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VOLUME 319

CASES ADJUDGED

IN

THE SUPREME COURT

AT

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FROM APRIL 20, 1943, TO AND INCLUDING JUNE 14, 1943

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ADDENDUM

In 307 U. S., p. III, note that MR. JUSTICE DOUGLAS took no part in the decisions handed down on April 17, 1939, l. c. pp. 1–160, the day when he took his seat (306 U. S., p. III, n. 4).

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

HARLAN FISKE STONE, Chief Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.

FRANCIS BIDDLE, Attorney General.
CHARLES FAHY, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Harlan F. Stone, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Frank Murphy, Associate Justice.

For the Eighth Circuit, Wiley Rutledge, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Wiley Rutledge, Associate Justice.

For the District of Columbia, Harlan F. Stone, Chief Justice.

March 1, 1943.

(For the next previous allotment, see 314 U. S. p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1942.

L. T. BARRINGER & CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 520. Argued March 3, 1943.—Decided May 3, 1943.

Section 2 of the Interstate Commerce Act forbids as an "unjust discrimination" that any carrier, "directly or indirectly, by any special rate, rebate, drawback, or other device," charge any person more or less than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Tariffs here under consideration, approved by the Interstate Commerce Commission, eliminate the loading charge on cotton moving from points in Oklahoma to certain ports on the Gulf of Mexico, while retaining it on cotton moving to the Southeast. *Held:*

1. Loading is a transportation service to which § 2 applies. P. 6.

2. In determining whether the difference in the loading charge resulted in unjust discrimination, the Commission was entitled to consider relevant differences in the "circumstances and conditions" relating to the through line-haul rates. P. 7.

3. Considering the truck competition to the Gulf ports and the relative rate structures, the determination of the Commission that the reduction in the line-haul cost to the shipper, effected by remission of the loading charge, did not result in an unjust discrimination was not lacking in rational basis. P. 10.

4. That the total through cost of the transportation service, of which the loading charge is a component, may be open to attack in a proceeding under § 13 (1) bringing the through rate into question

does not require a determination that the difference in the loading charge constitutes an unjust discrimination. P. 10.

5. Section 6 (1) does not preclude the Commission from considering the validity of the imposition or elimination of a separately stated loading charge in the light of its relationship to the through rate. P. 12.

6. The facts which justify the Commission's finding that the elimination of the loading charge does not result in an unjust discrimination, also justify its finding that the elimination of that charge does not create an undue preference in violation of § 3 (1). P. 13.

7. The Commission's findings are adequately supported by substantial evidence of record. P. 14.

49 F. Supp. 637, affirmed.

APPEAL from a decree of a District Court of three judges dismissing the complaint in a suit to enjoin and set aside an order of the Interstate Commerce Commission.

Mr. Nuel D. Belnap, with whom *Messrs. Luther M. Walter* and *John S. Burchmore* were on the brief, for appellant.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Arnold,* and *Messrs. Daniel W. Knowlton* and *J. Stanley Payne* were on the brief, for the United States et al.; and *Mr. Roland J. Lehman,* with whom *Messrs. R. S. Outlaw, C. S. Burg,* and *Clinton H. McKay* were on the brief, for the Atchison, Topeka & Santa Fe Railway Co. et al.,— appellees.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

This is a suit by appellant, a shipper of cotton over the lines of appellee railroads, brought under 28 U. S. C. § 41 (28), to enjoin and set aside an order of the Interstate Commerce Commission. The District Court of three judges dismissed the complaint, and the case comes here on direct appeal pursuant to 28 U. S. C. § 47. The question is whether the Commission erred in refusing to set

aside tariffs on cotton, filed by the five appellee railroads, as unjustly discriminatory and unduly prejudicial to shippers in violation of §§ 2 and 3 (1) of the Interstate Commerce Act, 24 Stat. 379, 380; 49 U. S. C. §§ 2, 3 (1).

From the report of the Commission, on which its order was based, 248 I. C. C. 643, the following facts appear. Appellees carry cotton from points in Oklahoma to ports on the Gulf of Mexico. Their lines also form relatively short parts of the through routes over which cotton moves from Oklahoma to points in the southeastern United States. During recent years carriers of cotton to the Gulf ports have been faced with serious truck competition. To meet it, successive rate reductions have been made. Until about ten years ago the only rates available on cotton were less-than-carload rates, since individual shipments of cotton are seldom, if ever, in carload quantities. As is customary on less-than-carload shipments, the cotton was loaded at the expense of the carrier.[1]

During 1932 and 1933 the carriers, in an effort to reduce rates and achieve operating economies, put in effect so-called carload rates for cotton which the Commission, after investigation, approved in Cotton From and to Points in Southwest and Memphis, 208 I. C. C. 677. Under these rates the cotton was typically collected in less-than-carload quantities at the ginning points, carried by rail for short distances to compressors, and after compression assembled in carload quantities for shipment

[1] Loading is customarily performed at the carrier's expense on less-than-carload freight, Loading Cotton in Oklahoma, 248 I. C. C. 643, 644, and at the shipper's expense on carload freight, *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 506; *Pennsylvania R. Co.* v. *Kittaning Co.*, 253 U. S. 319, 323; Loading and Unloading Carload Freight, 101 I. C. C. 394, 396; McCormick Warehouse Co. *v.* Pennsylvania R. Co., 148 I. C. C. 299, 300.

For discussions of loading practices on cotton in the Southwest, see Cotton Loading Provisions in the Southwest, 220 I. C. C. 702; Cotton Loading and Unloading in the Southwest, 229 I. C. C. 649.

to destination. The shipper paid the local, less-than-carload rate to the compress point, and the local rate from compress point to destination, but on the cotton's arrival at destination the carrier refunded the difference between the freight paid and the through, carload, rate from point of origin to destination. On these rates loading was at the shipper's expense; if the carrier performed the loading service a charge of 5½ cents a square bale was made, which was paid by a deduction from the refund allowed by the carrier on the transit settlement just referred to. This loading charge was stated separately in appellees' tariffs filed with the Commission, pursuant to § 6 (1).

Despite the reduction in cost to shippers produced by the adoption of these schedules, truck competition continued to be a serious problem. In 1939 carriers of cotton from Texas points effected a further rate reduction by eliminating the loading charge. The tariffs here under consideration, filed by appellees to be effective on June 11, 1941, similarly eliminate the loading charge for cotton moving from compress points in Oklahoma to certain ports on the Gulf of Mexico,[2] while retaining it on cotton moving to the Southeast.

Appellant buys cotton in Oklahoma for resale to mills in the Southeast. Under the proposed tariffs it must continue to pay the loading charge on cotton which it ships to the Southeast, while merchants who ship to the Gulf ports, and who compete with appellant in the purchase of cotton, are relieved of that charge. Contending that this situation would create an unjust discrimination under § 2, and would be unduly prejudicial under § 3 (1), appellant filed a petition with the Commission under § 15 (7) to suspend the proposed tariffs.

Division 3 of the Commission, after a hearing in which appellant participated, issued its report and order, refus-

[2] Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, Louisiana.

ing to set aside the proposed rates. It found that truck competition had continued to increase during 1940, so as to justify appropriate efforts by the carriers to meet such competition;[3] that the loading charge caused annoyance to shippers; that the cost of performing the loading service was in most cases nominal and its performance by the carrier would result in loading to maximum capacity, so that elimination of the charge was a suitable method of achieving a needed reduction in rates which were already low; that carriers in states farther East opposed the extension into their territory of the practice of free loading, and the elimination by appellees of the loading charge on cotton moving into that territory; that the "rates to the Southeast are already lower relatively than they are to the Texas ports"; and that "there is no trucking of cotton from Oklahoma . . . to the Southeast." Accordingly it found that the proposed elimination of the loading charge "is just and reasonable and not shown to be otherwise unlawful." Appellant's petition for reconsideration was denied by the full Commission, and the proposed rates, which had been suspended while under consideration by the Commission, became effective.

Appellant's principal contention is that, in considering the validity of the proposed tariffs under § 2, the Commission could look only at the charge for the loading service and was not entitled to consider conditions relating to the through line-haul rates. Section 2 of the Act declares it to be an "unjust" and prohibited discrimination for any carrier "directly or indirectly, by any special rate, rebate, drawback, or other device," to charge one person more or less than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and con-

[3] The Commission pointed out that carriers were free to adopt free loading or not as they chose, and in the same proceeding approved an application of certain Texas carriers to reëstablish the loading charge.

ditions." It is undoubted that the loading service here involved is a transportation service to which § 2 applies. § 1 (3) (a); *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511.

Section 2 is aimed at the prevention of favoritism among shippers. See Sharfman, Interstate Commerce Commission, vol. III–B, pp. 360–61. Where the transportation services are rendered under substantially similar conditions the section has been thought to prohibit any differentiation between shippers on the basis of their identity, *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 342; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 252, or on the basis of competitive conditions which may induce a carrier to offer a reduction in rate to one shipper while denying it to another similarly situated. *Wight* v. *United States*, 167 U. S. 512, 516–18; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166. Compare *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar." Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination. Hence its conclusion that in view of all the relevant facts and circumstances a rate or practice either is or is not unjustly discriminatory within the meaning of § 2 of the Act will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construc-

tion of the statute. *Seaboard Air Line Ry. Co.* v. *United States, supra,* 62; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co., supra,* 251–2; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 758; *Merchants Warehouse Co.* v. *United States, supra,* 508; *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 524.

In considering the circumstances and conditions attending the transportation service, the Commission was not required to ignore the fact that the loading charges, although separately stated in the tariffs, are in each case a component part of the total line-haul cost to the shipper and inseparable from it. All the carrier loading costs not compensated for by the loading charges, if any, to shippers, are necessarily absorbed by the carrier out of the line-haul charges which shippers pay. The loading charge is not paid until the line haul is completed and the ultimate destination known, and then only by a reduction of the refund payable by the carrier on the transit settlement prescribed by the tariffs. And where cotton moves on less-than-carload rates, the cost of loading is absorbed by the carrier, although the loading services performed by the carrier are the same. In these circumstances the net effect, on the shipper's line-haul cost, of the remission by the tariff of any part of the loading charge is precisely the same as though the like reduction were made in the line-haul tariff.

It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 636–7, and cases cited; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Co.,*

310 U. S. 344, 352–53; *Board of Trade* v. *United States*, 314 U. S. 534, 546. It follows that competitive conditions which would justify and render non-discriminatory a reduction in the line-haul tariff on a particular class of traffic, would likewise justify the reduction and render it non-discriminatory if made in the loading charge instead. Whether made in the one charge or the other, it enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as non-discriminatory equally justify the other.

This Court has held that the Commission may consider the through line-haul rate in determining whether a related accessorial charge is just and reasonable under § 1 (5) (a). *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 219–220. We find nothing in § 2 or in our decisions that precludes the Commission from similarly looking at the whole of the services rendered to different shippers to determine whether the conditions are such as to justify a difference in charges made for one component part of that whole. Nor has the Commission found such a limitation in the statute. Archer-Daniels-Midland Co. *v.* Alton R. Co., 246 I. C. C. 421, 428, 430; Minneapolis Traffic Assn. *v.* Chicago & N. W. Ry. Co., 241 I. C. C. 207, 220, 224; Railroad Comm'n of Wisconsin *v.* Ann Arbor R. Co., 177 I. C. C. 588, 592; State Docks Commission *v.* Louisville & Nashville R. Co., 167 I. C. C. 112, 115–116; Tide Water Oil Co. *v.* Director General, 62 I. C. C. 226, 227; Richmond Chamber of Commerce *v.* Seaboard Air Line Ry., 44 I. C. C. 455, 466.[4]

[4] Insofar as Birkett Mills *v.* Delaware, L. & W. R. Co., 123 I. C. C 63, 65, is to the contrary, it appears to rest on a misinterpretation o

Obviously there is nothing in this construction of § 2 which would preclude the Commission from setting aside a difference in a separately stated service charge which in fact operates to discriminate unjustly among shippers. We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. *Wight* v. *United States, supra; Interstate Commerce Commission* v. *Delaware, L. & W. R. Co., supra; Interstate Commerce Commission* v. *Baltimore & Ohio R. Co., supra; Seaboard Air Line Ry. Co.* v. *United States, supra; Louisville & Nashville R. Co.* v. *United States, supra; Merchants Warehouse Co.* v. *United States, supra.* The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the "circumstances and conditions" of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination.

This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the

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the effect of our decision in *Central R. Co.* v. *United States,* 257 U. S. 247, 255. Moreover it does not appear that there were present in that case any circumstances justifying a difference in the charges for the total transportation services rendered.

Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism. In the circumstances of this case, we cannot set aside, as lacking in rational basis, the Commission's determination that the reduction in the line-haul cost to the shipper effected by remission of the loading charge did not result in an unjust discrimination.

It is no answer to this determination of the Commission to say that the rates here approved as non-discriminatory may be open to attack in a proceeding under § 13 (1) to adjust the line-haul rates in which all connecting carriers who participate in the tariff are required to be parties by Rule II (c) of the Commission's 1936 Rules of Practice, or in a proceeding under § 15 (3) to establish divisions of the through rates among the connecting carriers, "a matter which in no way concerns the shipper," *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234. Here the difference in loading charge is assailed by a shipper only, and on the grounds alone that it is unjustly discriminatory or unduly preferential. The discrimination or preference, if any, is caused by the carriers who perform in part the line-haul transportation service. The Commission has not undertaken to pass upon the validity of the line-haul rates, and it does not appear that appellant has asked it to do so. It has passed only on the question of discrimination or preference resulting from the remission of the loading charge. In doing so it has, as § 2 contemplates, looked at all the relevant circumstances and conditions, including the respective line-haul conditions, in order to ascertain whether the loading service and line hauls are made under substantially similar circumstances and conditions with respect to the particular discrimination charged. The Commission has found that they are not and that the difference in service charge is not unjustly discriminatory as to shippers.

Section 2 gives us no mandate, and none is to be implied from the statutory scheme, to reverse that finding and to

declare that the difference in service charge constitutes an unjust discrimination merely because the total through cost, of which that charge is a component, may be open to attack in a proceeding bringing the through rate into question. See *Manufacturers Ry. Co.* v. *United States, supra,* 479, 481. But unless we are to say that § 2 precludes the Commission from considering facts which are relevant to the issue of discrimination which it must decide, we perceive no other ground upon which their consideration can be deemed forbidden.[5] In the present

[5] The Commission has not interpreted its Rule II (c) as precluding it from looking at relevant conditions and circumstances relating to the through rate although only part of that rate is brought in issue in the proceeding before it and other carriers participating in the through rate have not been joined as parties. Where the attack is on a component part of the through haul cost on grounds other than its effect on the through rate structure, there is no occasion for joining the other carriers participating in the through rate.

The Commission has frequently held that a complainant who attacks a component part of a through rate as unreasonable or prejudicial because of its effect on the through rate structure, must join all carriers participating in the through rate. Stevens Grocer Co. *v.* St. Louis, I. M. & S. Ry. Co., 42 I. C. C. 396, 397–8; cf. Cairo Association of Commerce *v.* Angelina & N. R. R. Co., 160 I. C. C. 604, 608–9; Switching at Minneapolis, 235 I C. C. 405, 410. But it has also held that a shipper who attacks the validity of a component part of a through rate, viewed separately, and does not put in issue the validity of the through rate as a whole, may do so without joining any carrier other than the one responsible for the particular component under attack. Cairo Board of Trade *v.* Cleveland, C., C. & St. L. Ry. Co., 46 I. C. C. 343, 350–51; Indianapolis Chamber of Commerce *v.* Cleveland, C., C. & St. L. Ry. Co., 46 I. C. C. 546, 556; Phoenix Utility Co. *v.* Southern Ry. Co., 173 I. C. C. 500, 501–2, and cases cited; see *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 776–7. In the latter type of case, where the complaint puts in issue only the validity of one part of a through rate, the Commission has held that the carrier is not precluded from introducing evidence to show that the rate attacked should not be set aside as unlawful, in view of its relationship to the whole through rate. Nebraska-Colorado Grain Producers Assn. *v.* C., B. & Q. R. Co., 243 I. C. C. 309, 311–13; Fraser-Smith Co. *v.* Grand Trunk

proceeding the only question in issue is whether the proposed elimination of the loading charge is unjustly discriminatory or unduly prejudicial; nothing in the Commission's order or its Rules of Procedure forecloses attack on the line-haul rates in an appropriate proceeding on any ground which the statute authorizes.

Nor do we find anything in § 6 (1) which precludes the Commission from looking at the entire through rate. That section merely requires carriers to file with the Commission all rates and charges established by them, and to "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed . . ." Appellees have complied with its requirement that the loading charge, and the exceptions to it created by the present tariffs, be separately posted. We have not

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W. Ry., 185 I. C. C. 57, 62; Atkinson Milling Co. *v.* Chicago, M., St. P. & P. Ry. Co., 235 I. C. C. 391, 393–4.

Nebraska-Colorado Grain Producers Assn. *v.* C., B. & Q. R. Co., *supra*, involved an attack on a component part of a through rate as unreasonable and preferential. In denying complainant's motions to exclude evidence introduced by the carrier relating to the through rate structure of which the rate under attack was a part, the Commission said: "The right to attack one factor of a combination through rate without putting the through rate in issue presents an entirely different question from that raised by these motions. While we have consistently held, in the cases referred to by complainant and supporting interveners, that where reparation is not claimed, one factor of a combination through rate may be assailed independently of the other factor or factors or even of the through rate itself, this does not mean that we may not look at the through situation." The Commission further pointed out that, "Although we have authority to find separate components of through rates unlawful, we must, in doing so, give careful consideration to the effect of such a finding on the through rates." 243 I. C. C. at 312, 313. Similarly in investigation and suspension proceedings under § 15 (7), where necessarily the only rate in issue is that proposed and under suspension, the Commission has deemed it proper to consider the effect of the proposed rate on the through rate structure. Livestock to Eastern Destinations, 156 I. C. C. 498, 509.

construed § 6 (1), which is designed to insure publicity of rates, *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 596–7, as precluding a carrier from performing an accessorial service free of charge provided no violation of any other section of the Act is shown. See *Interstate Commerce Comm'n* v. *Stickney*, 215 U. S. 98, 105. Nor does it preclude the Commission from considering the validity of the imposition or elimination of such a separately-stated charge in the light of its relationship to the through rate. Compare *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.*

What we have said of § 2 suffices also to dispose of the objection based on § 3 (1). That section makes it unlawful to give an "undue or unreasonable preference or advantage" to, or impose an "undue or unreasonable prejudice or disadvantage" on, any "person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic." It differs from § 2 in that it may be availed of not only by shippers but by any other person who has been or may be injured by an inequality of rates.

But the facts which we hold sufficient to justify the Commission's finding that the elimination of the loading charge does not result in an unjust discrimination, are sufficient also to justify its finding that the elimination of that charge does not create an undue preference. Compare Clover Splint Coal Co. *v.* Louisville & Nashville R. Co., 197 I. C. C. 276, 277. We have frequently sustained the Commission's determination, in cases arising under § 3, that differences in competitive conditions justify lower through rates over one route than over another. *Texas & Pacific Ry. Co.* v. *United States, supra; Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 205–217; *Interstate Commerce Comm'n* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 119, 121–2.

We cannot say here, any more than under § 2, that the Commission could not regard the truck competition to the Southwest, and the relative rate structures, disclosed in its report, as sufficient to warrant the difference in the cost of the through haul which results from the elimination of the loading charge by the present tariffs.

