to the *actio exercitoria* of the Roman law.

Ejidos /eyhíyðows/. In Spanish law, commons; lands used in common by the inhabitants of a city, pueblo, or town, for pasture, wood, threshing-ground, etc.

Ejuration /iyjəréyshən/. Renouncing or resigning one's place.

Ejusdem generis /iyjésdəm jénərəs/. Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. U. S. v. LaBrecque, D.C. N.J., 419 F.Supp. 430, 432. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

Under "ejusdem generis" canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. Campbell v. Board of Dental Examiners, 53 Cal.App.3d 283, 125 Cal.Rptr. 694, 696.

Ejus est interpretari cujus est condere /íyjəs èst intərprətéray kyúwjəs èst kóndəriy/. It is his to interpret whose it is to enact.

Ejus est nolle, qui potest velle /íyjəs èst nóliy, kwày pówtəst véliy/. He who can will [exercise volition], has a right to refuse to will [to withhold consent]. This maxim is sometimes written, *Ejus est non nolle qui potest velle,* and is translated, "He may consent tacitly who may consent expressly."

Ejus est periculum cujus est dominium aut commodum /íyjəs èst pəríkyələm kyúwjəs èst dəmíniyəm òt kómədəm/. He who has the dominion or advantage has the risk.

Ejus nulla culpa est, cui parere necesse sit /íyjəs nálə kálpə èst, k(yúw)ay pəríriy nəsésiy sít/. No guilt attaches to him who is compelled to obey. Obedience to existing laws is a sufficient extenuation of guilt before a civil tribunal.

Elaborare /əlæbərériy/. In old European law, to gain, acquire, or purchase, as by labor and industry.

Elaboratus /əlæbəréytəs/. Property which is the acquisition of labor.

Elder brethren. A distinguished body of men, elected as masters of Trinity House, an institution incorporated in the reign of Henry VIII, charged with numerous important duties relating to the marine, such as the superintendence of light-houses. The full title of the corporation is Elder Brethren of the Holy and Undivided Trinity.

Elder title. A title of earlier date, but coming simultaneously into operation with a title of younger origin, is called the "elder title," and prevails.

Eldest. Oldest; first born; one with greatest seniority.

Electa una via, non datur recursus ad alteram /əléktə yuwnə váyə, nòn déytər rəkərsəs æd óltərəm/. He who has chosen one way cannot have recourse to another.

Elected. The word "elected," in its ordinary signification, carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position.

Electio est interna libera et spontanea separatio unius rei ab alia, sine compulsione, consistens in animo et voluntate /əléksh(iy)ow èst intárnə líbərə èt spòntəníyə sèpəréysh(iy)ow yənáyəs ríyay æb éyliyə, sáyniy kəmpàlsiyówniy, kənsístenz ìn ænəmow èt vòlantéytiy/. Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will.

Election. The act of choosing or selecting one or more from a greater number of persons, things, courses, or rights. The choice of an alternative. The internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society. An expression of choice by the voters of a public

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8 CFR - CHAPTER I - PART 215

View Part

§ 215.1 Definitions.

For the purpose of this part:

(a) The term *alien* means any person who is not a citizen or national of the United States.

(b) The term *Commissioner* means the Commissioner of Immigration and Naturalization.

(c) The term *regional commissioner* means an officer of the Immigration and Naturalization Service duly appointed or designated as a regional commissioner, or an officer who has been designated to act as a regional commissioner.

(d) The term *district director* means an officer of the Immigration and Naturalization Service duly appointed or designated as a district director, or an officer who has been designated to act as a district director.

(e) The term *United States* means the several States, the District of Columbia, the Canal Zone, Puerto Rico, the Virgin Islands, Guam, American Samoa, Swains Island, the Trust Territory of the Pacific Islands, and all other territory and waters, continental and insular, subject to the jurisdiction of the United States.

(f) The term *continental United States* means the District of Columbia and the several States, except Alaska and Hawaii.

(g) The term *geographical part of the United States* means: (1) The continental United States, (2) Alaska, (3) Hawaii, (4) Puerto Rico, (5) the Virgin Islands, (6) Guam, (7) the Canal Zone, (8) American Samoa, (9) Swains Island, or (10) the Trust Teritory of the Pacific Islands.

(h) The term *depart from the United States* means depart by land, water, or air: (1) From the United States for any foreign place, or (2) from one geographical part of the United States for a separate geographical part of the United States: *Provided,* That a trip or journey upon a public ferry, passenger vessel sailing coastwise on a fixed schedule, excursion vessel, or aircraft, having both termini in the continental United States or in any one of the other geographical parts of the United States and not touching any territory or waters under the jurisdiction or control of a foreign power, shall not be deemed a departure from the United States.

(i) The term *departure-control officer* means any immigration officer as defined in the regulations of the Immigration and Naturalization Service who is designated to supervise the departure of aliens, or any officer or employee of the United States designated by the Governor of the Canal Zone, the High Commissioner of the Trust Territory of the Pacific Islands, or the governor of an outlying possession of the United States, to supervise the departure of aliens.