We have considered appellant's attack on the sufficiency of the evidence to support the Commission's findings, and conclude, as did the court below, that they are adequately supported by substantial evidence of record. Compare *Florida* v. *United States*, 292 U. S. 1, 12; *Merchants Warehouse Co.* v. *United States*, *supra*, 508.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting:

Sec. 2 of the Act makes it unlawful for any common carrier "by any special rate, rebate, drawback, or other device" to receive from any person "a greater or less compensation for any service rendered" in the "transportation" of passengers or property than it receives from any other person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Loading is clearly a "service rendered" in the "transportation" of property [1] within the meaning of § 2. See *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. The practice which is now held to be free from the charge of unlawful discrimination under § 2 is the practice of loading cotton free for certain shippers who ship to one destination and exacting a loading charge from others who ship from the same points but to a different destination. That is to say, free loading of cotton is allowed shippers who ship cotton from Oklahoma to the

[1] Sec. 1 (3) (a) defines "transportation" so as to include "all services in connection with the receipt, delivery . . . and handling of property transported."

Texas Gulf ports; a loading charge [2] is required from those who ship cotton from the identical places in Oklahoma to the Southeast.

The Commission in its report justified that discrimination on the following considerations: (1) there is no trucking of cotton between points in Oklahoma and the Southeast, while there is considerable truck competition in the movement of cotton from Oklahoma to the Texas Gulf ports; (2) carload rates on cotton from Oklahoma to the Southeast are on a relatively lower basis than carload rates from the same origins to the Texas Gulf ports; and (3) rates from points in Oklahoma both to the Southeast and to the Texas Gulf ports are depressed. The Commission in its report made no specific reference to § 2. It now seeks to sustain its order on the ground that the conditions surrounding the respective line-hauls justified the carriers in absorbing the loading charge in the line-haul rates for one shipper but not for another. It endeavors to avoid the issue of discrimination by contending that § 2 as a matter of law has no application to the present situation. Its argument is that § 2 does not apply where the line-hauls are not over the same line, for the same distance, and to the same destination. That contention is based on *Wight* v. *United States,* 167 U. S. 512, which the Commission claims to have followed consistently.[3]

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[2] The loading charge is 5.5¢ per square bale of cotton and 2.75¢ per round bale. This loading rate is carried separately in the tariffs as is required by § 6 (1) of the Act. See Tariff Circular 20 (I. C. C. 1933), Rule 10 (a).

[3] Richmond Chamber of Commerce *v.* Seaboard Air Line Railway, 44 I. C. C. 455, 464–466; Pacific Lumber Co. *v.* N. W. P. R. Co., 51 I. C. C. 738, 760; Tide Water Oil Co. *v.* Director General, 62 I. C. C. 226, 227; Standard Oil Co. *v.* Director General, 87 I. C. C. 214; Bunker Hill & Sullivan M. & C. Co. *v.* N. P. Ry. Co., 129 I. C. C. 242, 246; Cane Sugar from Wisconsin to Minnesota, 203 I. C. C. 373, 376; Miller Waste Mills, Inc. *v.* Chicago, M., St. P. & P. R. Co., 226 I. C. C. 451, 453.

I disagree with that construction of § 2. The *Wight* case involved a rebate by one road of a part of the rate between Cincinnati and Pittsburgh and was made on account of drayage at the Pittsburgh end. The Court held that § 2 was violated, saying that that section "prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." 167 U. S. p. 518. It does not follow that § 2 applies *only* where those identical conditions exist. Thus in Birkett Mills *v.* Delaware, L. & W. R. Co., 123 I. C. C. 63, the Commission had before it a complaint of millers, grain dealers, and elevator companies in New York respecting different transit charges on ex-lake and all-rail traffic, the transit charges being separately established. It held that "as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists." p. 65. No reference was made to line-haul conditions, though the relation between transit privileges and rate structures is intimate. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768; *Board of Trade* v. *United States,* 314 U. S. 534. And the principles of the Birkett Mills case have been applied by the Commission to other situations where the haul was not over the same line, for the same distance, and to the same destination. Suffern Grain Co. *v.* Illinois Central R. Co., 22 I. C. C. 178, 183–184; Washington, D. C., Store-Door Delivery, 27 I. C. C. 347.

It was stated in *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.,* 145 U. S. 263, 284, that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge." Those inequalities of conditions may relate to the circumstances of carriage. But the fact that different rates for carriage are warranted does not necessarily mean that dif-

ferent rates for identical accessorial services in connection with the carriage are justified. The Court stated in *Merchants Warehouse Co.* v. *United States, supra,* p. 511, that "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." And see *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 524. By the same token, there is a forbidden discrimination, in case of an accessorial service such as loading, where different rates are charged different shippers though the physical services rendered during the loading are alike.

But it is said in reply that there is nothing in § 2 which limits the phrase "under substantially similar circumstances and conditions" to the circumstances surrounding the particular accessorial service in question; and that it is a factual issue for the informed judgment of the Commission whether line-haul conditions are to be considered in determining the validity of separate charges for services such as loading. The answer, however, seems clear. The service of loading, like the transit service in the Birkett Mills case, is identical whether the property is going south or southeast, whether its journey is long or short, whether it is transported by one carrier or another. A carrier which is loading in Oklahoma one car of cotton for a southeastern mill and another car of cotton for a Gulf port is certainly performing a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." A carrier which is loading two cars at the same time, on the same siding, with the same commodity is indeed performing the same service under the same circumstances and conditions. To charge the first shipper for loading his car and to load the other one free would be to impair the rule of equality which § 2 was designed

to inaugurate. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 749–750. The result in the present case is a gross discrimination against shippers to the Southeast.[4]

There may be cases of special charges for special services where the validity of the rate under § 2 is dependent on whether the line-haul conditions are the same.[5] Yet § 2, though primarily related to the line-haul, is not restricted to it. *Merchants Warehouse Co.* v. *United States, supra.* At least where the service in question is purely accessorial, § 2 is applicable though the line-hauls are not over the same line, for the same distance and to the same destination. Where § 2 is applicable, competitive factors (such as those on which the Commission relied) are no justification for the discrimination. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166; *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 342; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62; Absorption of Loading Charge, 161 I. C. C. 389, 391; Allowance for Driving Horses, 227 I. C. C. 387, 389. The justification under § 2 for "unequal rates must rest in the facts of carriage and not in the financial interests of the carrier." Sharfman, The Interstate Commerce Commission, Pt. 3, Vol. B, p. 371.

There are, of course, occasions when a consideration of the line-haul rate in relation to the charge for an accessorial

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[4] None of the carriers to the Southeast serves the Gulf ports. Appellee carriers have only a short part of the line-haul on cotton from Oklahoma to the Southeast.

[5] The Commission apparently has so treated the problem of absorption of switching charges. See Tide Water Oil Co. *v.* Director General, 62 I. C. C. 226; Restriction of Kansas City Switching District, 146 I. C. C. 438, 440. And see *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57. Cf. *United States* v. *American Tin Plate Co.*, 301 U. S. 402.

service is proper. That is the case where a rate has been challenged under § 1 (5) (a) as not being "just and reasonable." In that event it is wholly proper to determine whether elements of cost not provided in the separate rate are in fact included in the line-haul rate. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 219–220; Perishable Freight Investigation, 56 I. C. C. 449, 461–465; *Alton & Southern R. Co.* v. *United States,* 49 F. 2d 414, 417–428. But the issues framed by § 1 (5) (a) are larger than the more limited ones under § 2. And though the rate is just and reasonable under § 1, it may nevertheless create an unjust discrimination under § 2. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.,* 145 U. S. 263, 277; *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 524.

But it is said that the loading charge is a component part of the total line-haul charge; that competitive conditions would justify a reduction in the line-haul tariff; and that a shipper is affected no more by an increase or decrease in one than in the other. It is therefore argued that changes in the charge for this accessorial service may be treated the same as if the line-haul tariff were in issue. That argument, however, results in this: an adjustment in charges for accessorial services such as loading is utilized as an indirect method of adjusting line-haul rates. That is not permitted under this statutory system. Although charges for services such as loading are a part of the total line-haul charge, they must be separately stated in the tariffs. § 6 (1); Rule 10 (a), *supra,* note 2. This proceeding put in issue not the line-haul tariff but the separately stated charge for loading, since the amended tariff made no change in the former. To allow this proceeding to be used to adjust indirectly the line-haul tariff is to circumvent the Act. The difference between the removal of a discrimination and the adjustment or fixing of rates

has long been recognized. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 145. The present line-haul rate is a through or joint rate in which carriers other than the appellee roads participate. Those other carriers are not parties to this proceeding; nor does it appear that they have consented to any adjustment of the line-haul rates. Congress has prescribed in § 15 (3) how those rates may be adjusted. It may be done only after a "full hearing," which means that all other carriers who are parties to the tariff must be joined. Stevens Grocer Co. *v.* St. Louis, I. M. & S. Ry. Co., 42 I. C. C. 396, 398; McDavitt Bros. *v.* St. Louis, B. & M. Ry. Co., 43 I. C. C. 695; *United States* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 283, note 6; Rules of Practice (I. C. C. 1936), Rule II (c) and (d). And the Commission may then adjust the through rates or joint rates either with or without the consent of the carriers. *St. Louis S. W. Ry. Co.* v. *United States, supra.* On the other hand, the loading charge, like the transit privilege involved in *Central R. Co.* v. *United States,* 257 U. S. 247, 255, 259, is a tariff for which other carriers participating in the through or joint rates are not necessarily responsible. In short, Congress has prescribed the procedure for obtaining adjustments of line-haul rates. That method is different from the one provided for adjusting a separate tariff of the kind we have here. We should not allow the procedure for readjusting line-haul rates to be circumvented through the rebate route. Cf. *Central R. Co.* v. *United States, supra.*

The determination by the Commission on the question of discrimination under § 2 is ordinarily a question of fact. *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, 322. Its findings on that issue are entitled to great weight (*Seaboard Air Line Ry. Co.* v. *United States, supra*) and will be given the respect which expert judgment on the intricacies of rate structures deserves. But disregard of the statutory standards is another matter. *Central R. Co.* v. *United States, supra.*

Since I would rest the reversal of the judgment below on § 2, it is not necessary for me to reach the issues raised under § 3.

MR. JUSTICE ROBERTS, MR. JUSTICE BLACK and MR. JUSTICE REED join in this dissent.

ROCHE, U. S. DISTRICT JUDGE, ET AL. *v.* EVAPORATED MILK ASSOCIATION ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 584. Argued April 6, 1943.—Decided May 3, 1943.

1. The Circuit Court of Appeals is empowered by § 262 of the Judicial Code to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, agreeably to the usages and principles of law. P. 24.
2. As the jurisdiction of the Circuit Court of Appeals is exclusively appellate, its authority to issue writs of mandamus is restricted to those cases in which the writ is in aid of that jurisdiction. P. 25.
3. The authority of the Circuit Court of Appeals to issue writs of mandamus is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. P. 25.
4. The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. P. 25.
5. In the circumstances of this case, issuance by the Circuit Court of Appeals of a writ of mandamus, directing the District Court to reinstate the defendants' pleas in abatement to an indictment for violation of the Sherman Act and to set for trial the issues raised by the pleas and replications, was inappropriate. P. 25.

   The District Court's order striking the pleas in abatement was an exercise of its jurisdiction and involved no abuse of judicial power; the legislation and policy of Congress by which an appellate review of such orders may be had only on review of a final judgment of conviction are not to be circumvented by resort to mandamus.
6. Where the appeal statutes establish the conditions of appellate review, an appellate court can not rightly exercise its discretion to

issue a writ the only effect of which would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. P. 30.

130 F. 2d 843, reversed.

CERTIORARI, 318 U. S. 747, to review a judgment of the Circuit Court of Appeals directing the issuance of a writ of mandamus to the District Judge and the District Court.

Mr. Paul A. Freund argued the cause, and *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Charles H. Weston, Kenneth L. Kimble,* and *Robert L. Stern* were on the brief, for petitioners.

Mr. Francis R. Kirkham, with whom *Messrs. Marshall P. Madison, Herbert W. Clark, Arthur B. Dunne, U. S. Webb, Maurice E. Harrison, Willis I. Morrison, Joseph A. Murphy,* and *Nat Brown* were on the brief, for respondents.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the Circuit Court of Appeals below rightly issued its writ of mandamus to the district court to correct that court's alleged error in striking respondent's pleas in abatement to a criminal indictment.

An indictment returned in June, 1941, by the grand jury sitting in the district court for Southern California, charged respondents and others with conspiracy to fix the price of evaporated milk sold in interstate commerce in violation of §§ 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1, 3. The indictment recited that the grand jury which returned it had been impaneled at the November, 1940, term of court; that it had "begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment"; and that by order of the court the grand jury had continued to sit

during the March, 1941, term "for the sole purpose of finishing investigations begun but not completed during said November Term."

In September, 1941, respondents filed pleas in abatement, asking that the indictment be quashed for want of jurisdiction of the court, on averments that the minutes of the grand jury for its meeting of February 28, 1941, disclosed that no investigation of any matter mentioned in the indictment had been "begun" by the grand jury within the meaning of § 284 of the Judicial Code, 28 U. S. C. § 421,[1] during the November, 1940, term of court, which expired March 2, 1941.[2]

The Government filed replications denying generally all the allegations of the pleas, and the issues thus raised

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[1] That section provides in part:

"A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months . . ."

[2] The grand jury minutes for February 28, 1941, stated:

"Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected. (See below.) Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned."

Then below the following appears:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food Industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland, Asparagus and Cherries."

were set for trial before a jury. Thereafter leave was granted to the Government to withdraw its replications and to file demurrers to the pleas, and motions to strike them because insufficient in law, because they failed to state specific facts with sufficient certainty, and because they alleged facts which could not be within the pleaders' knowledge. After argument the district court sustained the demurrers and granted the motions. Respondents thereupon instituted the present proceeding by their petition to the Circuit Court of Appeals for the Ninth Circuit, praying that a writ of mandamus issue directing petitioners—the Honorable Michael J. Roche, district judge, and the district court—to reinstate the pleas in abatement and the Government's replications, and to set the issues raised by the pleas and replications for jury trial.

On the petition for the writ and the Government's return, the court of appeals ordered the writ to issue. Upon rehearing before the full court sitting *en banc* the court held that it had jurisdiction to issue the writ; that the district court had erred in striking the pleas in abatement; that the case was an appropriate one for intervention by mandamus; and that the writ should issue directing petitioners to reinstate the pleas in abatement and the replications, and to try the issues of fact thus raised. 130 F. 2d 843. The court of appeals seems to have regarded the district court's order striking the pleas in abatement as in effect a refusal to act upon the pleas, *id.* 845. We granted certiorari, 318 U. S. 747, on a petition which set up that the circuit court of appeals erred in directing that mandamus issue, and in holding that the district court erred in striking the pleas in abatement.

Petitioners concede that the circuit courts of appeals, like this Court, may, as provided by § 262 of the Judicial Code, 28 U. S. C. § 377, "issue all writs not specifically provided for by statute, which may be necessary for the

exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *McClellan* v. *Carland,* 217 U. S. 268, 279; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 272–3. They argue that as the district court's order striking the pleas in abatement was an exercise of its jurisdiction, its action is reviewable only on appeal and not by mandamus, and that since by Congressional enactment and policy appellate review of the district court's order may be had only on review of a final judgment of conviction, that legislation and policy are not to be circumvented by resort to mandamus.

We are of opinion that in the circumstances of this case these are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ.

As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal. *Ex parte Bradstreet,* 7 Pet. 634; *Insurance Company* v. *Comstock,* 16 Wall. 258, 270; *McClellan* v. *Carland, supra,* 280; *Ex parte United States,* 287 U. S. 241, 246; cf. *Ex parte Siebold,* 100 U. S. 371, 374–5; *Ex parte Peru,* 318 U. S. 578, and cases cited.

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. *Ex parte Peru, supra,* p. 584, and cases cited; *Whitney* v. *Dick,* 202 U. S. 132, 136, 140. Hence the question presented on this record is not whether the court below had

power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.

The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru, supra,* p. 584, and cases cited; *Ex parte Newman,* 14 Wall. 152, 165–6, 169; *Ex parte Sawyer,* 21 Wall. 235, 238; *Interstate Commerce Comm'n* v. *United States ex rel. Campbell,* 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding,* 219 U. S. 363, 369; cf. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66.

But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment, is not questioned. This is not a case like *Ex parte Bain,* 121 U. S. 1, where the petitioner had been convicted on an indictment which, because it had

been amended after it was returned by the grand jury, was thought to be "no indictment of a grand jury." Here the indictment was returned by the requisite number of duly qualified grand jurors, acting under order of the court continuing the grand jury in session. The objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court. Cf. *Breese* v. *United States,* 226 U. S. 1, 10–11; *Kaizo* v. *Henry,* 211 U. S. 146, 149; *Matter of Moran,* 203 U. S. 96, 104; *Harlan* v. *McGourin,* 218 U. S. 442, 451; *In re Ward,* 173 U. S. 452, 454.

Nor does this case involve a refusal by the district court to adjudicate issues properly presented to it, such as justified the issuance of the writ in *McClellan* v. *Carland, supra.* Compare *Ex parte United States, supra.* In sustaining the Government's demurrers to the pleas and its motions to strike, the district court did not, as the court below seemed to think, refuse to act on the pleas. Instead, it held that they were insufficient in law to abate the criminal prosecution. In thus ruling on questions of law decisive of the issue presented by the pleas and replications the district court acted within its jurisdiction as a federal court to decide issues properly brought before it. Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari.[3]

Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been

[3] In the court below, petitioners urged that the decision of the district court in striking the pleas in abatement could not have been reviewed by the circuit court of appeals after final judgment by rea-

prescribed or to review an appealable decision of record. *Ex parte Morgan,* 114 U. S. 174, 175; *In re Atlantic City R.*

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son of R. S. § 1011, which has been carried over in substance into 28 U. S. C. § 879. R. S. § 1011 provides:

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

This provision was taken from § 22 of the Judiciary Act of 1789, 1 Stat. 73, 84, a section which was in terms applicable only to civil cases. Neither the Judiciary Act of 1789 nor the Revised Statutes made any provision for review of federal criminal cases on writ of error, although R. S. §§ 651 and 697 provided for certification to the Supreme Court of questions arising in criminal cases. Review on writ of error of criminal cases in the federal courts was first established by the Act of Mar. 3, 1879, 20 Stat. 354, authorizing review of district court decisions by circuit courts. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, the Supreme Court was given appellate review of capital cases on writ of error, and §§ 5 and 6 of the Judiciary Act of 1891, 26 Stat. 826, 827–8, abolished the appellate powers of the circuit courts, enlarged the appellate criminal jurisdiction of the Supreme Court, and authorized review of criminal cases tried in the circuit and district courts, by the circuit courts of appeals on writ of error.

None of these acts contains any provision making applicable to criminal cases reviewed on writ of error the limitations which § 22 of the Judiciary Act of 1789 imposed on such review of civil cases. Although R. S. § 1011 is phrased in terms of general applicability, it was held in *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213, that the rearrangement and rewording in the Revised Statutes of § 22 of the Judiciary Act of 1789 was not intended to change the meaning of that section, and that since § 22 had applied only to cases from federal courts, R. S. § 1011 did not prevent consideration of a ruling on a plea in abatement in a case on writ of error from a state court. We think that similar reasoning applies here to preclude the section's application to criminal cases, to which in its original form it did not apply.

In a large number of criminal cases, this Court and the circuit courts of appeals have reviewed on the merits decisions overruling or refusing to entertain pleas in abatement, although without reference to R. S § 1011. *Agnew* v. *United States,* 165 U. S. 36, 43–5; *Bram* v. *United*

Co., 164 U. S. 633, 635; *Ex parte Roe*, 234 U. S. 70, 73; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414; *Ex parte Riddle*, 255 U. S. 450, 451. Circuit courts of appeals, with exceptions not now material, have juris-

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States, 168 U. S. 532, 566–8; *Crowley* v. *United States*, 194 U. S. 461, 468–74; *Holt* v. *United States*, 218 U. S. 245, 247–8; *Hyde* v. *United States*, 225 U. S. 347, 372–4; e. g. *Dunn* v. *United States*, 238 F. 508; *Breese* v. *United States*, 143 F. 250, 252–3; *Mulloney* v. *United States*, 79 F. 2d 566, 572–80; *Hillman* v. *United States*, 192 F. 264, 269–70; *Lowdon* v. *United States*, 149 F. 673. A few circuit courts of appeals have said that the section prevented appellate consideration of a decision overruling a plea in abatement to an indictment, although also holding that the pleas were properly overruled. *Mounday* v. *United States*, 225 F. 965, 967 (C. C. A. 8); *Luxenberg* v. *United States*, 45 F. 2d 497, 498 (C. C. A. 4); *Biemer* v. *United States*, 54 F. 2d 1045 (C. C. A. 7); *United States* v. *Molasky*, 118 F. 2d 128, 133 (C. C. A. 7). And the section has on occasion been cited as precluding appellate review of the weight and sufficiency of the evidence in criminal cases—a proposition which hardly needs its support. *Miles* v. *United States*, 103 U. S. 304, 313; e. g. *Jaramillo* v. *United States*, 76 F. 2d 700; *Rosenberg* v. *United States*, 15 F. 2d 179, 181; *Jezewski* v. *United States*, 13 F. 2d 599, 602; *Stoecko* v. *United States*, 1 F. 2d 612, 613; *Kinser* v. *United States*, 231 F. 856, 861. The fact that the great majority of appellate decisions, including all in this Court, have considered pleas in abatement on the merits, establishes a practice, beginning soon after the first authorization of criminal appellate review, which is persuasive of the statutory intent.

Our conclusion that R. S. § 1011 is inapplicable to criminal cases is reinforced by a consideration of the kinds of objections which in a criminal case may properly be the subjects of a plea in abatement. Although frequently described as a dilatory plea which should be strictly construed, *United States* v. *Greene*, 113 F. 683, 688–9, such a plea is an appropriate means of raising objections to an indictment which may involve serious and prejudicial infringements of procedural rights, such as an objection to the qualifications of grand jurors, *Crowley* v. *United States*, *supra* (compare the Act of April 30, 1934, 48 Stat. 648, 649, 18 U. S. C. 554a); to the method of selection of the grand jury, *Agnew* v. *United States*, *supra* (cf. *Glasser* v. *United States*, 315 U. S. 60, 85); or to its composition, see *Carter* v. *Texas*, 177 U. S. 442, 447.

diction to review only final decisions of district courts, 28 U. S. C. § 225 (a).[4] Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States,* 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a "plain evasion" of the Congressional enactment that only final judgments be brought up for appellate review. "The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment." *Bank of Columbia* v. *Sweeney,* 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams,* 9 Pet. 573, 602; *Ex parte Hoard,* 105 U. S. 578, 579–80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.,* 148 U. S. 372, 379.

For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. *Ex parte Hoard, supra; Ex parte Harding,*

[4] By the Act of May 9, 1942, Pub. L. No. 543, 77th Cong., 2d Sess., the Government is given a right of appeal from a decision or judgment sustaining a plea in abatement to an indictment or information or any count thereof.

supra; Ex parte Roe, supra; Ex parte Park Square Automobile Station, supra.[5] And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, *In re Atlantic City R. Co., supra; Ex parte Chicago, R. I. & P. Ry. Co.*, 255 U. S. 273, 280; cf. *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531, or denying a nonsuit, *Ex parte Loring*, 94 U. S. 418, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. *Ex parte Whitney*, 13 Pet. 404, 408; *Ex parte Perry*, 102 U. S. 183, 186. Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct. Hence there are in this case no special circumstances which would justify the issuance of the writ, such as the persistent disregard of the Rules of Civil Procedure prescribed by this Court, found in *McCullough* v. *Cosgrave*, 309 U. S. 634 (see *Los Angeles Brush Co.* v. *James*, 272 U. S. 701, 706–8); or the refusal to perform a plain ministerial duty, involved in *Ex parte United States, supra;* or the considerations of comity between state and federal courts, thought to be controlling in *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 29.

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[5] Mandamus has frequently been used to compel the remand to a state court of a criminal case improperly removed under §§ 31–33 of the Judicial Code, 28 U. S. C. §§ 74–6. *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, and cases cited; *Colorado* v. *Symes*, 286 U. S. 510. But removal of such cases involves an extraordinary interference with a state's administration of criminal justice such as to justify an exceptional use of the writ. Moreover, in those cases there was no provision for appeal by the state from an acquittal, *Maryland* v. *Soper, supra*, 30; cf. *United States* v. *Sanges*, 144 U. S. 310. And see *Kepner* v. *United States*, 195 U. S. 100, with which compare *Palko* v. *Connecticut*, 302 U. S. 319, 322–3.

The decisions of this Court on which respondents especially rely are not applicable here. In *Ex parte Simons,* 247 U. S. 231, the writ directed the district court to set aside its order transferring to the equity docket a case plainly triable at law by jury. The district court's order was regarded by this Court "as having repudiated jurisdiction" of the suit. In *Ex parte Peterson,* 253 U. S. 300, in which the writ was sought similarly to compel the district court to set aside its order referring the cause to an auditor, the application was denied because the order was held not to preclude a jury trial. And in *Ex parte Skinner & Eddy,* 265 U. S. 86, the writ prohibited the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. There its assumption of jurisdiction would have deprived the litigants of trial by jury in a state court where an action against an agency of the United States involving the same issue was pending. Thus in the two cases in which the writ was granted, it was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated. Cf. *Ex parte Peru, supra.* In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court.

Reversed.

Mr. Justice Murphy took no part in the consideration or decision of this case.

BOWLES *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 589. Argued April 14, 1943.—Decided May 3, 1943.

1. The Court takes judicial notice of a decision of the Director of Selective Service rendered on an appeal pursuant to the Selective Training and Service Act of 1940. P. 35.
2. Upon review here of a conviction under § 11 of the Selective Training and Service Act of 1940 for failure of the defendant to respond to an order of his draft board to report for induction into the Army, it appears that the induction order rests not on the alleged erroneous interpretation of the Act which the defendant urged as a defense to the criminal proceeding, but on the Selective Service Director's controlling determination of fact, adverse to the defendant's claim of conscientious objection to military service; and the judgment is affirmed. P. 35.
3. The trial court's denial to the defendant of access to his Selective Service file, review of which ruling was not here sought, was, at most, harmless error. P. 36.

131 F. 2d 818, affirmed.

CERTIORARI, 318 U. S. 749, to review the affirmance of a conviction for violation of the Selective Training and Service Act.

Mr. Osmond K. Fraenkel for petitioner.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Mr. Richard S. Salant* were on the brief, for the United States.

PER CURIAM.

Petitioner has been convicted in the district court of violating § 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, in that he failed to respond to an order of his draft board to report for induction into the Army. On the trial, he set up as a defense that he was

entitled to exemption from the draft as a conscientious objector under the provisions of § 5 (g) of the Act; that he had claimed his exemption before the local draft board which rejected it; that, on his appeal to the appropriate appeal board, the Department of Justice, acting pursuant to § 5 (g), had submitted to the board its advisory recommendation that petitioner's objection to military service be sustained, but that the appeal board, by reason of an erroneous interpretation of the statute, had rejected petitioner's claim of exemption.

In the course of the trial, petitioner sought leave to inspect his entire Selective Service file, as he apparently is authorized to do by § 605.32 of the Selective Service Regulations. On objection of the Government, leave was denied by the district court. Petitioner has not presented this question for review by his petition for certiorari. The court also excluded evidence proffered by petitioner to show that the appeal board had rejected his appeal on the ground that, as he was not a member of a recognized religious organization opposed to participation in war, he was not entitled to exemption by the statute, which grants the exemption only to a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." In particular the trial court excluded a letter to petitioner by the chairman of the appeal board which expressed the opinion that the statutory exemption applies only to members of a "religious sect or cult that has as one of its canons a resistance to participation in activity of armed forces or participation in war."

On appeal the circuit court of appeals affirmed, 131 F. 2d 818. It thought that if the appeal board rejected the claim of exemption for the reasons asserted by petitioner, the board erroneously interpreted the statute. But the court held that such an error could not be set up as a defense to the indictment charging petitioner's failure to

comply with the order to report for induction. The court suggested that petitioner's appropriate remedy was by petition for habeas corpus after the administrative appeal procedure provided by the Act had been concluded, and after he had submitted to induction. We granted certiorari, 318 U. S. 749, because of the public importance of the questions of law decided by the circuit court of appeals.

But it now appears from the proceedings in this Court that the judgment should be affirmed without decision of those questions. On the argument before us the Government, which in the district court had denied petitioner access to his Selective Service file, produced from the file, and tendered for our consideration (1) a copy of petitioner's appeal to the President from the action taken by the appeal board, (2) a copy of the decision on that appeal rendered by the Director of Selective Service, by authority of the President and pursuant to § 628.1 of the Selective Service Regulations, and (3) a copy of the letter of the draft board notifying petitioner that upon his appeal to the President his classification had been affirmed and that he would therefore be ordered to report for induction.

The decision of the Director, of which we take judicial notice, *Caha* v. *United States,* 152 U. S. 211, 221–22; *Thornton* v. *United States,* 271 U. S. 414, 420; *The Paquete Habana,* 175 U. S. 677, 696, antedated the order of the draft board directing petitioner to report for induction. The claim to exemption was rejected by the Director on the ground that in fact petitioner was not conscientiously opposed to military service, and that he was therefore not entitled to the benefit of the exemption prescribed by the Act. Before the local draft board issued its order to petitioner, the appeal board's determination which he assails here, had been superseded by the action taken by the Director on the final appeal to the President. Hence the order rests on the Director's controlling

determination of fact, adverse to petitioner's claim of conscientious objection to military service, and not on the alleged erroneous interpretation of the Act which petitioner urges as a defense in the present criminal proceeding.

It thus appears that that defense to the criminal charge could never have been available to petitioner in this proceeding; that at most it was harmless error, which petitioner has not sought to review here, to deny him access to his Selective Service file; and that the judgment must be affirmed without consideration of the points of law on which the court below rendered its decision and which were urged as grounds for certiorari.

Affirmed.

MR. JUSTICE JACKSON, dissenting:

Bowles was indicted for failing to respond to an order for induction into the Army. He sought to show that the order of induction was invalid because his classification had been made under a wrong interpretation of the law. He had a letter from the Board of Appeal, a part of which showed that at one time and in one aspect the Board clearly misapprehended the law applicable to his case. He sought to inspect his Selective Service file, as he had a right to do. This file would show when and how, if ever, his case was considered under a proper understanding of the law. The prosecutor refused to produce the file and kept it out of evidence. Bowles was convicted.

Bowles asks us to review the trial court's ruling that even if he was wrongly classified through mistake of law it is no defense to the indictment. The Government succeeds in persuading us to refuse to entertain this question, by printing in its brief a copy of a decision by General Hershey, acting for the President, denying petitioner's appeal. No question has been raised as to the authenticity of this copy, and I raise none. But the facts remain

that, for some reason, the prosecution denied Bowles the right to inspect his Selective Service file and kept it out of evidence. What the file may reveal I do not know. I strongly suspect he will be no better off for seeing it. Yet the prosecuting attorneys presumably knew what was in the file and they withheld it from him. My experience indicates that it would be more reasonable to assume that they illegally suppressed the file to help their case than to assume such behavior was purposeless. I see no reason why the strong inferences that usually arise from suppression, destruction, or failure to produce evidence in control of a litigating party should not apply here. I am confident that counsel handling this case in this Court not only would not suppress, but would disclose to us, any relevant part of this file, whether it helped or hurt their case. But confidence in counsel founded on personal knowledge is not a safe basis for establishing a practice.

Bowles was forced to try his case in the dark, being refused information to which he was entitled. It is true that he did not assign this as grounds for certiorari. But it is not Bowles who is here trying to use the information contained in the file. The citizen, of necessity, has few rights when he faces the war machine. One of them is the right to know what happened to him and why, as shown by his Selective Service file, even if he is not able to do anything about it.

The ultimate question raised by Bowles is whether one indicted for failing to submit to an induction order may defend by showing that the order is invalid. The Court considers the parts of the file now tendered by the Government and accepts the Government's suggestion that "the record does not properly present the question whether petitioner was entitled to contest the validity of his order to report for induction." The Court does not consider whether one may be convicted for disobeying an invalid

order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the Court precludes its determination of the question. But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made.

If we are to consider the decision of the case by General Hershey and assume that the file contains nothing else helpful to the defendant, I agree with the Court's conclusion that Bowles is defenseless. But where the prosecution has illegally closed to the defendant files to which he was entitled, I do not think we should allow it to supplement the record here for the purpose of precluding decision of questions which, even if doubtful, Bowles seems entitled to raise if he can establish that the order of induction was illegal. To let the Government foreclose the question by producing records here which if ever relevant should have been examined in the court below seems to let the prosecution eat its cake and have it too.

MR. JUSTICE REED joins in this opinion.

STEFFLER *v.* UNITED STATES.

ON MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE.

No. 14, Original. Decided May 3, 1943.

A poor person entitled to prosecute an appeal from the District Court to the Circuit Court of Appeals is authorized by the in forma pauperis statute to apply to the District Court for leave to appeal in forma pauperis, and it is the duty of the District Court to entertain the application. P. 40.

Fred Steffler, pro se.

PER CURIAM.

In 1938 petitioner pleaded guilty, in the District Court for the Southern District of Indiana, to an indictment charging him with entering a state bank insured with the Federal Deposit Insurance Corporation, with intent to commit larceny, 50 Stat. 749, and was sentenced to fifteen years imprisonment. In 1942 he made a motion in that court to set aside the judgment of conviction on the grounds, among others, that the indictment did not state an offense against the United States and that he had been denied the assistance of counsel at the trial. The district court denied the motion without taking testimony or making findings of fact, and denied an application for rehearing. Petitioner lodged with the clerk of the district court a petition for leave to appeal to the circuit court of appeals in forma pauperis. The clerk returned this to him by letter, stating, "Under the law the petition to prosecute an appeal in forma pauperis should be submitted to the United States circuit court of appeals and not the district court. Therefore your motion for leave to appeal in forma pauperis and order thereon are returned herewith."

Petitioner then applied to the Circuit Court of Appeals for the Seventh Circuit for leave to appeal in forma pauperis, which court denied the application. He now seeks certiorari in this Court under § 262 of the Judicial Code, 28 U. S. C. § 377 (see *In re 620 Church Street Corp.*, 299 U. S. 24, 26; *Holiday* v. *Johnston*, 313 U. S. 342, 348, n. 2), upon a petition which sets up, among other alleged errors, the denial by the district court of his motion to set aside the judgment of conviction, and its refusal to entertain his application for leave to appeal in forma pauperis. He also asks to be permitted to proceed in forma pauperis in this Court.

It is evident on the face of the papers that petitioner has been unable to prosecute an appeal or to secure ap-

pellate review by reason of the refusal of the district court to entertain his application to appeal in forma pauperis and the denial of a like application by the circuit court of appeals. Appeal from the district court's order denying petitioner's motion to vacate the conviction is governed by § 8 (c) of the Act of February 13, 1925, 28 U. S. C. § 230, which requires that proper application be made for allowance of an appeal. *Wells* v. *United States,* 318 U. S. 257, 260, and cases cited. But petitioner's filing of a motion for leave to appeal with the clerk of the district court was a sufficient application, in view of the fact that an appeal may be allowed by either the district court or the district judge. *Ex parte Railroad Co.,* 95 U. S. 221, 227; *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174, 175–76. The district court declined to consider petitioner's application, apparently on the ground that the in forma pauperis statute required that his right to appeal as a poor person be determined by the circuit court of appeals instead of by the district court.

The Act of June 25, 1910, 36 Stat. 866, as amended, 28 U. S. C. § 832, granting the right to proceed in forma pauperis, provides that "Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the Unted States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals . . ., including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs . . ." It is plain that under these provisions petitioner, being a poor person entitled to prosecute an appeal from the trial court to the circuit court of appeals, was authorized to apply to the district court for leave to appeal in forma pauperis and that it was the duty of the district court to entertain his application. See *Wells* v.

United States, supra. The statute authorizes the suit, including the appeal, to be prosecuted in forma pauperis upon order of the court in which the proceeding is commenced. The right to appeal in forma pauperis from the district court to the circuit court of appeals is not conditioned upon the consent of the circuit court of appeals, even though it be assumed that that court could grant such permission.

It follows that petitioner's application for appeal in forma pauperis should have been entertained by the district court and that opportunity should now be given to that court to act on the application before the consideration of other questions which the petitioner seeks to raise here by his application for certiorari. We accordingly grant the motion to proceed in forma pauperis in this Court. We also grant the petition for certiorari, and remand the cause to the district court for further proceedings in conformity to this opinion.

So ordered.

ST. PIERRE *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 687. Argued April 15, 1943.—Decided May 3, 1943.

1. The sentence which this Court granted certiorari to review having been fully served, and petitioner not having shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment, the cause is moot and the writ of certiorari is dismissed. P. 42.
2. The moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review. P. 43.

Dismissed.

CERTIORARI, 318 U. S. 751, to review the affirmance (132 F. 2d 837) of a sentence to imprisonment for contempt of court.

Mr. Edward V. Broderick, with whom *Messrs. S. Bertram Friedman* and *Joseph H. Broderick* were on the brief, for petitioner.

Solicitor General Fahy, Assistant Attorney General Berge, and *Messrs. Robert L. Stern* and *Oscar A. Provost* and *Misses Melva M. Graney* and *Beatrice Rosenberg* were on the brief, for the United States.

PER CURIAM.

Petitioner, who it is alleged had in his testimony before a federal grand jury confessed to the commission of the crime of embezzlement, refused to divulge the name of the person whose money he had embezzled. For the refusal the district court sentenced him to five months' imprisonment for contempt of court, and the circuit court of appeals affirmed the judgment. 132 F. 2d 837. We granted certiorari, 318 U. S. 751, on a petition which raised important questions with respect to petitioner's constitutional immunity from self-incrimination. In the order allowing the writ we requested counsel to discuss the question whether the case had become moot.

On the argument it was conceded that petitioner had fully served his sentence before certiorari was granted. We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 115–16, and cases cited; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475–77. The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term

of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied. In these respects the case differs from that of an injunction whose command continues to operate *in futuro* even though obeyed. *Federal Trade Comm'n* v. *Goodyear Co.*, 304 U. S. 257, 260, and cases cited.