(j) The term *port of departure* means a port in the continental United States, Alaska, Guam, Hawaii, Puerto Rico or the Virgin Islands, designated as a port of entry by the Attorney General or by the Commissioner, or in exceptional circumstances such other place as the departure-control officer may, in his discretion, designate in an individual case, or a port in American Samoa, Swains Island, the Canal Zone, or the Trust Territory of the Pacific Islands, designated as a port of entry by the chief executive officer thereof.

(k) The term *special inquiry officer* shall have the meaning ascribed thereto in section 101(b)(4) of the Immigration and Nationality Act.

25, 27; Anderson v. Biesman & Carrick Co., 287 Ill.App. 507, 4 N.E.2d 639, 640, 641.

Express authority. Authority delegated to agent by words which expressly authorize him to do a delegable act. Authority which is directly granted to or conferred upon agent in express terms. That authority which principal intentionally confers upon his agent by manifestations to him. Epstein v. Corporacion Peruana de Vapores, D.C.N.Y., 325 F.Supp. 535, 537.

That which confers power to do a particular identical thing set forth and declared exactly, plainly, and directly with well-defined limits. An authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given.

Express color. In old English law, an evasive form of special pleading in a case where the defendant ought to plead the general issue. Abolished by the common-law procedure act, 1852, 15 & 16 Vict., c. 76, § 64.

Express common-law dedication. *See* Dedication.

Express company. A firm or corporation engaged in the business of transporting parcels or other movable property, in the capacity of common carriers, and especially undertaking the safe carriage and speedy delivery of small but valuable packages of goods and money.

Express conditions. *See* Condition.

Express contract. *See* Contract.

Express dissatisfaction. Where will declares that any one expressing dissatisfaction with its provisions should forfeit his interest, "dissatisfaction" is legally "expressed" when beneficiary contests or objects in legal proceeding to enforcement of any provision of will.

Expressed. Means stated or declared in direct terms; set forth in words; not left to inference or implication. Anderson v. Board of Ed. of School Dist. No. 91, 390 Ill. 412, 61 N.E.2d 562, 567. *See* Express.

Expressio eorum quæ tacite insunt nihil operatur /əksprésh(iy)ow iyórəm kwìy tásətiy ínsənt náy(h)əl òpəréytər/. The expression or express mention of those things which are tacitly implied avails nothing. A man's own words are void, when the law speaks as much. Words used to express what the law will imply without them are mere words of abundance.

Expression, freedom of. One of the basic freedoms guaranteed by the First Amendment of U.S.Const. and by most state constitutions. Such is equivalent to freedom of speech, press, or assembly.

Expressio unius est exclusio alterius /əksprésh(iy)ow yənáyəs èst əksklúwz(h)(i)yow òltəráyəs/. A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325; Newblock v. Bowles, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

Expressio unius personæ est exclusio alterius /əksprésh(iy)ow yənáyəs pərsówniy èst əksklúwz(h)(i)yow òltəráyəs/. The mention of one person is the exclusion of another.

Expressly. In an express manner; in direct or unmistakable terms; explicitly; definitely; directly. St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685, 689. The opposite of impliedly. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, 396.

Express malice. Express malice for purposes of first degree murder includes malice, formed design or intention to kill or to do great bodily harm, and sedate and deliberate mind of which that intention is the product. State v. Gardner, 7 Storey 588, 203 A.2d 77, 80. As used with respect to libel, means publication of defamatory material in bad faith, without belief in the truth of the matter published, or with reckless disregard of the truth or falsity of the matter. Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102, 1113. *See also* Malice.

Express permission. Within statute respecting automobile owner's liability, includes prior knowledge of intended use and affirmative and active consent thereto.

Express private trust. *See* Trust.

Express repeal. Abrogation or annulment of previously existing law by enactment of subsequent statute declaring that former law shall be revoked or abrogated.

Express republication. Occurs with respect to will when testator repeats ceremonies essential to valid execution, with avowed intention of republishing will.

Express request. That which occurs when one person commands or asks another to do or give something, or answers affirmatively when asked whether another shall do a certain thing.

Express terms. Within provision that qualified acceptance, in "express terms," varies effect of draft, "express terms" means clear, unambiguous, definite, certain, and unequivocal terms.

Express trust. *See* Trust.

Expressum facit cessare tacitum /əksprésəm féysət səsériy tásətəm/. That which is expressed makes that which is implied to cease [that is, supersedes it, or controls its effect]. Thus, an implied covenant in a deed is in all cases controlled by an express covenant. Where a law sets down plainly its whole meaning the court is prevented from making it mean what the court pleases. Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733, 743.

Expressum servitium regat vel declaret tacitum /əksprésəm sərvísh(iy)əm ríygət vèl dèkləréret tásətəm/. Let service expressed rule or declare what is silent.

Express warranty. *See* Warranty.