It does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence, and although it is said he applied for bail to the district court and to the circuit court of appeals, he did not apply to this Court for a stay or a supersedeas. The Government admits that petitioner will be required to testify again before the grand jury and that in the event of his refusal it will ask that he be committed until he answers. In that case, there will be ample opportunity to review such a judgment; and even though he be sentenced to a fixed term, the questions which he seeks to raise here may be preserved by his admission to bail, or by the grant of a stay or a supersedeas, for which he may apply to this Court if necessary. In all these respects the case differs from *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, which we do not regard as controlling here.

Petitioner also suggests that the judgment may impair his credibility as witness in any future legal proceeding. But the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review. Since the cause is moot, the writ will be

Dismissed.

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SOUTHLAND GASOLINE CO. *v.* BAYLEY ET AL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 581. Submitted April 5, 1943.—Decided May 3, 1943.

The exemption from the maximum hour provisions of the Fair Labor Standards Act, by § 13 (b) (1), of any employee with respect to whom the Interstate Commerce Commission "has power" under § 204 of the Motor Carrier Act of 1935 to establish maximum hours of service, became effective immediately as to those employees of private carriers of property by motor vehicle with respect to whom § 204 (a) (3) gave the Commission the power to establish maximum hours of service "if need therefor is found," and did not become effective only from the later date when the Commission exercised the power. P. 47.

No. 581, 131 F. 2d 412, reversed.

No. 725, 132 F. 2d 627, affirmed.

CERTIORARI, 317 U. S. 623 and 318 U. S. 750, to review, in No. 581, the reversal, and, in No. 725, the affirmance, of judgments dismissing the complaints in suits brought by employees to recover sums alleged to be due them under the Fair Labor Standards Act.

Mr. Claude H. Rosenstein submitted for petitioner in No. 581. *Mr. George A. Mahone* for petitioner in No. 725.

Mr. C. D. Atkinson submitted for respondents in No. 581. *Messrs. O. Bowie Duckett, Jr.,* and *Charles T. LeViness,* with whom *Mr. Edward E. Hargest, Jr.,* was on the brief, for respondent in No. 725.

Solicitor General Fahy and *Messrs. Robert L. Stern* and *Irving J. Levy* and *Miss Bessie Margolin* filed a brief, in No. 581, on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* urging affirmance.

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*Together with No. 725, *Richardson* v. *James Gibbons Co.,* on writ of certiorari, 318 U. S. 750, to the Circuit Court of Appeals for the Fourth Circuit,—argued April 5, 1943.

MR. JUSTICE REED delivered the opinion of the Court.

By writs of certiorari these two cases were brought here to resolve the conflict between them over the proper interpretation of § 13 (b) (1) of the Fair Labor Standards Act of 1938.[1]

Section 7 of the Fair Labor Standards Act relates to the maximum number of hours per week an employer may employ an employee who is engaged in commerce or in the production of goods for commerce.[2] The scope of the exemption from the maximum hour standards granted by § 13 (b) (1) in turn depends upon the interpretation to be given § 204 (a) of the Motor Carrier Act. The portions of that section which are important here are set out below.[3]

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[1] 52 Stat. 1060, 1068, § 13 (b):

"The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

[2] The pertinent provisions of § 7 are as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063.

[3] 49 Stat. 543, 49 U. S. C. § 301:

"Sec. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable

These cases turn upon the interpretation to be given the exemption, by § 13 (b) (1) of the Fair Labor Standards Act, of employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." In the *Southland* case, the Circuit Court of Appeals for the Eighth Circuit construed this to exempt employees of private carriers of property from the requirements of the Fair Labor Standards Act only after the Interstate Commerce Commission has found need to establish maximum hours for such employees under the authority of § 204 (a) (3) of the Motor Carrier Act. *Bayley* v. *Southland Gasoline Co.*, 131 F. 2d 412. The Fourth Circuit, in the *Gibbons Company* case, was of the opinion that "power" in § 13 (b) meant the existence of the power and not its actual exercise. 132 F. 2d 627; cf. *Plunkett* v. *Abraham Bros. Packing Co.*, 129 F. 2d 419, 421, C. C. A. 6.

The employers in both cases are concededly private carriers of property, engaged in interstate commerce. All employees are subject to regulation to promote safety of operation under § 204 (a) (3). In both cases the employees seek recovery solely for the failure of their employers to pay them the time and a half for overtime as

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requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . ."

required by § 7 of the Fair Labor Standards Act. There is no claim for unpaid overtime compensation after May 1, 1940, the date that the Interstate Commerce Commission first found need to establish reasonable requirements as to maximum hours to promote safety in the operations of private carriers of property by motor vehicle under § 204 (a) (3).

The problem of statutory construction posed by this conflict of circuits should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542. The words of the sections under consideration are, however, basic data from which to draw the sections' meaning. Section 13 (b) (1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission "has power to" prescribe maximum hours of service. Section 204 (a) (3) certainly gives "power to" the Commission to establish maximum hours for the employees here involved. There is a limitation on the authority delegated, urged here by the employees as a condition precedent to the existence of the power. This is that the Commission may establish maximum hours only "if need therefor is found." Since the employees seek unpaid overtime compensation only for the period prior to a finding of need by the Commission, the employees argue that no "power" existed in the Commission during the time for which compensation is claimed. We conclude to the contrary. The power to fix maximum hours has existed in the Commission since the enactment of the Motor Carrier Act in 1935. Before that power could be used, it was necessary to make a

finding of need. Such a necessity, however, did not affect the existence of the power. Legislation frequently delegates power subject to a finding of need or necessity for its exercise.[4]

The general purposes of the Fair Labor Standards Act and of the Motor Carrier Act do not point to a different conclusion. With the adoption of the Motor Carrier Act, the national government undertook the regulation of interstate motor transportation to secure the benefits of an efficient system. Safety through the establishment of maximum hours for drivers was an important consideration. *Maurer* v. *Hamilton,* 309 U. S. 598, 604, 607. When Congress later came to deal with wages and hours, its primary concern was that persons should not be permitted to take part in interstate commerce while operating with substandard labor conditions. *United States* v. *Darby,* 312 U. S. 100, 115. The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 576, 577. By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime.

Not only does the language of § 13 (b) (1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor

[4] Cf. Federal Food, Drug and Cosmetic Act, § 401, 52 Stat. 1046, 21 U. S. C. 341; Emergency Price Control Act of 1942, § 2, 56 Stat. 24; Fair Labor Standards Act, § 8d, 52 Stat. 1064, 29 U. S. C. 208; Public Utility Holding Company Act of 1935, § 11, 49 Stat. 820, 15 U. S. C. 79 (k); Tariff Act of 1930, § 350 (a), 48 Stat. 943, 19 U. S. C. 1351; Alien Enemy Act, R. S. 4067, 50 U. S. C. § 21.

vehicles from the regulation by two agencies of the hours of drivers. No comment appears as to the desirability of statutory limitation on their hours prior to the establishment of maximum hours by the Commission. 81 Cong. Rec. 7875; 82 Cong. Rec. 1573 *et seq.* No distinction was pointed out between common, contract, and private carriers, although there was a distinction in § 204 (a). It would seem that if the point now urged had been in the mind of Congress it would have itself expressed the intention to leave private carriers subject to the Fair Labor Standards Act until the Commission took action.[5] Even under the argument of the employees, those drivers who work for common or contract carriers would not at any time be subject to the maximum hour provision of the Labor Act. Furthermore, it was said on the Senate floor that the amendment as to motor vehicle operators was to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service Acts.[6] These do not provide for overtime pay and like the subsections of § 204 of the Motor Carrier Act are immediately effective to exempt the railroad employees covered by their provisions from the maximum hour provisions of the Fair Labor Standards Act. Cf. note 1. Since the employees of contract and common motor carriers, as well as railway employees, are exempt from the Fair Labor Standards provisions for maximum hours by virtue of the same words which govern private motor carriers' employees, it would require definite evidence of a

[5] An understanding that the Interstate Commerce Commission had already acted upon maximum hours for drivers may have shortened the discussion of the amendment. 81 Cong. Rec. 7875. Subsequent to this discussion and prior to the passage of the Labor Act, the Commission had acted for common and contract carriers. Ex parte MC–2, 3 M. C. C. 665, 690. Private carriers were held to need regulation by the decision of May 1, 1940, Ex parte MC–3, 23 M. C. C. 1.

[6] 81 Cong. Rec. 7875; 34 Stat. 1415, 39 Stat. 721.

contrary Congressional purpose toward private carrier employees to lead us to accept the argument advanced here by the employees. No such evidence appears.[7]

No. 581, reversed.
No. 725, affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

NATIONAL LABOR RELATIONS BOARD *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 460. Argued March 5, 8, 1943.—Decided May 3, 1943.

The conclusion of the National Labor Relations Board in this case, that an association of employees which prior to the passage of the National Labor Relations Act in 1935 was a company-dominated and supported union had not ceased to be such, notwithstanding the reorganization of the association and efforts to dissipate the effect of such early domination, was supported by substantial evidence; and the order directing the company to disestablish completely the association as bargaining representative, and to cease and desist

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[7] District Courts which have interpreted § 13 (b) (1) have reached the same conclusion as we do. *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590; *Bechtel* v. *Stillwater Milling Co.*, 33 F. Supp. 1010; *Fitzgerald* v. *Kroger Grocery & Baking Co.*, 45 F. Supp. 812; *Gibson* v. *Wilson & Co.*, 2 Federal Carriers Cases ¶ 9604; *Derer* v. *Snow Ice, Inc.*, 3 Federal Carriers Cases ¶ 80,029. The Wage and Hour Division of the Department of Labor has taken the position that the Fair Labor Standards Act applies to drivers of private carriers until May 1, 1940, the date the Interstate Commerce Commission determined that need existed for their regulation. Interpretative Bull. No. 9, 5 Wage & Hour Rep. 233, 235, March 30, 1942.

*Together with No. 461, *National Labor Relations Board* v. *Southern Association of Bell Telephone Employees*, also on writ of certiorari, 317 U. S. 618, to the Circuit Court of Appeals for the Fifth Circuit.

from giving effect to the contractual arrangements resulting from the association's former representation of the employees, was within the authority of the Board. P. 60.

129 F. 2d 410, reversed.

CERTIORARI, 317 U. S. 618, to review judgments setting aside an order of the National Labor Relations Board, 35 N. L. R. B. 621, and denying the Board's petition for enforcement.

Mr. Robert B. Watts, with whom *Solicitor General Fahy* and *Messrs. Robert L. Stern* and *Ernest A. Gross* and *Miss Ruth Weyand* were on the brief, for petitioner.

Mr. Marion Smith, with whom *Mr. John A. Boykin, Jr.* was on the brief, for respondent in No. 460; and *Mr. James A. Branch,* with whom *Mr. Frank A. Hooper, Jr.* was on the brief, for respondent in No. 461.

MR. JUSTICE REED delivered the opinion of the Court.

On this certiorari the question is whether the order of the Board herein is supported by substantial evidence. Upon charges filed by the International Brotherhood of Electrical Workers, A. F. of L., the Board issued a complaint on February 17, 1941, against respondent Southern Bell Telephone and Telegraph Company, charging inter alia that respondent company was dominating and supporting respondent Southern Association of Bell Telephone Employees, hereafter referred to as the Association, as a labor organization of its employees in violation of § 8 (2) of the act, and that in other ways respondent company had interfered with the rights of its employees in the exercise of rights guaranteed them by § 7 in violation of § 8 (1) of the act.[1] After hearing, the Board made find-

[1] The pertinent provisions of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, are as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted

ings and conclusions in support of the stated charges and ordered that respondent cease and desist from dominating or interfering with the Association, from contributing financial and other support, recognizing it as the collective bargaining agency of its employees and giving effect to or entering into any collective bargaining contract with the Association and further that it cease and desist from interfering with its employees in the exercise of their rights, including the right to organize and bargain collectively, as guaranteed by § 7 of the act. Affirmative action ordered was that respondent withdraw all recognition from the Association and post appropriate notices to its employees.

Separate petitions were filed in the court below by respondent and the Association to review this order and

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activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

. . . . . .

"SEC. 10. . . .

"(c) . . . If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

. . . . . .

"(f) . . . the findings of the Board as to the facts, if supported by evidence, shall . . . be conclusive."

the Board answered, requesting enforcement. The court below held that the Board's findings were without support in the evidence and that the Board's order requiring the respondent to withdraw recognition from and to disestablish the Association as the collective bargaining agency of its employees was an abuse of discretion and contrary to the policy of the act. It accordingly vacated the order of the Board and denied the Board's petition for enforcement. We turn immediately to the facts of the case and the Board's findings.

Respondent does a general telephone business in nine southeastern states, furnishing local and long distance communication facilities, both interstate and intrastate. It has 23,000 employees and 1,375,000 subscribers.

The Association was organized in 1919 by respondent Company to represent its employees as a labor organization and admittedly until July 5, 1935, the date of the passage of the National Labor Relations Act, respondent liberally contributed support to the Association. The factual center of controversy here, resolved by the Board against the respondent, is whether this domination and interference came to an end with the reorganization of the Association in the spring and summer of 1935 or at any later date before the complaint. Another act of disassociation is alleged by respondent to have taken place on February 14, 1941.

There is testimony that in April and May, 1935, just before the passage of the National Labor Relations Act, the Association's president, Askew, in anticipation of the passage of the act, successfully canvassed the membership for fifty cent contributions so that the Association would have its own funds and be able to operate after the bill became a law. The Company aided the solicitation with advice, automobile transportation and expenses for the solicitors. Over five thousand dollars was raised. Three Association officials actively engaged in the fund

raising. Askew, the President, Weil, the vice-president and soon to be president, and Wilkes, the acting treasurer, were employees having close touch with the company management. Askew was a state cashier, Wilkes was secretary to key officials and Weil, plant practice supervisor, a position described by him as covering the distribution and explanation to the proper employees of printed routine job instructions.

On July 16, 1935, immediately after the passage of the Labor Act, Warren, respondent's vice-president in charge of operations, called a meeting of his chief supervisory employees, attended by Askew and Wilkes as Association officers. At this meeting the Wagner Act was discussed and a "hands-off" policy announced by the Company as to the organization of its workers. The supervisory employees were instructed to and did transmit these views down to the ranks by word of mouth, superior supervisors speaking to their inferiors. No mention was made at this meeting of the disestablishment or dissolution of the Association. A few days later a memorandum on the "Wagner Bill Interpretations" was issued by the Company and called to its employees' attention. It read as follows:

"The Company can continue to pay salaries of Association officers who are filling their regular jobs and doing Association work incidental to their regular duties.

"The Company can continue to pay the salaries of Association officers while engaged in conferring with Management and while they are meeting among themselves before or after these conferences to discuss their presentation or disposition of the matters involved. Salaries cannot be paid when Association officers are devoting their time solely to internal affairs of the Association.

"The Company cannot pay traveling expenses. However, all Management Representatives are anxious to cooperate and will endeavor to meet Association officers

at such times and places as will be most convenient and economical.

"The Association may continue to use Company premises for their meetings without charge. Space for the exclusive full time use of the Association could not be provided without proper charge.

"Association Local meetings cannot be held on Company time.

"The Association may use Company typewriters and other office facilities when such is incidental to the regular Company use of these facilities. Out-of-pocket expenses such as stamps, stationery and supplies cannot be borne by the Company.

"Association Representatives may make limited use of toll lines upon the same basis as is effective for employees generally.

"The expense of preparation and distribution of the Minutes of Joint Conferences will be borne by the Company."

This memorandum was revised in accordance with the Company's views of developments in the interpretation of the National Labor Relations Act. The most significant changes occurred in the revision of April 1937 when the paragraph as to salaries was changed to read:

"1. The Company can pay salaries of association officers while engaged in conferring with Management. The Company cannot pay salaries of association officers under the following conditions:

"(a) While they are meeting among themselves before and after joint conferences to discuss their presentation or disposition of the matters involved.

"(b) While association officers are devoting their time solely to internal affairs of the association."

In that issue, it was made clear that the Association must pay for services rendered by the Company, such as

space, long distance calls and collection of dues. The memorandum concluded:

"The provisions of this Act make it illegal for an employer to dominate or interfere with the formation or administration of any labor organization, and the Management of this Company should conscientiously observe these provisions."

No disestablishment of the Association as the representative of the employees in their negotiations with the management appears from this evidence and the Board found none.

Respondents urge that the historical continuity between the Company organized and financed employee association of 1919 to 1936 and the reorganized association of 1936 to date is not controlling in determining whether the Association was dominated by the Company in 1941. There was certainly sufficient evidence of continuity to form a basis for the Board's conclusion that the reorganization did not so completely displace the original association as to amount at that time to the creation of a "free and uninspired" employee agency. The reorganization was guided by the principal officers of the existing association. The vice-president of the old became the president of the new. Two of these active reorganizers continued in the higher offices of the Association through 1939. A new agreement with the Company, which for the first time provided for a check-off for association dues, was negotiated before the ratification of the changes in the association constitution, which were made in an attempt to conform to the National Labor Relations Act. The reorganization proceeded by revision rather than by original creation. Members were ineligible for election to offices in locals until a year from their admission and to the presidency until five years. In asking for new applications for membership, it was explained by the Association that it would provide a complete record of

membership "and it is not to be considered as a new application for membership." Until the March 1940 meeting, the preamble of the revised constitution referred to the formation of the Association in 1919. At that date, the preamble was changed so that it recited the date of the formation to be August 30, 1935.

The revision of the constitution was important from the standpoint of the Labor Act. The Company could no longer properly pay the expenses of the Association. Consequently the membership had to pay dues to meet the expenses. These changes were made.

Even though this continuity of the employee organization as a matter of law may not be controlling as to the continuance of dominance by the Company, it is at least evidence of such dominance, entitled to consideration by the Board. The effects of long practice persist. Notwithstanding freedom from labor difficulties, the disestablishment of an employee organization may be necessary to give untrammelled freedom for the creation of a bargaining unit. *Labor Board* v. *Greyhound Lines,* 303 U. S. 261, 271; *Labor Board* v. *Newport News Co.,* 308 U. S. 241, 250; *Westinghouse Electric & Mfg. Co.* v. *Labor Board,* 112 F. 2d 657, 660, affirmed 312 U. S. 660.

So much the respondents concede, or at least assume. They agree that a cleavage is necessary but they deny that the Board may decide that all that happened between the passage of the Act in 1935 and the issuance of the complaint in 1941 does not overcome the lawful domination prior to the enactment of the Act. Formal disestablishment is not, the Company says, the only act which will comply with the law and the evidence after the passage of the Labor Act shows without contradiction, so the respondents contend, that the Company was neutral and the Association the choice of the employees.

The Board called attention to minor favors shown the Association after 1935 by the Company. The use of a

Company bulletin board to post association notices, the limited use of employer space or facilities, the deduction of dues without charge, all without discrimination between employee organizations and prior to administrative and judicial clarification of the Labor Act, may be of little importance but they are a part of the circumstances from which the Board is to draw conclusions.

There is also evidence that in 1940 a long distance supervisor at Shreveport, Louisiana, at a superior's suggestion, undertook to influence two subordinates to favor the Association against the efforts of an outside union to secure members. While only a single incident, it is entitled to consideration by the Board.

The respondents' evidence shows further that when an outside union sought members among the Company employees and while the Labor Board was investigating charges of Association dominance by the Company, the Association wrote the Company in part as follows:

"Because such a charge clouds this Association's right to represent the employees of the Company and that under such circumstances the best interests of the employees may not adequately be served, the Association will not undertake to act as their collective bargaining agent pending a canvass of its membership by signed ballot."

Immediately the Company on February 14, 1941, posted notice to its employees which quoted §§ 7 and 8 of the Labor Act and then added:

"The Company Recognizes Its Employees' Right to Join, Form or Affiliate With Any Labor Organization of Their Own Choice and Freely to Exercise All Rights Secured to Them by This Act.

"The Company Guarantees Its Strict Compliance With All the Provisions of This Act and That No Employee Will Be Discriminated Against or Suffer Any Other Penalty Because of His or Her Exercise of Any Right Secured by This Act.

"The Company Is Not Interested in Whether Its Employees Join or Do Not Join Any Labor Organization." Thereafter, by means of a signed ballot poll, a majority of the employees indicated their desire to continue their membership in the Association and their choice of the Association as their representative for collective bargaining. Pending the poll, the Company continued in effect its 1940 agreement with the Association. After the poll and subsequent to a certification to it of the manner of voting and the result, the Company on March 6, 1941, recognized the Association as the "authorized collective bargaining agent of the employees of this company." The same agreement continued to govern the relations between the Company and the Association until the present hearing.

The respondents' evidence shows also that in the years 1936 to 1940, inclusive, the Association represented the employees in bargaining conferences over wages, hours and working conditions. Out of these conferences came substantial concessions to the employees, estimated by witnesses as worth more than three million dollars annually to the employees.

From the group of circumstances heretofore detailed in this opinion, the Board concluded that the Company had continued to countenance the Association. It held that:

"The effect of the domination and support of the Association by the respondent prior to and during the years since 1935, could not, under the circumstances, be dissipated except by an explicit announcement to the employees that the respondent would no longer recognize or deal with the Association. In the absence of such action by the respondent, its employees were not afforded the opportunity to start afresh in organizing for the adjustment of their relations with the employer which they must have if the policies of the Act are to be effectuated."

We are of the opinion that there was substantial evidence to justify this conclusion. Since the Association prior to the passage of the National Labor Relations Act in 1935 was obviously a company-dominated and supported union, the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board. Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference. *Labor Board* v. *Greyhound Lines,* 303 U. S. 261, 270; *Labor Board* v. *Falk Corp.,* 308 U. S. 453, 461.

Management control over company-sponsored employee organizations runs the entire scale of intensity. It may be slight or complete. A genuinely free union composed of employees of one corporation alone may satisfy the requirements of § 7 but where, as here, evidence exists of original employer interference, the Board may appraise the situation and even forbid the appearance of such a union on the ballot to select bargaining representatives where in the Board's judgment the evidence does not establish the union's present freedom from employer control. *Labor Board* v. *Falk Corp., supra,* 461, 462. In the present case the Board ordered the Company to completely disestablish the Association as bargaining representative and to cease and desist from giving effect to the contractual arrangements resulting from the Association's former representation of the employees. For the reasons given this order was, in our opinion, within the discretion of the Board.

The order of the Circuit Court of Appeals is reversed and the cause is remanded to that Court with instructions to enforce the order of the Board.

Reversed.

Mr. Justice Roberts took no part in the consideration or decision of this case.

JERSEY CENTRAL POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 299. Argued January 4, 5, 1943. Reargued March 4, 5, 1943.—Decided May 3, 1943.

1. The conclusion of the Federal Power Commission in this case that facilities owned and operated by a power company within a State—which connected with facilities of a second company, also within the State, whose facilities connected with those of a third company, in another State—were utilized for the transmission of electric energy across state lines, *held* supported by substantial evidence. P. 67.
2. Federal regulation of the transmission of electric energy in interstate commerce, under the Federal Power Act of 1935, is not limited to energy at the instant it crosses the state line, nor to companies which own the facilities which cross the line. P. 71.
3. The jurisdiction of the Federal Power Commission does not extend to all connecting transmission facilities but only to those which transmit energy actually moving in interstate commerce. P. 72.
4. Since the power company here in question owns and operates a transmission line which is a facility within the jurisdiction of the Federal Power Commission under § 201 (b), it is a "public utility" under § 201 (e). P. 73.
5. The purchase by a company which is a public utility under the Federal Power Act, of the stock of another company which also is a public utility under the Act, requires the approval of the Federal Power Commission, notwithstanding that the purchase could be, and the transfer is, regulated by the State. P. 74.
6. The limitation of § 201 (a) of the Federal Power Act—"such federal regulation, however, to extend only to those matters which are not subject to regulation by the States"—is inapplicable to regulation under § 203 (a) of the acquisition of securities. P. 76.

129 F. 2d 183, affirmed.

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*Together with No. 329, *New Jersey Power & Light Co.* v. *Federal Power Commission*, also on writ of certiorari, 317 U. S. 610, to the Circuit Court of Appeals for the Third Circuit.

CERTIORARI, 317 U. S. 610, to review the affirmance of an order of the Federal Power Commission, 30 P. U. R. (N. S.) 33.

Mr. John W. MacDonald for petitioner in No. 299, and *Messrs. Frederic P. Glick* and *Allen E. Throop* for petitioner in No. 329. *Mr. Reynier J. Wortendyke, Jr.* was with them on a joint brief.

Assistant Attorney General Shea argued the cause on the reargument and *Mr. Lester P. Schoene* on the original argument, and *Solicitor General Fahy* and *Messrs. Paul A. Sweeney, Charles V. Shannon, Lambert McAllister,* and *Howard E. Wahrenbrock* were with them on the brief, for respondent.

Mr. Frank H. Sommer filed a brief on behalf of the State of New Jersey, as *amicus curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

These two cases bring here for review the construction of §§ 201 and 203 (a) of the Federal Power Act, as amended by the Public Utility Act of 1935.[1] These sections are included in Title II, Part II, of the latter act, which Part relates to federal regulation of the business of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale. By these sections, the public utilities subject to the Federal Power Commission are defined and the acquisition of securities of such utilities by any other utility subject to the act is forbidden without authorization of the Commission.

I. After the enactment of the above amendments to the Federal Power Act, and without seeking Commission authorization, the New Jersey Power & Light Company purchased from others than the issuer certain securities of the Jersey Central Power & Light Company. The Fed-

[1] 49 Stat. 803, 847, 849, 16 U. S. C. §§ 824, 824 (b).

eral Power Commission, being of the opinion that both the purchaser and the issuer were public utilities within the definition of the Federal Power Act and that therefore the acquisition of the stock was illegal, on June 7, 1938, entered an order that the purchaser submit information concerning the acquisition of the stock and show cause why the Commission should not proceed to enforce the requirements of the act. To this order, the purchaser answered that the Jersey Central was not a public utility within the definition of the act and that the approval by the Federal Power Commission to the acquisition was therefore not required by law. By permission of the Commission, the Jersey Central intervened and made the same contention as to its status. Thus there were presented for determination two questions: first, whether Jersey Central was a public utility under the act; and second, whether if it was a public utility, this acquisition of its stock was permissible in view of the declaration of § 201 (a) that federal regulation should "extend only to those matters which are not subject to regulation by the States." This purchase is subject to regulation by New Jersey.

It is admitted that the purchaser, Jersey Power, is a public utility under the act. The Commission after investigation and hearing held that Jersey Central also was a public utility under the act. 30 P. U. R. (N. S.) 33. This holding was based on findings that Jersey Central owns and operates transmission facilities (an electric line) extending from its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River in the same state where the line joins the transmission facilities of another company, not here involved, the Public Service Electric & Gas Company. This latter company transmits the energy from the point of junction on the Raritan to a common bus

bar [2] in one of its substations, located also in New Jersey at Mechanic Street, Perth Amboy. From the bus bar, Public Service has transmission facilities extending to the mid-channel of Kill van Kull, a body of water between New Jersey and Staten Island, New York. At mid-channel, Staten Island Edison Corporation, another utility, connects with its transmission facilities which extend to its own Atlantic substation on Staten Island. The Commission further found, in the words quoted below, that energy generated in New Jersey by Jersey Central was consumed in New York and energy generated in New York was consumed in New Jersey.[3]

The evidence upon which these findings were based showed that the energy was delivered from Jersey Central

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[2] A bus conductor, or group of conductors, is a switchgear assembly which serves as a common connection for three or more circuits, *American Standard Definitions of Electric Terms*, published by American Institute of Electrical Engineers, p. 97.

[3] 30 P. U. R. (N. S.) 33, 36: "that the transmission facilities described provide a direct and interconnected line for the flow of electric energy between the substation of Jersey Central Power & Light Company located adjacent to its generating plant in South Amboy and Atlantic substation of Staten Island Edison Corporation on Staten Island in the state of New York, via Mechanic street substation, and electric energy was transmitted over such transmission facilities between such points via Mechanic street substation on numerous occasions during certain days and almost daily throughout 1936, 1937, and to September, 1938; that there is no evidence or testimony of any change in such operations during this period or subsequent thereto; that electric energy transmitted over facilities extending from the substation adjacent to the generating plant of Jersey Central Power & Light Company in South Amboy, New Jersey to Atlantic substation, on Staten Island, in the state of New York, via Mechanic street substation, is generated in the state of New Jersey and consumed in the state of New York; that electric energy transmitted from Atlantic Street substation to the substation of Jersey Central Power & Light Company in South Amboy, New Jersey, via Mechanic street substation, is generated in the state of New York and consumed in the state of New Jersey; . . ."

to and from Public Service under contract and that Public Service likewise delivered and received energy under contract to and from Staten Island Edison. Jersey Central had no control over the destination of its energy after it made delivery to Public Service at the Raritan but it did, of course, control the distribution of energy received from Public Service. The deliveries from Jersey Central to Public Service were substantial, above fifty-five million kilowatt hours in each year of the period 1934 to 1937, inclusive. Those from Public Service to Staten Island were smaller for the same period, amounting to three to four million k. w. h. annually and the flow from Staten Island to Public Service aggregated about the same amount. Although, as will appear hereafter, the evidence shows some Jersey Central energy is consumed in New York, the amount is unknown.

The connection between Public Service and Staten Island is maintained primarily to guard the Staten Island distribution against breakdown. It is used for emergencies a few times per year on an average. Surplus energy is occasionally sold. The rest of the time the line is maintained "in balance." This is to avoid a delay of transmission in an emergency. If the connection were not maintained, an appreciable time would be lost in communicating and reëstablishing the connection. Any oscillation of the balance, created by increased demand in New York or New Jersey, carries energy in one direction or in another to be consumed on one side or the other of the line between the states. This is called "slop-over" energy. These bulk deliveries were the subject of the sale agreements between Public Service and Staten Island.

Since the bus bar into which the Jersey Central energy is fed also receives large amounts of energy from other sources, the facts heretofore detailed do not prove conclusively that energy generated by Jersey Central passes to and is consumed in New York. This further evidence

appears from testimony presented by investigators of the Commission. Their examination of Public Service records discloses that there were moments of time between January 26, 1937, and September 6, 1938, when all the energy flowing into the bus bar at Mechanic Street came from Jersey Central and at the same moments energy flowed from Mechanic Street in New Jersey to the Atlantic substation in New York. As no pools of energy exist from which the flow to New York could have been drawn, it necessarily follows that Jersey Central production was instantaneously transmitted to New York. Cf. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. The amount of energy transmitted was small. The evidence was developed from 184 log readings selected from 25,000. Of the 184 log readings, 12 showed this flow of energy from Jersey Central to New York between August 26, 1935, the effective date of the Federal Power Act, and March 14, 1938, the date of the present purchase of stock.[4] Twelve showed such flow shortly after the purchase.

[4] There is dispute as to whether the 184 instances selected for examination were typical. In view of the evidence just detailed as to the service arrangements between Jersey Central and Public Service, and Public Service and Staten Island Edison, this seems of no importance. There is no contention that the energy actually transmitted interstate shall be treated as accidental or that it falls under the *de minimis* rule. The method of selection is explained as follows:

"Q. . . . Then you have taken some 150* readings out of approximately 25,000 readings. Just why did you take these particular 150, Mr. Grimsley? A. At times when considerable power was going over from Jersey Central and for the same period it was going to Staten Island. That was necessary to make my determination. Now we might get 15,000, I don't know, to compare with those, but the point was to establish certain conditions at time of flow and at times when there was no energy flowing to Staten Island there was no point in taking those readings.

"Q. These are hand-picked readings where you worked toward a particular result and you selected those that would best show what you desired to establish? A. I was trying to get a condition when the

This evidence, we think, furnishes substantial basis[5] for the conclusion of the Commission that facilities of Jersey Central are utilized for the transmission of electric energy across state lines.

Petitions for rehearing were denied. An appeal was taken to the Circuit Court of Appeals under the provisions of § 313 of the act.[6] The determination of the Commission was affirmed, 129 F. 2d 183, and in view of the important questions of federal law raised by the petitions for certiorari, we granted review. 317 U. S. 610.

The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act, *supra* note 1, was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the states by *Public Utilities*

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energy was coming over from Jersey Central and flowing to Staten Island and over a period that might be considered typical.

"Q. Just a moment—A. (interposing) I don't know unless we go through all of them and compare them with these.

"Q. I suppose it would be pretty easy to pick out 150 other examples when power is flowing from Metuchen substation to Staten Island supplying the Mechanic Street load, would it not? A. Oh, I think so, yes. Maybe more."

*The Commission's witness Grimsley spoke of 150 instances, but actual count discloses 184.

[5] "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." § 313 (b), 49 Stat. 860, 16 U. S. C. § 825*l* (b).

[6] The order entered determined that Jersey Central Power & Light Company is a public utility and that the acquisition of its stock by New Jersey Power & Light Company was a violation of § 203 (a) of the Federal Power Act. 30 P. U. R. (N. S.) 33, 36. This order fixed the status of Jersey Central as a utility amenable to the provisions of the Act: e. g., rates, § 205 (a); ascertainment of cost of property, § 209 (a); accounts, § 201. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *Federal Power Commission* v. *Pacific Co.,* 307 U. S. 156; *Columbia Broadcasting System* v. *United States,* 316 U. S. 407.

Commission v. *Attleboro Steam Co.*, 273 U. S. 83. On account of the development of interstate sales of electric energy, it was deemed desirable by Congress to enter this field of regulation.[7]

II. Petitioners concede that some energy generated by Jersey Central and sold and delivered by it to Public Service passes thereafter to New York. Their contention is that the arrangements by which this energy passes to New York does not make Jersey Central a public utility,

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[7] S. Rep. No. 621, 74th Cong., 1st Sess., p. 17:

"In recent years the growth of giant holding companies has been paralleled by the rapid development of the electric industry along lines that transcend State boundaries. To a great extent through the agency of the holding company, local operating units have been tied together into vast interstate systems. As a result the proportion of electric energy that crosses State lines has steadily increased. While in 1928, 10.7 percent of the power generated in the United States was transmitted across State lines, the percentage had increased by 1933 to 17.8. The amount of energy which flowed in interstate commerce in 1933 exceeded the entire amount generated in the country in 1913.

"The new part 2 of the Federal Water Power Act would constitute the first assertion of Federal jurisdiction over this major interstate public utility. The decision of the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam Co.* (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from State control either legally or practically.

"The necessity for Federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible cost has been clearly revealed in the recent reports of the Federal Power Commission, the Mississippi Valley Committee, and the National Resources Board. Assertion of the power of the Federal Government in this direction becomes the more important at the time when the Federal Government is compelling the reorganization of holding companies along regional lines. The new part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by Title I of the bill."

within the definition of the act, because it "does not own or operate facilities for the transmission of electric energy, or sale of electric energy at wholesale, in interstate commerce." "A person owning or operating facilities . . . must own the facilities which transmit—send across—the energy, and this connotes voluntary, intentional action." From the asserted fact that Jersey Central has no control over the energy produced by it after its delivery to Public Service, petitioners conclude that this short transmission and sale, wholly in New Jersey, is an intrastate transaction. Without this separation from the movement across the New Jersey-New York line, the transmission by Jersey Central would fall within the definition of commerce declared by two former decisions of this Court.

In *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83, 86, this Court held in interstate commerce the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. We see no distinction between a sale at or before reaching the state line.

The other case is *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498. In this case, a wholly-owned subsidiary bought gas in Illinois from its parent corporation. The parent had transported the gas across the state line and delivered it at a reduced pressure to the subsidiary in Illinois. The subsidiary transported the gas wholly intrastate and sold and, on again reducing pressure, delivered it to an Illinois distributing company. The intrastate movement by the subsidiary was held by us to be a part of interstate commerce. We said that the point at which title and custody passed, without arresting movement, did not affect the essential interstate movement of the business.

But we need not decide whether the intervention of Public Service between Jersey Central and Staten Island

Edison and the consequent loss of actual control of the energy by Jersey Central is significant to distinguish the two cases just cited. Petitioners, as we understand their briefs, concede, and rightly so, that power rests in Congress to regulate such a flow of energy from Jersey Central as here occurs. Such a flow affects commerce. Cf. *Wickard* v. *Filburn*, 317 U. S. 111, and cases cited.[8] But petitioners say that Congress did not intend to exercise its full power over interstate transmission and directed only that transmission "in interstate commerce" should be regulated. As contrasted with "affecting commerce" in the Public Utility Holding Company Act of 1935, 49 Stat. 803, § 1 (c), or the "current of commerce" in the Commodity Exchange Act, 42 Stat. 998, or the broad language of the Bituminous Coal Act, 50 Stat. 83, or the Agricultural Adjustment Act, 50 Stat. 246, the words "in interstate commerce" are said, by petitioners, to be the "strictest test of jurisdiction available to Congress." But the argument, we think, gives no effect to the definition of "transmitted in interstate commerce" as used in this act. In the note below there is set out the pertinent provisions of § 201 which indicate the meaning given the phrase, which provisions are italicized for quick reference.[9] Subsections (a) and (b) show the intent to regulate such transactions as are beyond state power under the *Attle-*

[8] Cf. *Peoples Natural Gas Co.* v. *Federal Power Comm'n*, 127 F. 2d 153, 157; *Hartford Electric Light Co.* v. *Federal Power Comm'n*, 131 F. 2d 953, 958.

[9] The Federal Power Act of 1935, 49 Stat. 847:

"Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy *in interstate commerce* and the sale of such energy at wholesale *in interstate commerce* is necessary in the public interest, such Federal regulation, however, to

boro case, *supra.* Subsection (c) defines the electric energy in commerce as that "transmitted from a State and consumed at any point outside thereof." There was no change in this definition in the various drafts of the bill. The definition was used to "lend precision to the scope of the bill." [10] It is impossible for us to conclude that this definition means less than it says and applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities which cross the line. The purpose of this act was primarily to regulate the rates and charges of the interstate energy. If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed

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extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy *in interstate commerce* and to the sale of electric energy at wholesale *in interstate commerce,* but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for *such transmission* or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be *transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof;* but only insofar as such transmission takes place within the United States.

. . . . .

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

[10] S. Rep. No. 621, 74th Cong., 1st Sess., p. 49.

prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile.

Petitioners make the point, however, that this interpretation subjects connected facilities to the Commission's jurisdiction which facilities were deliberately eliminated by Congress. As an illustration they cite the provisions of § 201 (a) as they appeared in a predecessor bill.[11] We do not think that the result which the petitioners apprehend follows from our interpretation. The language of § 201 (a) and (b) indicates a distinction between the facilities for generation or production and those for transmission. Also, it is sales at wholesale only which are regulated and, finally, Commission power does not extend over all connecting transmitting facilities but only over those which transmit energy actually moving in interstate commerce. Mere connection determines nothing.