§ 110. Same; definitions

Release date: 2006-03-20

As used in sections 105–109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

U.S. Constitution: Article IV

Article Text | Annotations

Article. IV. [Annotations]

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States

concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

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

Annotations

Article IV - States' Relations

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Related FindLaw Resources
FindLaw Resources

U.S. Constitution: Sixth Amendment

Sixth Amendment - Rights of Accused in Criminal Prosecutions

Amendment Text | Annotations

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Annotations

- **Criminal Prosecutions**
- **Coverage**
  - Offenses Against the United States
- **Right to a Speedy and Public Trial**
- **Speedy Trial**
  - Source and Rationale
  - Application and Scope
  - When the Right Is Denied
- **Public Trial**
- **Right to Trial by Impartial Jury**
- **Jury Trial**
  - The Attributes and Function of the Jury
  - Criminal Proceedings to Which the Guarantee Applies
- **Impartial Jury**
- **Place of Trial--Jury of the**

Amendment

Election Law

Federal Constitution

Supreme Court

Age Discrimination Act

'); } //

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CITES BY TOPIC: citizen

Department of State scams with "Certificates of non-citizen National Status" under 8 U.S.C. §1452

IRS Deposition Questions, Section 14: Citizenship

Duties and Responsibilities of Citizens within a Free Republic

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You're not a "citizen" as defined in the Internal Revenue Code

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Why you are a "national" or a "state national" and not a "U.S. citizen"

IMPORTANT!: **Read Great IRS Hoax, Sections 4.11 through 4.11.11: Citizenship**

Social Security Handbook: Section 1725: Evidence of Citizenship-details on what the Social Security Administration "thinks" is a citizen

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U.S. Citizenship/Lawful Presence Payment Requirements (POMS Manual section RS00204.010)-who the the Social Security Administration "thinks" is a citizen

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19 C.J.S., Corporations §886 [Legal encyclopedia]

> "A corporation is a citizen, resident, or inhabitant of the state or country by or under the laws of which it was created, and of that state or country only."
>
> [19 Corpus Juris Secundum, Corporations, §886]

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26 CFR §31.3121(e)-1 State, United States, and citizen

> *(b)…The term 'citizen of the United States' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.*

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26 CFR §1.1-1(c): Income Tax on individuals

(c) ***Who is a citizen.*** Every person born or naturalized in the [federal] United States and subject to ***its*** [exclusive federal jurisdiction under Article 1, Section 8, Clause 17 of the Constitution] jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481-1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7332, 39 FR 44216, Dec. 23, 1974]

Black's Law Dictionary, Sixth Edition, page 244:

citizen. One who, under the Constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. U.S. Const., 14th Amend. See Citizenship.

"Citizens" are members of a political community who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as collective rights. Herriott v. City of Seattle, 81 Wash.2d 48, 500 P.2d 101, 109.

The term may include or apply to children of alien parents from in United States, Von Schwerdtner v. Piper, D.C.Md., 23 F.2d 862, 863; U.S. v. Minoru Yasui, D.C.Or., 48 F.Supp. 40, 54; children of American citizens born outside United States, Haaland v. Attorney General of United States, D.C.Md., 42 F.Supp. 13, 22; Indians, United States v. Hester, C.C.A.Okl., 137 F.2d 145, 147; National Banks, Amierican Surety Co. v. Bank of California, C.C.A.Or., 133 F.2d 160, 162; nonresident who has qualified as administratrix of estate of deceased resident, Hunt v. Noll, C.C.A.Tenn., 112 F.2d 288, 289. However, neither the United States nor a state is a citizen for purposes of diversity jurisdiction. Jizemerjian v. Dept of Air Force, 457 F.Supp. 820. On the other hand, municipalities and other local governments are deemed to be citizens. Rieser v. District of Columbia, 563 F.2d 462. A corporation is not a citizen for purposes of privileges and immunities clause of the Fourteenth Amendment. D.D.B. Realty Corp. v. Merrill, 232 F.Supp. 629, 637.

Under diversity statute [28 U.S.C. §1332], which mirrors U.S. Const, Article III's diversity clause, a person is a "citizen of a state" if he or she is a citizen of the United States and a domiciliary of a state of the United States. Gibbons v. Udaras na Gaeltachta, D.C.N.Y., 549 F.Supp. 1094, 1116.

Minor v. Happersett, 88 U.S. 162 (1874):

"**There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment 'all persons born or naturalized in the United States and subject to the jurisdiction thereof' are expressly declared to be 'citizens of the United States and of the State wherein they reside.' But, in our opinion, it did not need this amendment to**

give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an [88 U.S. 162, 166] association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. **Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.**" [Minor v. Happersett, 88 U.S. 162 (1874)]

State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)

"...it is well settled that **a corporation created by a state is a citizen of the state, within the meaning of those provisions of the constitution and statutes of the United States which define the jurisdiction of the federal courts.** Railroad Co. v. Railroad Co., 112 U.S. 414 , 5 Sup. Ct. Rep. 208; Paul v. Virginia, 8 Wall. 168, 178; Pennsylvania v. Bridge Co., 13 How. 518."

Boyd v. State of Nebraska, 143 U.S 135 (1892):

'The words 'people of the United States' and 'citizens,' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. ..." [Boyd v. State of Nebraska, 143 U.S. 135 (1892)]