Further, we think the definition in subsection (e) of "public utility" covers Jersey Central, since that company owns and operates the transmission line to the Raritan and that line, as a result of the interpretation of interstate commerce in the preceding paragraph, is a facility under Commission jurisdiction by the terms of subsection (b). Subsection (b) declares that the provisions of this part apply "to the transmission of electric energy at wholesale in interstate commerce." This subsection gives jurisdiction over facilities used for such transmission. The business of transmitting and selling electric energy is said

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[11] S. 1725, 74th Cong., 1st Sess., February 6, 1935:

"The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State. . . ."

to be affected with a public interest and federal regulation of a portion of that business is declared necessary. § 201 (a). The fact that a company is engaged in this business is not determinative of its inclusion in this act. The determinative fact is the ownership of facilities used in transmission. Such use makes the owner or operator of such facilities a public utility under the act (e). We conclude, therefore, that Jersey Central is a public utility under this act. It is quite clear, however, from § 201 that although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission. In the next section of this opinion, we consider whether this purchase of stock is subject to Commission regulation.

III. Although only the facilities of a public utility used in the transmission or sale at wholesale of electric energy in interstate commerce or the rates and charges for such energy are subjected by Parts II and III of the act to regulation by the Federal Power Commission, that Commission has general power over the issue of all securities or assumption of all obligations by such a public utility.[12] This generality of control is in turn limited by an exception in the case of utilities organized and operating in a state where its security issues are regulated by a state commission.[13]

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[12] "Sec. 204. (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. . . ."

There is the same extent of control over records and accounts. § 301 (a).

[13] Sec. 204. "(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission."

In the section of Part II in question here, however, which prohibits the purchase of the security of any other public utility, without authorization of the Commission, there is no exception of any kind.[14] Consequently the action of Jersey Power, admittedly a public utility under Part II, in purchasing the stock of Jersey Central, hereinbefore held to be a public utility under the act, requires Commission approval, unless some other provision of law exempts the transaction from this control. Petitioners find this exemption in the concluding words of § 201 (a), "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." [15] The Commission denies that this limitation is to be read into § 203 (a). If the limitation is to be read as applying to § 203 (a), the limitation exempts this transaction and the purchase here involved is beyond the reach of Commission power for the reason that the purchase could be and the transfer is regulated by the State of New Jersey.[16]

It will be observed that § 201 (a) is a declaration of the end sought by the enactment of this Part, that is, federal regulation of the generation, transmission and sale of electric energy in commerce. The sounder conclusion, it seems to us, is that this limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production

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[14] "Sec. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. . . ."

[15] See Note 9, *supra.*

[16] § 19 of the Act of April 21, 1911, as amended. New Jersey Stat. Ann. 48: 3–10.

and distribution. This conclusion finds strong support in the fact that not only § 203 (a), here under discussion, but §§ 204 (a),[17] 208[18] and 301 (a)[19] regulate matters obviously subject to state regulation. If the scope of the limitation was as broad as petitioners contend, none of these sections just referred to would be effective. Section 203 (a) would be a nullity as of course the disposition and acquisition of facilities, merger, consolidation or purchase of securities by their utilities may be regulated by the states. But this does not follow where a specific limitation is placed on the issue of securities by § 204. Section 204 is not rendered useless by subsection (f) since it is applicable to states without state commissions authorized to regulate security issues. See notes 12 and 13, *supra*. In view of the contemporaneous legislation as to

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[17] See Note 12, *supra*.

[18] "Sec. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

"(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction." 49 Stat. 853, 16 U. S. C. § 824 (g).

[19] "Section 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records or cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. . . ." *Id.* 854, 16 U. S. C. § 825.

holding companies (Title I, Public Utility Act of 1935, 49 Stat. 803) which left independent operating companies or subsidiaries of unregistered holding companies free to acquire securities in other operating companies,[20] it is difficult to conclude that by § 201 (a) Congress limited the regulation of the acquisition of securities by § 203 (a).[21]

The legislative history points to this result. When S. 2796, containing the progenitor of the disputed section, was reported by the Committee on Interstate Commerce of the Senate,[22] § 201 (a) concluded:

"It is further declared to be the policy of Congress to extend Federal regulation to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and not to impair or diminish the powers of any State commission."

The same bill had §§ 208 (a) and 301 (a), just referred to, which did regulate matters which could be regulated by the states. After its passage through the Senate in this form, the bill went to the House and 201 (a) was there amended by the Committee on Interstate and Foreign Commerce (H. Rep. No. 1318, 74th Cong., 1st Sess., June 24, 1935) to conclude, as it now does, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." The report, although it commented on the section, did not mention this change as one of substance from the conclusion of the Senate bill. H. Rep. No. 1318, 74th Cong.,

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[20] § 9 (a) and (b), 49 Stat. 817.

[21] S. Rep. No. 621, 74th Cong., 1st Sess., p. 50, in referring to what is now § 203 (a), said: "In this way the Commission would have authority to keep the same kind of check upon the creation of spheres of influence among operating companies that the Securities and Exchange Commission has over holding companies under title I."

[22] *Id.*

1st Sess., p. 26. Sections 208 and 301, with their regulation of matters subject to state regulation, remained unchanged. More significant even than these indicia of the scope of the concluding words of § 201 (a) is the fact that the Committee which adopted the new concluding words, adopted also § 204, subsection (f), withdrawing federal regulation from security issues where such issues are "regulated by a state commission." While, of course, this may have been done to make certain that state power would not be infringed, such meticulous care was entirely unnecessary, if the wording of § 201 (a), simultaneously added, had the effect now urged.[23] One might deduce from the language of the report in the House that the precise question at issue here was in the mind of the House Committee and was resolved in accord with our conclusion.[24] From this record of the pains taken by the Congress to make clear the respective responsibilities

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[23] The language added to § 201 (a) and § 204 (f) is practically identical with the suggestions made by the National Association of Railroad and Utility Commissioners. Senate Hearings, Committee on Interstate Commerce, Public Utility Holding Company Act of 1935, pp. 748–51.

[24] Public Utility Act of 1935, H. Rep. No. 1318, 74th Cong., 1st Sess., General Purpose of Title. "Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties." Page 8.

Sectional Analysis of Bill:

"Section 203. Disposition of Property; Consolidations; Purchase of Securities

"Under the provisions of this section, approval must be secured for the sale, lease, or other disposition by a public utility of all of its facilities subject to the jurisdiction of the Commission, or any part of the facilities in excess of a value of $100,000, and for mergers or consolidations of such facilities or for the purchase by a public utility of the securities of any other public-utility company. Commission approval of an acquisition, consolidation, or control would remove

of federal and state authorities, we conclude that power was given the Federal Power Commission by § 203 to regulate the present transaction.

The judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE ROBERTS:

The sole question is whether Jersey Central Power & Light Company is a public utility within the meaning of subchapter II of the Federal Power Act.

The company's business is the generation of electricity within New Jersey, and distribution of it in the State, principally by retail sale to the public. Its physical property is within New Jersey. It neither owns nor operates any facility which crosses a state line.

Jersey Central exchanges electric energy with another utility, Public Service. The physical hook-up by which this exchange is effected is such that Jersey Central at times transmits electricity to Public Service and at times receives electricity from Public Service. Jersey Central owns and operates a transmission line seven-eighths of a mile long extending from its power plant to another point in the State where the line connects to a cable owned by Public Service running to a station owned by the latter at Perth Amboy, New Jersey. Over these connecting facilities exchanges of two sorts are made. One is of emergency service whereby, in case of a breakdown in either company's system, energy is drawn from that of the other.

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such transaction from the prohibitory provisions of any other law." Page 28.

Section 204:

"The requirement of subsection (f) of the Senate bill that applicable State laws must be complied with before Commission approval may be given, has been changed to authorize security issues without Federal approval where such issues are regulated by a State commission in which the public utility is organized and operating." Page 28.

The second is of economy flow energy, delivery of which takes place to either company when the other is able to generate at less cost than the receiving company could with its own facilities. The savings effected by the latter exchange are divided between the companies.

Any flow of electric energy from Jersey Central to Public Service is carried from the point of connection over Public Service cable to a so-called bus bar, a facility of Public Service located in New Jersey having a number of connections, one of which is with a transmission line connecting the Public Service system with that of Staten Island Edison in the State of New York. Over this line Public Service and Staten Island exchange from time to time emergency service. To accomplish this the lines of the two companies are always connected so that, whenever there is demand for additional energy by either company, the current flowing from the plant of the other supplies the deficiency until a speed up of the generators of the receiving company takes care of the load and stops the draught upon the energy supply of the other.

The lines of Jersey Central and Public Service are likewise always connected so that, in case of emergency, some of the energy generated by Jersey Central may pass over the lines of Public Service or vice versa. Thus energy generated by any of the three systems at times reaches that of one of the others in case of a deficiency of generation on the line of that other. This current, passing for short periods from time to time, due to an imbalance of potential between the interconnected systems, is called slop-over current.

Jersey Central has no contractual relations with Staten Island and does not sell it any energy. Jersey Central's relations with Public Service are independent of any contractual relations between the latter and Staten Island. At times when energy is flowing from Jersey Central to Public Service it is also flowing from Public Service to

Staten Island and, in fact, at such times, some of the energy sold by Jersey Central to Public Service passes from Public Service to Staten Island under Public Service's contractual arrangements with Staten Island.

On the basis of these facts, the Commission held that Jersey Central owned and operated transmission facilities utilized for the transmission of electric energy in interstate commerce, and was, therefore, a public utility within the meaning of the Act, although the company sells no electricity directly in interstate commerce.

I am of opinion that the provisions of the Act require the contrary conclusion, and this reading of the statute is powerfully reinforced when the mischief intended to be remedied and the legislative history of the Act are considered.

There is no dispute concerning the exigency which moved Congress to adopt the statute. It had been settled that the transmission and sale of a commodity, such as electricity or gas, produced in one state, transported and furnished directly to consumers in another state, in interstate commerce, did not preclude regulation of the rates to the consumer by the state of delivery.[1] In 1927, however, this court held that where a company generated electric energy and transmitted it, under contract, to another public utility in an adjoining state, at the state line, whence the purchasing company transmitted and sold the energy to its consumers, the rate at which the first company sold to the second was not subject to regulation by the authorities of the state of origination.[2] The court stated: "The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." It is clear that the mischief to be

[1] *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23.

[2] *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83.

remedied was the incompetence of the states to regulate rates for the sale by the producer of electricity at wholesale to be transmitted and delivered to an extrastate utility at or across a state line. This was the problem and the only problem which confronted the Congress. The legislation itself discloses that, in enacting Part II of the Act, Congress did not go beyond the needs of the situation.

Jersey Central's security issues are not subject to regulation under § 203 unless it is a public utility within the definition of the Act. To determine whether it is, we must turn to § 201. Subsection (e) defines a public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part." We must look to other provisions of the section to ascertain what facilities are subject to the Commission's jurisdiction.

Subsection (a) reads: "It is hereby declared that the *business* of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part . . . and of that part of such *business* which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*" (Italics supplied.)

It is conceded that Jersey Central, as respects generation and sale of the energy in question, and as respects also its security issues, was, at the date of adoption of the federal Act, and still is, subject to regulation under the law of New Jersey, and that law does regulate these matters.[3]

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[3] N. J. Rev. Stats., 1937, Title 48, chaps. 1 to 3; N. J. Stats. Ann. 48: 1–1 to 48: 3–20.

The nature of Jersey Central's dealing with Public Service certainly does not fairly fall within the scope of the statutory description of the "business" of transmitting and selling electric energy in interstate commerce. But, out of abundance of caution, Congress added that the federal regulation should extend only "to those matters which are not subject to regulation by the States." Language could not be plainer, nor more clearly exclude the present case. Congress desired to fill the gap left by the inability of the states to regulate certain forms of interstate transmission and sale. Congress made clear that it intended to go no further. The opinion of the court ignores this fundamental declaration of purpose and policy and reads as an independent mandate *in vacuo* the words of subsection (e). This I think is not a fair construction.

Subsection (b) provides: "The provisions of this Part shall apply to the *transmission* of electric energy in interstate commerce and to the *sale* of electric energy at wholesale *in interstate commerce, but shall not apply to any other sale of electric energy. . . .*" (Italics supplied.) Here again Congress is at pains to restrict the federal regulation to a commercial transaction in interstate commerce to which the company to be regulated is a party.

The electric current which sometimes reaches Staten Island is, no doubt, "propelled" in some measure by Jersey Central's dynamos, but whether the current shall go to Staten Island or be used within the State is a matter wholly beyond Jersey Central's control in point either of law or of fact. Public Service may or may not choose to transmit and sell the energy interstate as a part of the interstate business which is subject to regulation by the Commission. The current flows beyond the State line only because Public Service maintains wires for that purpose and turns the current into them. What § 201 authorizes the Commission to regulate is "that part of such

business which consists of the transmission of electric energy in interstate commerce." Jersey Central is not engaged in the business of transmitting electric energy beyond the point of connection with Public Service's system, certainly not beyond the bus bar where Public Service alone determines its destination. Nor is Jersey Central engaged in interstate commerce because, after the current reaches the bus bar of Public Service, that company diverts it to Staten Island.

The construction now given to the Act makes the Commission's power to regulate Jersey Central depend, not on the nature of its own business, as § 201 (a) and (b) plainly require, but on the interstate character of the business of Public Service, over which Jersey Central has no control and which is subject to regulation by the Commission. § 201 (b) and (e). I can find no support in the language, history or avowed purposes of the Act for such a construction. Moreover, it is in flat contradiction to the words of § 201 (a), (b), and (e), which, when read together, explicitly exclude from the jurisdiction of the Commission a "person" who "owns or operates facilities" otherwise subject to the jurisdiction of the Commission by providing, in § 201 (a), that the federal regulation is "to extend only to those matters which are not subject to regulation by the States." Jersey Central is engaged in generating electricity which it sells and delivers to Public Service, all within the State. When the present Act was adopted it was not doubted, and in the light of our decisions it could not be, that the seller's business was intrastate and subject to state regulation. The manufacture and sale of a product wholly within a state is not interstate commerce even though the product is destined by the buyer to be shipped out of the state in interstate commerce.[4] That this is equally the case where

[4] See *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Parker* v. *Brown,* 317 U. S. 341, 360, 361, and cases cited.

the product produced and sold within the state is gas or electricity is implicit in our decisions.[5] As will presently appear more in detail, while it was the purpose of Congress, in enacting the Federal Power Act to extend the national control over the interstate transmission and sale of electrical energy, which had been held to be beyond the control of the states, the purpose was equally to preserve unimpaired the existing state power of regulation over intrastate production and sale. The provisions of § 201 to which I have referred were introduced into the legislation which became the Federal Power Act in the course of its progress through Congress with the repeatedly declared object of accomplishing that precise purpose.

I submit that to argue that, as Jersey Central's seven-eighths' mile intrastate line which connects with the lines of its intrastate customer, Public Service, is a facility over which flows energy which sometimes ultimately finds its way from Public Service's system into New York, and, hence, a facility for transmission of electric energy interstate, ownership of which subjects the owner to the Commission's jurisdiction, is to tie together two phrases found in separate provisions of the Act and to ignore the statute's provisions viewed in their integrity and entirety. By this process any desired result may readily be reached.

I conclude that the provisions of § 203 [6] relating to regulation of security issues should not be considered since

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[5] *Union Dry Goods Co.* v. *Public Service Corp.*, 248 U. S. 372; *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 471; cf. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 611.

[6] It is to be noted that, even if Jersey Central were a utility within the Act, the proviso in § 201 (a) limits the jurisdiction of the Commission under § 203 respecting the company's acquisition and disposition of facilities and issue of securities, just as it limits the Com-

§ 201 wholly excludes Jersey Central from the scheme of control established by the Act. But if this conclusion were less obvious from the face of the Act, the legislative history is convincing.

When a proposed bill first came before a committee of the House of Representatives, the chairman of the Federal Power Commission, its sponsor, said: [7]

"The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. *It is conceived entirely as a supplement to, and not a substitute for, State regulation.*" (Italics supplied.)

Section 201 (a) of the bill as presented granted the Commission control of the "production" of electric energy, and "over all facilities" for its transmission and sale in interstate commerce, "and over all facilities connected therewith as parts of a system of power transmission situated in more than one State. . . ."

The National Association of Railroad and Utility Commissioners, while recognizing the need of federal legislation to fill the "gap" created by decisions of this court, urged that the bill, as introduced, would overlap and break down state regulation and submitted amendments designed to avoid this result.[8]

The spokesman for the Association said of these proposed changes:[9] "We have, accordingly, sought to make it as clear as language will that Congress does not in this case intend to regulate anything except interstate power, sold at wholesale." With alterations of expression not

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mission's authority over other phases of the business, since these matters are subject to regulation, and are, in fact, regulated by New Jersey.

[7] Hearings on H. R. 5423 before House Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session, p. 384.

[8] Hearings, *supra*, pp. 1620, 1622.

[9] *Id.*, p. 1638.

affecting their sense, the proposed amendments of § 201 (a) were embodied in the section as enacted.

I need not follow in detail the changes which were made in the bill in both branches of Congress. Suffice it to say that they progressively emphasized the purpose to regulate only those matters which the states could not regulate.

In reporting the revised bill to the Senate, the Committee said: [10]

"Subsection (a) . . . declares *the policy of Congress to extend that regulation to those matters which cannot be regulated by the States* and to assist the States in the exercise of their regulatory powers, but *not to impair or diminish the powers of any State commission.*" (Italics supplied.)

"Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. . . . This subsection leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State. In *Pennsylvania Gas Co.* v. *Public Service Commission* (252 U. S. 23), the Supreme Court held that such rates may be regulated by the States in the absence of Federal legislation. The present bill carefully refrains from asserting Federal jurisdiction over these rates. The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U. S. 83), to be beyond the reach of the States."

Notwithstanding the statement in the Senate Committee's report on the Senate bill that "The revision has also removed every encroachment upon the authority of the States," the House, not satisfied that State power had been adequately protected, struck out the entire Senate bill by amendment and substituted a new draft. In pre-

[10] Senate Report No. 621, 74th Cong., 1st Sess., p. 48.

senting the amended bill to the House, the Committee reported: [11]

"The new Parts [II and III] are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. . . . Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

"Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties. . . .

"*The bill takes no authority from State commissions* and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. . . . *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.*" (Italics supplied.)

In Conference Committee § 201 (a) (b) took its present form, which is the language of the House bill in all particulars here material. In the light of this history it is evident the Congress specifically refrained from the regulation of the business of any utility whose business transactions, especially as respects transmission and sale of energy, state authority could regulate. Such is the instant case.

Both the language of the Act and the legislative history show that Congress did not intend to regulate matters

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[11] House Report No. 1318, 74th Cong., 1st Sess., p. 7.

affecting commerce, as well as commerce itself. It is interesting to compare, in this connection, other statutes enacted by the same Congress. Three adopted in July and August 1935 covered activities "affecting" commerce; [12] three, including the Federal Power Act in question, adopted in August 1935 did not cover activities "affecting" commerce.[13] Thus the legislature's discriminating use of language argues strongly for denial of the jurisdiction the Commission asserts.

I think the judgment should be reversed.

The CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur in this opinion.

NOBLE, DOING BUSINESS AS NOBLE TRANSIT CO., *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 511. Argued April 6, 7, 1943.—Decided May 3, 1943.

In a permit to operate as a contract carrier under the "grandfather" clause of § 209 (a) of the Motor Carrier Act of 1935, it is within the authority of the Interstate Commerce Commission—under § 209 (b), requiring that the Commission specify in such permit "the business of the carrier covered thereby and the scope thereof"—to specify the shippers or types of shippers for whom the carrier may haul designated commodities. P. 91.

45 F. Supp. 793, affirmed.

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[12] See National Labor Relations Act, § 2 (7), 49 Stat. 449, 450, 29 U. S. C. § 152 (7); Public Utility Holding Company Act, § 1 (c), 49 Stat. 803, 804, 15 U. S. C. § 79 (c); Bituminous Coal Conservation Act, § 1, 49 Stat. 991, 992.

[13] See Federal Power Act, § 201 (b), 49 Stat. 838, 847, 16 U. S. C. § 824 (b); Motor Carrier Act, § 202 (b), 49 Stat. 543, 49 U. S. C. § 302 (b); Federal Alcohol Administration Act, § 3, 49 Stat. 977, 978, 27 U. S. C. § 203.

APPEAL from a judgment of a District Court of three judges, dismissing the complaint in a suit to set aside an order of the Interstate Commerce Commission.

Messrs. Charles A. Lethert and *C. D. Todd, Jr.* for appellant.

Mr. Allen Crenshaw, with whom *Solicitor General Fahy* and *Messrs. Daniel W. Knowlton* and *E. M. Reidy* were on the brief, for the United States et al.; and *Mr. Franklin R. Overmyer* for the Regular Common Carrier Conference of the American Trucking Associations et al.,—appellees.

Mr. C. D. Todd, Jr. filed a brief on behalf of the Contract Carrier Division of the American Trucking Associations, as *amicus curiae,* in support of appellant.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal [1] from the judgment of a three-judge court (45 F. Supp. 793) which dismissed a complaint filed by appellant to review and annul certain restrictive provisions of an order of the Interstate Commerce Commission (28 M. C. C. 653), granting appellant a permit to operate as a contract carrier by motor vehicle under the Motor Carrier Act of 1935 (49 Stat. 543, 49 U. S. C. § 301), now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

Appellant filed an application for a permit as a contract carrier under the "grandfather" clause of § 209 (a) of the Act. That section provides that if the contract carrier or his predecessor in interest "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time," he

[1] §§ 210 and 238 of the Judicial Code, 28 U. S. C. § 47a, § 345.

shall be granted a permit without more. And § 209 (b) provides that the Commission "shall specify in the permit the business of the contract carrier covered thereby and the scope thereof." [2]

The Commission found that appellant was not a common carrier of general commodities but a contract carrier [3] of specified commodities. It found in that connection that on and after July 1, 1935, appellant had been "in bona fide operation as a contract carrier" by motor vehicle "under individual contracts" with persons who "operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., over irregular routes;" 28 M. C. C. p. 660. The Commission accordingly found

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[2] Sec. 209 (b) also provides that the Commission shall attach certain terms, conditions and limitations to the permit. It goes on to state, however, that those conditions shall not "restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

[3] The term "contract carrier" is defined by § 203 (a) (15) as "any person which, under individual contracts or agreements," engages in the transportation by motor vehicle of "passengers or property in interstate or foreign commerce for compensation."

that appellant was entitled to a permit authorizing "the continuance of such operations."

Appellant's chief objection to that limitation of his rights under the "grandfather" clause is that the Commission has restricted the shippers or types of shippers for whom he may haul the specified commodities. His argument comes down to this: once the territory which he may serve and the commodities which he may haul have been determined, he should be allowed to haul these commodities for any one he chooses within those territorial limits. In the present case appellant hauled under contract miscellaneous supplies for Swift & Co. such as glue, paper, barrels, soap, bolts, thermometers, etc. His argument accordingly is that he should be allowed to haul the same items for any other person in the territory, whatever may be the business of that person and irrespective of the fact that appellant had never had any contract of carriage with him.

The Commission at one time seems to have followed that view. Longshore Contract Carrier Application, 2 M. C. C. 480, 481. But it no longer does. Keystone Transportation Co. Contract Carrier Application, 19 M. C. C. 475. In the latter case the power and duty of the Commission under § 209 (b) to specify in the permit "the business of the contract carrier covered thereby and the scope thereof" were reëxamined. It was held that that phrase meant "more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier." 19 M. C. C. 493.

We agree. An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate

definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the Act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior *bona fide* operations" which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion, for all practical purposes, of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See § 206 (a), § 207, and § 209 (b).

Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its

scope,[4] our function is at an end. The precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the Commission. *United States* v. *Maher,* 307 U. S. 148; *Alton R. Co.* v. *United States, supra; United States* v. *Carolina Freight Carriers Corp., supra.*

We have considered the other objections raised by the appellant and find them without merit.

Affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of the case.

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[4] We do not accede to the suggestion that the permit specification clause in § 209 (b) is applicable only to new operators, not to "grandfather" applicants. The Commission has consistently taken the view that it covers both. Motor Convoy, Inc., 2 M. C. C. 197, 200; Wray Wible, 7 M. C. C. 165, 168; James P. Hunter, 13 M. C. C. 109, 112–113; Marine Trucking Co., Inc., 17 M. C. C. 615. That interpretation is entitled to "great weight." *United States* v. *American Trucking Assns.,* 310 U. S. 534, 549. It is consistent with the wording of § 209. Paragraph (a) requires a contract carrier to have a "permit" in order to operate as such; and it requires the Commission to issue the permit "without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b)" within the prescribed time limitation.

CENTRAL HANOVER BANK & TRUST CO. ET AL. *v.* KELLY, STATE TAX COMMISSIONER.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 659. Argued April 12, 13, 1943.—Decided May 3, 1943.

1. A grantor domiciled in New Jersey made in New York in 1929 a transfer of securities. The transfer was in trust, and irrevocable, to pay the income to the grantor for life, then to his wife for life if she survived him; if she predeceased him, the principal was to go to two sons, nonresidents of New Jersey. The wife predeceased, and the sons survived, the grantor, who in 1936 died domiciled in New Jersey. The securities were at all times kept in New York and there administered by the trustee. *Held*, a New Jersey tax upon the transfer, measured by the value of the securities at the time of the grantor's death, did not violate the due process or equal protection clauses of the Fourteenth Amendment. P. 96.
2. The determination by the New Jersey courts, in applying the tax statute of that State, of the kind of interest transferred and the time when it was effected, is a matter of local law and is binding here. P. 97.

129 N. J. L. 127, 28 A. 2d 174, affirmed.

APPEAL from a judgment sustaining the imposition of a state tax upon a transfer of property in trust.

Mr. Robert McC. Marsh, with whom *Messrs. Jehiel G. Shipman* and *Claude A. Hope* were on the brief, for appellants.

Mr. William A. Moore, Assistant Attorney General of New Jersey, for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

New Jersey imposes a tax, with exceptions not material here, "upon the transfer of any property, real or personal, of the value of five hundred dollars ($500.00) or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, . . . in the following

cases . . . Third. When the transfer is of property[1] made by a resident . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." Laws of 1935, c. 90, pp. 264–265. And see Rev. Stat. 1937, § 54: 34–1.

Prior to 1929 decedent, who at all times relevant here was a resident of New Jersey, owned certain securities which he kept in New York City in safekeeping with the appellant trust company, a New York corporation. In 1929 he went to New York City and executed a trust agreement by which he transferred those securities to the appellant corporation as trustee. The trust deed was an irrevocable agreement under which he retained no control over the property. It contained a provision that it was to be construed according to the laws of New York where it was made and where it was to be enforced. It provided that the trustee should pay the net income to the grantor during his life and thereafter to his wife for life in case she survived him. In the event that the grantor's wife did not survive him and his two sons did, then the trustee was to transfer to each son one-half of the principal. The wife predeceased the grantor, who died in 1936 a resident of New Jersey. Both sons survived him. They were nonresidents of New Jersey. The securities were at all times kept in New York and there administered by the trustee.[2]

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[1] The statute embraces the transfer of property "whether such property be situated within or without this State." Rev. Stat. 1937, § 54: 33–1. The word "transfer" is defined so as to include "the passing of property, or any interest therein, in possession or enjoyment, present or future" by deed. *Id.*

[2] Art. XVI, § 3 of the Constitution of the State of New York provides: "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purpose of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being

The New Jersey Prerogative Court held on an appeal from the Tax Commissioner that the creation of the so-called equitable contingent remainders in the sons was a "transfer" of an interest in the property by deed within the meaning of the statute at a time when the grantor was domiciled in New Jersey; [3] that that transfer was made in contemplation of the grantor's death and intended to take effect in possession or enjoyment at or after his death; and that it was that transfer rather than the property on which the tax was laid. It accordingly upheld the assessment of the Commissioner against the contention of appellants that the statute as construed and applied violated the due process and equal protection clauses of the Fourteenth Amendment. 129 N. J. Eq. 186, 18 A. 2d 45. Both the Supreme Court and the Court of Errors and Appeals of New Jersey affirmed. See 127 N. J. L. 468, 23 A. 2d 284; 129 N. J. L. 127, 28 A. 2d 174. The case is here on appeal. § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone* v. *Miller,* 188 U. S. 189; *Blodgett* v. *Silberman,* 277 U. S. 1; *Curry* v. *McCanless,* 307 U. S. 357, and cases cited. The command of the state over the owner, the obligations which domicile creates, the practical necessity

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domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation."

[3] The Court held, in the alternative, that there was a taxable transfer under the statute even if it be assumed that the remainder was vested in the grantor until the happening of the contingency. Under that view, there was no transfer until the actual vesting at his death. Yet at that time he was domiciled in New Jersey. So the transfer was taxable. 129 N. J. Eq. pp. 212–213.

of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax. *Curry* v. *McCanless, supra.* We recently applied that principle to sustain, on facts very close to the present ones, Oregon's power to tax a transfer of intangibles held in Illinois by one domiciled in Oregon. *Pearson* v. *McGraw,* 308 U. S. 313. And see *Van Dyke* v. *Tax Commission,* 235 Wis. 128, 292 N. W. 313, aff'd 311 U. S. 605. The execution of the present trust agreement in New York, the circumstance that the remaindermen as well as the trustee were nonresidents of the taxing state are quite immaterial. Domicile is the single controlling consideration in this situation, as it is in the case of the taxation of income derived from activities outside the state. *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308.

Appellants contend, however, that at the time of the execution of the trust agreement there was no taxable transfer to the sons; that their interests were wholly speculative and contingent and did not become taxable until they became vested interests; and that New Jersey has not levied a tax according to the quality and value of the interests as they existed in 1929 but has appraised the property at its value at the time of the grantor's death. They also argue that if the trust agreement be construed to transfer an interest to the sons only at the grantor's death, it was a transfer which New Jersey could not tax.

The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us. *Orr* v. *Gilman,* 183 U. S. 278, 288; *Chanler* v. *Kelsey,* 205 U. S. 466, 476; *Nickel* v. *Cole,* 256 U. S. 222, 225–226; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270. There is no constitu-

tional reason why a state may not make the transfer *inter vivos* the taxable event and then measure the tax by the value of the property at time of death. *Keeney* v. *New York,* 222 U. S. 525. Cf. *Milliken* v. *United States,* 283 U. S. 15, 20, 22, 23; *Helvering* v. *Hallock,* 309 U. S. 106, 111; Paul, Federal Estate and Gift Taxation (1942) § 2.13. A state which may tax the disposition of property made by one of its domiciliaries certainly may make the payment of the tax conditional on his being domiciled in the state at his death, and may delay payment until then. The fact that the taxable event and the tax levy are widely separated in time is quite irrelevant. In short, "The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." *Salomon* v. *State Tax Commission,* 278 U. S. 484, 490. And if the transfer to the sons is assumed to have taken place only at the time of the grantor's death, there is no constitutional reason why the result need be different. The fact that he did not then "own" the property is inconsequential. Cf. *Whitney* v. *State Tax Commission,* 309 U. S. 530. The significant facts are that the rights of the remaindermen derived solely from the trust agreement and that the grantor died domiciled in New Jersey.

Affirmed.

DETROIT EDISON CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 675. Argued April 13, 1943.—Decided May 3, 1943.

1. Under § 23 (l) of the Revenue Act of 1936, an electric power company is not entitled to a deduction on account of depreciation in respect of the cost of extensions of its facilities, to the extent that

such cost was borne by customers whose payments to the company therefor were not refunded nor refundable. P. 102.

2. Sections 113 (a) (2) and (8) (B) of the Revenue Act of 1936 are inapplicable, since the customers' payments in question were neither "gifts" nor "contributions" to the company. P. 102.

131 F. 2d 619, affirmed.

CERTIORARI, 318 U. S. 749, to review the affirmance of a decision of the Board of Tax Appeals, 45 B. T. A. 358, which sustained the Commissioner's determination of a deficiency in income tax.

Mr. Norris Darrell, with whom *Messrs. Edward H. Green* and *Oscar C. Hull* were on the brief, for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The petitioner, The Detroit Edison Company, engages in the generation of electric energy and its distribution to the public in and near Detroit. It receives many applications for service which in its opinion would require an investment in extension of its facilities greater than prospective revenues therefrom would warrant. In such cases it undertakes to render the service if the applicant will pay the estimated cost of the necessary construction. This is done by contract of which there are five variations, some of which provide for refunds of part of the customers' cost if additional customers come in to share it, or if revenues exceed estimates. With these provisions we are not concerned, since the controversy here relates only to payments that never were, or which by the contracts have ceased to be, refundable. The amounts of the cus-

tomers' payments are fixed by an estimate of the cost; they never exceed, and sometimes fall short of actual cost, but are not adjusted because of the difference between estimates and realization.

The Company constructs the facilities, which become its property, and adds the full cost to its appropriate property accounts without deduction for the customer payment. It claims as a base for computing its depreciation the investment for which the Company is then reimbursed. Customers' payments are not appropriated to the particular construction nor earmarked for it, but go into the Company's general working funds. During the period that a payment is subject to refund it is carried in a suspense account; but if it is not subject to refund, or when the refund period is past, the unrefunded and unrefundable balances are transferred to surplus through an account designated as "Contributions for Extensions."

During 1936 and 1937, the years in question, the Company added to its surplus from such sources $36,065.81 and $47,500.67 respectively. The Commissioner eliminated from the depreciable property of the Company that portion of the cost equivalent to the unrefunded and unrefundable balances of the deposits. These eliminations, amounting to upwards of $1,160,000 in each year, resulted in disallowing depreciation deductions from income of $40,273.11 for 1936 and $41,786.26 for 1937, and in deficiencies which the Company contested. The Board of Tax Appeals sustained the Commissioner and the Circuit Court of Appeals affirmed.[1] Because the decision appeared to conflict with principles followed in another circuit,[2] we granted certiorari.

A deduction from gross income on account of depreciation is permitted by § 23 (l) of the applicable Revenue

[1] 45 B. T. A. 358; 131 F. 2d 619.

[2] *Arundel-Brooks Concrete Corp.* v. *Commissioner,* 129 F. 2d 762 (C. C. A. 4th).

Act in these terms: "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." [3] For the basis we are referred by § 23 (n) to § 114 of the Act which refers us again to § 113 (b) thereof which provides an "adjusted basis" for gain or loss but which again refers us to § 113 (a) for the basis upon which adjustment is to be made. The sum of these is that the basis of depreciation allowance "shall be the cost of such property" (§ 113 (a)) making "proper adjustment" in respect of the property "for expenditures, receipts, losses, or other items, properly chargeable to capital account," (§ 113 (b) (1) (A)) except in case of certain gifts, transfers as paid-in surplus, or contributions to capital (§ 113 (a) (2), (8) (B)), which exceptions we will later consider.

It will be seen that the rule applicable to most business property of a cost basis properly adjusted leaves many problems of depreciation accounting to be answered by sound and fair tax administration. The end and purpose of it all is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets. For this purpose it is sound accounting practice annually to accrue as to each classification of depreciable property an amount which at the time it is retired will with its salvage value replace the original investment therein. Or as a layman might put it, the machine in its life time must pay for itself before it can be said to pay anything to its owner. Experience and judgment hit upon usable mortality tables for classes of property from which annual rates of accrual are estimated and several different methods are employed for relating this physical deterioration and functional obsolescence to financial statements. The calculation is influenced by too many

[3] Revenue Act of 1936, 49 Stat. 1648.

variables to be standardized for differing enterprises, assets, conditions, or methods of business. The Congress wisely refrained from formalizing its methods and we prescribe no over-all rules.

But we think the statutory provision that the "basis of property shall be the cost of such property" (§ 113 (a)) normally means, and that in this case the Commissioner was justified in applying it to mean, cost to the taxpayer. A property may have a cost history quite different from its cost to the taxpayer. It may have been purchased for less or more than original cost, or built by contract which called for payments on which the builder profited greatly or suffered heavy loss. But generally and in this case the Commissioner was in no error in ruling that the taxpayer's outlay is the measure of his recoupment through depreciation accruals.

If this were otherwise in doubt it would be made clear by the provisions for "proper adjustment" of cost for receipts properly chargeable to capital account found in § 113 (b) (1) (A). The customer payments so far as in question found their way into the Company's capital accounts by way of an addition to surplus. Their interdependency with the increases in property accounts caused by the construction they induced justified the Commissioner in relating the one to the other for the purpose of adjusting the basis for depreciation.

The Company, however, seeks to avoid this result by the contention that what it has obtained are gifts to it or contributions to its capital of the property paid for by the customer, and that therefore by the provisions of § 113 (a) (2) and (8) (B) it takes the basis of the donor or transferor. It is enough to say that it overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company. The transaction neither in form nor in substance bore such a semblance.

The payments were to the customer the price of the service. The receipts have gone, so far as here involved, to add to the Company's surplus. They have not been taxed as income, presumably because it has been thought to be precluded by this Court's decisions in *Edwards* v. *Cuba R. Co.*, 268 U. S. 628, holding that under the circumstances of that case a government subsidy to induce railroad construction was not income. But it does not follow that the Company must be permitted to recoup through untaxed depreciation accruals on investment it has refused to make. The Commissioner was warranted in adjusting the depreciation base to represent the taxpayer's net investment. Nothing in the Regulations is to the contrary and nothing in *Helvering* v. *American Dental Co.*, 318 U. S. 322, when read in the context of its facts touches this problem at all.

Affirmed.

The CHIEF JUSTICE did not participate in the consideration or decision of this case.

JONES *v.* OPELIKA.*

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 280, October Term, 1941. Reargued March 10, 11, 1943.—Decided May 3, 1943.

Upon rehearing, 318 U. S. 796, the judgments heretofore entered in these cases, 316 U. S. 584, affirming the judgments of the state courts, are vacated, and the judgments of the state courts are reversed. P. 104.

242 Ala. 549, 7 So. 2d 503, reversed.

202 Ark. 614, 151 S. W. 2d 1000, reversed.

58 Ariz. 144, 118 P. 2d 97, reversed.

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*Together with No. 314, October Term, 1941, *Bowden et al.* v. *Fort Smith*, on writ of certiorari, 315 U. S. 793, to the Supreme Court of Arkansas, and No. 966, October Term, 1941, *Jobin* v. *Arizona*, on appeal from the Supreme Court of Arizona.

Mr. Hayden C. Covington for petitioners.

No appearance for respondents in Nos. 280 and 314, and appellee in No. 966.

Briefs of *amici curiae* were filed by *Mr. Osmond K. Fraenkel,* on behalf of the American Civil Liberties Union, in support of the petition for rehearing; and by *Mr. Elisha Hanson,* on behalf of the American Newspaper Publishers Association, and *Messrs. Homer Cummings* and *Millward C. Taft,* on behalf of the General Conference of Seventh-Day Adventists, in support of the petition for rehearing and urging reversal.

Per Curiam (announced by Mr. Justice Douglas):

The judgments in these cases were affirmed at the October Term, 1941. 316 U. S. 584. Because the issues in all three cases were of the same character as those brought before us in other cases by applications for certiorari at the present term, we ordered a reargument and heard these cases together with *Murdock* v. *Pennsylvania, post,* p. 105. For the reasons stated in the opinion of the Court in the *Murdock* case, and in the dissenting opinions filed in the present cases after the argument last term, the Court is of opinion that the judgment in each case should be reversed. The judgments of this Court heretofore entered in these cases are therefore vacated, and the judgments of the state courts are reversed.

So ordered.

For dissenting opinions, see *post,* pp. 117–140.

Syllabus.

MURDOCK *v.* PENNSYLVANIA (CITY OF JEANNETTE).*

CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

No. 480. Argued March 10, 11, 1943.—Decided May 3, 1943.

1. A municipal ordinance which, as construed and applied, requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities, is invalid under the Federal Constitution as a denial of freedom of speech, press and religion. Pp. 108–110.
2. The mere fact that the religious literature is "sold" rather than "donated" does not transform the activities of the colporteur into a commercial enterprise. P. 111.
3. Upon the record in these cases, it can not be said that "Jehovah's Witnesses" were engaged in a commercial rather than in a religious venture. P. 111.
4. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution. P. 113.
5. The flat license tax here involved restrains in advance the Constitutional liberties of press and religion and inevitably tends to suppress their exercise. P. 114.
6. That the ordinance is "nondiscriminatory," in that it applies also to peddlers of wares and merchandise, is immaterial. The liberties guaranteed by the First Amendment are in a preferred position. P. 115.
7. Since the privilege in question is guaranteed by the Federal Constitution and exists independently of state authority, the inquiry as to whether the State has given something for which it can ask a return is irrelevant. P. 115.
8. A community may not suppress, or the State tax, the dissemination of views because they are unpopular, annoying, or distasteful. P. 116.

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*Together with No. 481, *Perisich* v. *Pennsylvania* (*City of Jeannette*), No. 482, *Mowder* v. *Pennsylvania* (*City of Jeannette*), No. 483, *Seders* v. *Pennsylvania* (*City of Jeannette*), No. 484, *Lamborn* v. *Pennsylvania* (*City of Jeannette*), No. 485, *Maltezos* v. *Pennsylvania* (*City of Jeannette*), No. 486, *Anastasia Tzanes* v. *Pennsylvania* (*City of Jeannette*), and No. 487, *Ellaine Tzanes* v. *Pennsylvania* (*City of Jeannette*), also on writs of certiorari, 318 U. S. 748, to the Superior Court of Pennsylvania.

9. The assumption that the ordinance has been construed to apply only to solicitation from house to house can not sustain it, since it is not narrowly drawn to prevent or control abuses or evils arising from that particular type of activity. P. 117.

149 Pa. Super. 175, 27 A. 2d 666, reversed.

CERTIORARI, 318 U. S. 748, to review affirmances of orders in eight cases refusing to allow appeals from judgments and sentences for violations of a municipal ordinance.

Mr. Hayden C. Covington for petitioners.

Mr. Fred B. Trescher for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The City of Jeannette, Pennsylvania, has an ordinance, some forty years old, which provides in part:

"That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

"For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette."

Petitioners are "Jehovah's Witnesses." They went about from door to door in the City of Jeannette distributing literature and soliciting people to "purchase" certain religious books and pamphlets, all published by the

Watch Tower Bible & Tract Society.[1] The "price" of the books was twenty-five cents each, the "price" of the pamphlets five cents each.[2] In connection with these activities, petitioners used a phonograph [3] on which they played a record expounding certain of their views on religion. None of them obtained a license under the ordinance. Before they were arrested each had made "sales" of books. There was evidence that it was their practice in making these solicitations to request a "contribution" of twenty-five cents each for the books and five cents each for the pamphlets, but to accept lesser sums or even to donate the volumes in case an interested person was without funds. In the present case, some donations of pamphlets were made when books were purchased. Petitioners were convicted and fined for violation of the ordinance. Their judgments of conviction were sustained by the Superior Court of Pennsylvania, 149 Pa. Super. Ct. 175, 27 A. 2d 666, against their contention that the ordinance deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment. Petitions for leave to appeal to the Supreme Court of Pennsylvania were denied. The cases are here on petitions for writs of certiorari which we granted along with the petitions for rehearing of *Jones* v. *Opelika,* 316 U. S. 584, and its companion cases.

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[1] Two religious books—Salvation and Creation—were sold. Others were offered in addition to the Bible. The Watch Tower Bible & Tract Society is alleged to be a non-profit charitable corporation.

[2] Petitioners paid three cents each for the pamphlets and, if they devoted only their spare time to the work, twenty cents each for the books. Those devoting full time to the work acquired the books for five cents each. There was evidence that some of the petitioners paid the difference between the sales price and the cost of the books to their local congregations which distributed the literature.

[3] Purchased along with the record from the Watch Tower Bible & Tract Society.

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The First Amendment, which the Fourteenth makes applicable to the states, declares 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 . . ." It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is, in substance, just that.

Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers.[4] They claim to follow the example of Paul, teaching "publickly, and from house to house." Acts 20:20. They take literally the mandate of the Scriptures, "Go ye into all the world, and preach the gospel to every creature." Mark 16:15. In doing so they believe that they are obeying a commandment of God.

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses.[5] It has been a potent force in various religious movements down through the years.[6] This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thou-

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[4] The nature and extent of their activities throughout the world during the years 1939 and 1940 are to be found in the 1941 Yearbook of Jehovah's Witnesses, pp. 62–243.

[5] Palmer, The Printing Press and the Gospel (1912).

[6] White, The Colporteur Evangelist (1930); Home Evangelization (1850); Edwards, The Romance of the Book (1932) c. V; 12 Biblical Repository (1844) Art. VIII; 16 The Sunday Magazine (1887) pp. 43–47; 3 Meliora (1861) pp. 311–319; Felice, Protestants of France (1853) pp. 53, 513; 3 D'Aubigne, History of The Reformation (1849) pp. 103, 152, 436–437; Report of Colportage in Virginia, North Carolina & South Carolina, American Tract Society (1855). An early type of colporteur was depicted by John Greenleaf Whittier in his legendary poem, The Vaudois Teacher. And see, Wylie, History of the Waldenses.

sands upon thousands of homes and seek through personal visitations to win adherents to their faith.[7] It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds* v.

[7] The General Conference of Seventh-Day Adventists, who filed a brief *amicus curiae* on the reargument of *Jones* v. *Opelika*, has given us the following data concerning their literature ministry: This denomination has 83 publishing houses throughout the world, issuing publications in over 200 languages. Some 9,256 separate publications were issued in 1941. By printed and spoken word, the Gospel is carried into 412 countries in 824 languages. 1942 Yearbook, p. 287. During December 1941, a total of 1,018 colporteurs operated in North America. They delivered during that month $97,997.19 worth of gospel literature, and for the whole year of 1941 a total of $790,610.36—an average per person of about $65 per month. Some of these were students and temporary workers. Colporteurs of this denomination receive half of their collections, from which they must pay their traveling and living expenses. Colporteurs are specially trained and their qualifications equal those of preachers. In the field, each worker is under the supervision of a field missionary secretary to whom a weekly report is made. After fifteen years of continuous service, each colporteur is entitled to the same pension as retired ministers. And see Howell, The Great Advent Movement (1935), pp. 72–75.

United States, 98 U. S. 145, 161–167, and *Davis* v. *Beason,* 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. See for example *Cox* v. *New Hampshire,* 312 U. S. 569, and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. But that merely illustrates that the rights with which we are dealing are not absolutes. *Schneider* v. *State,* 308 U. S. 147, 160–161. We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.

The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated, in *Jones* v. *Opelika, supra,* p. 597, that when a religious sect uses "ordinary commercial methods of sales of articles to raise propaganda funds," it is proper for the state to charge "reasonable fees for the privilege of canvassing." Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day, in *Jamison* v. *Texas,* 318 U. S. 413, 417, "The states can prohibit the use of the streets for

the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. *Valentine* v. *Chrestensen,* 316 U. S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find

that petitioners "sold" the literature. The Supreme Court of Iowa in *State* v. *Mead,* 230 Iowa 1217, 300 N. W. 523, 524, described the selling activities of members of this same sect as "merely incidental and collateral" to their "main object which was to preach and publicize the doctrines of their order." And see *State* v. *Meredith,* 197 S. C. 351, 15 S. E. 2d 678; *People* v. *Barber,* 289 N. Y. 378, 385–386, 46 N. E. 2d 329. That accurately summarizes the present record.

We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44–45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

It is contended, however, that the fact that the license tax can suppress or control this activity is unim-

portant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56–58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.*, p. 47 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State, supra; Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Largent* v. *Texas*, 318 U. S. 418; *Jamison* v. *Texas, supra.* It was for that reason that the dissenting opinions in *Jones* v. *Opelika, supra,* stressed the nature of this type of tax. 316 U. S. pp. 607–609, 620, 623. In that case, as in the present ones, we have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee

imposed as a regulatory measure to defray the expenses of policing the activities in question.[8] It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, a person cannot be compelled "to purchase, through a license fee or a license tax, the privilege freely granted by the constitution."[9] *Blue Island* v. *Kozul*, 379 Ill. 511, 519, 41 N. E. 2d 515. So, it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom

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[8] The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick* v. *Berwind-White Co.*, *supra*, pp. 56–58), it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. "So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267, and cases cited. And see *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185–188.

[9] That is the view of most state courts which have passed on the question. *McConkey* v. *Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; *State* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497; *People* v. *Banks*, 168 Misc. 515, 6 N. Y. S. 2d 41. *Contra: Cook* v. *Harrison*, 180 Ark. 546, 21 S. W. 2d 966.

of the press and religion as the "taxes on knowledge" at which the First Amendment was partly aimed. *Grosjean* v. *American Press Co., supra,* pp. 244–249. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.

The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. *State Tax Commission* v. *Aldrich,* 316 U. S. 174, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution.

Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative,

abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *Jeannette,* concurring opinion, *post,* p. 166. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Jehovah's Witnesses are not "above the law." But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Cf. *Chaplinsky* v. *New Hampshire, supra.* Nor do we have here, as we did in *Cox* v. *New Hampshire, supra,* and *Chaplinsky* v. *New Hampshire, supra,* state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. See *Cantwell* v. *Connecticut, supra,* 306. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors. See *Cox* v. *New Hamp-*

shire, supra, pp. 576–577. Nor can the present ordinance survive if we assume that it has been construed to apply only to solicitation from house to house.[10] The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city-wide in scope (*Jones* v. *Opelika*) are different only in degree. Each is an abridgment of freedom of press and a restraint on the free exercise of religion. They stand or fall together.

The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.

Reversed.

The following dissenting opinions are applicable to Nos. 280, 314, and 966 (October Term, 1941), *Jones* v. *Opelika, ante,* p. 103; and to Nos. 480–487, *Murdock* v. *Pennsylvania, ante,* p. 105. See also opinion of MR. JUSTICE JACKSON, *post,* p. 166.

MR. JUSTICE REED, dissenting:

These cases present for solution the problem of the constitutionality of certain municipal ordinances levying a tax for the production of revenue on the sale of books

[10] The Pennsylvania Superior Court stated that the ordinance has been "enforced" only to prevent petitioners from canvassing "from door to door and house to house" without a license and not to prevent them from distributing their literature on the streets. 149 Pa. Super. Ct., p. 184, 27 A. 2d 670.

and pamphlets in the streets or from door to door. Decisions sustaining the particular ordinances were entered in the three cases first listed at the last term of this Court. In that opinion the ordinances were set out and the facts and issues stated. *Jones* v. *Opelika,* 316 U. S. 584. A rehearing has been granted. The present judgments vacate the old and invalidate the ordinances. The eight cases of this term involve canvassing from door to door only under similar ordinances, which are in the form stated in the Court's opinion. By a *per curiam* opinion of this day, the Court affirms its acceptance of the arguments presented by the dissent of last term in *Jones* v. *Opelika.* The Court states its position anew in the *Jeannette* cases.

This dissent does not deal with an objection which theoretically could be made in each case, to wit, that the licenses are so excessive in amount as to be prohibitory. This matter is not considered because that defense is not relied upon in the pleadings, the briefs or at the bar. No evidence is offered to show the amount is oppressive. An unequal tax, levied on the activities of distributors of informatory publications, would be a phase of discrimination against the freedom of speech, press or religion. Nor do we deal with discrimination against the petitioners, as individuals or as members of the group, calling themselves Jehovah's Witnesses. There is no contention in any of these cases that such discrimination is practiced in the application of the ordinances. Obviously, an improper application by a city, which resulted in the arrest of Witnesses and failure to enforce the ordinance against other groups, such as the Adventists, would raise entirely distinct issues.

A further and important disclaimer must be made in order to focus attention sharply upon the constitutional issue. This dissent does not express, directly or by inference, any conclusion as to the constitutional rights of state or federal governments to place a privilege tax upon the

soliciting of a free-will contribution for religious purposes. Petitioners suggest that their books and pamphlets are not sold but are given either without price or in appreciation of the recipient's gift for the furtherance of the work of the Witnesses. The pittance sought, as well as the practice of leaving books with poor people without cost, gives strength to this argument. In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books, delivered to the public by the Witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts. The evidence is conclusive that the Witnesses normally approach a prospect with an offer of a book for twenty-five cents. Sometimes, apparently rarely, a book is left with a prospect without payment. The *quid pro quo* is demanded. If the profit was greater, twenty cents or even one dollar, no difference in principle would emerge. The Witness sells books to raise money for propagandizing his faith, just as other religious groups might sponsor bazaars, or peddle tickets to church suppers, or sell Bibles or prayer books for the same object. However high the purpose or noble the aims of the Witness, the transaction has been found by the state courts to be a sale under their ordinances and, though our doubt was greater than it is, the state's conclusion would influence us to follow its determination.[1]

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[1] The Court in the *Murdock* case analyzes the contention that the sales technique partakes of commercialism and says: "It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners 'sold' the literature." The state court, in its opinion, 149 Pa. Super. Ct. 175, 27 A. 2d 666, 667, stated the applicable ordinance as forbidding sales of merchandise by canvassing without a license, and said that the evidence established its violation by selling "two books entitled 'Salvation' and 'Creation' respectively, and certain

In the opinion in *Jones* v. *Opelika*, 316 U. S. 584, on the former hearing, attention was called to the differentiation between these cases of taxation and those of forbidden censorship, prohibition or discrimination. There is no occasion to repeat what has been written so recently as to the constitutional right to tax the money-raising activities of religious or didactic groups. There are, however, other reasons, not fully developed in that opinion, that add to our conviction that the Constitution does not prohibit these general occupational taxes.

The real contention of the Witnesses is that there can be no taxation of the occupation of selling books and pamphlets because to do so would be contrary to the due process clause of the Fourteenth Amendment, which now is held to have drawn the contents of the First Amendment into the category of individual rights protected

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leaflets or pamphlets, all published by the Watch Tower Bible and Tract Society of Brooklyn, N. Y., for which the society fixed twenty-five cents each as the price for the books and five cents each as the price of the leaflets. Defendants paid twenty cents each for the books, unless they devoted their whole time to the work, in which case they paid five cents each for the books they sold at twenty-five cents. Some of the witnesses spoke of 'contributions' but the evidence justified a finding that they *sold* the books and pamphlets."

The state court then repeated with approval from one of its former decisions the statements: "The constitutional right of freedom of worship does not guarantee anybody the right to *sell* anything from house to house or in buildings, belonging to, or in the occupancy of, other persons." ". . . we do not accede to his contention on the oral argument that the federal decisions relied upon by him go so far as to rule that the constitutional guaranty of a free press forbids dealers in books and printed matter being subjected to our State mercantile license tax or the federal income tax as to such sales, along with dealers in other merchandise." *Pittsburgh* v. *Ruffner*, 134 Pa. Super. Ct. 192, 199, 202, 4 A. 2d 224. And after further discussion of selling, the conviction of the Witnesses was affirmed. It can hardly be said, we think, that the state court did not treat the Jeannette canvassers as engaged in a commercial activity or occupation at the time of their arrests.

from state deprivation. *Gitlow* v. *New York,* 268 U. S. 652, 666; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303. Since the publications teach a religion which conforms to our standards of legality, it is urged that these ordinances prohibit the free exercise of religion and abridge the freedom of speech and of the press.

The First Amendment reads as follows:

"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."

It was one of twelve proposed on September 25, 1789, to the States by the First Congress after the adoption of the Constitution. Ten were ratified. They were intended to be and have become our Bill of Rights. By their terms, our people have a guarantee that so long as law as we know it shall prevail, they shall live protected from the tyranny of the despot or the mob. None of the provisions of our Constitution is more venerated by the people or respected by legislatures and the courts than those which proclaim for our country the freedom of religion and expression. While the interpreters of the Constitution find the purpose was to allow the widest practical scope for the exercise of religion and the dissemination of information, no jurist has ever conceived that the prohibition of interference is absolute.[2] Is subjection to nondiscriminatory, nonexcessive taxation in the distribution of religious literature, a prohibition of the exercise of religion or an abridgment of the freedom of the press?

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[2] *Whitney* v. *California,* 274 U. S. 357, 371, and the concurring opinion, 373; *Reynolds* v. *United States,* 98 U. S. 145, 166; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Cox* v. *New Hampshire,* 312 U. S. 569, 574, 576.

Nothing has been brought to our attention which would lead to the conclusion that the contemporary advocates of the adoption of a Bill of Rights intended such an exemption. The words of the Amendment do not support such a construction. "Free" cannot be held to be without cost but rather its meaning must accord with the freedom guaranteed. "Free" means a privilege to print or pray without permission and without accounting to authority for one's actions. In the Constitutional Convention the proposal for a Bill of Rights of any kind received scant attention.[3] In the course of the ratification of the Constitution, however, the absence of a Bill of Rights was used vigorously by the opponents of the new government. A number of the states suggested amendments. Where these suggestions have any bearing at all upon religion or free speech, they indicate nothing as to any feeling concerning taxation either of religious bodies or their evangelism.[4] This was not because freedom of

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[3] Journal of the Convention, 369; II Farrand, The Records of the Federal Convention, 611, 616–8, 620. Cf. McMaster & Stone, Pennsylvania and the Federal Constitution, 251–3.

[4] I Elliot's Debates on the Federal Constitution (1876) 319 *et seq.* In ratifying the Constitution the following declarations were made: *New Hampshire,* p. 326, "XI. Congress shall make no laws touching religion, or to infringe the rights of conscience." *Virginia,* p. 327, ". . . no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States." *New York,* p. 328, "That the freedom of the press ought not to be violated or restrained." After the submission of the amendments, *Rhode Island* ratified and declared, pp. 334, 335, "IV. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the

religion or free speech was not understood. It was because the subjects were looked upon from standpoints entirely distinct from taxation.[5]

The available evidence of Congressional action shows clearly that the draftsmen of the amendments had in mind the practice of religion and the right to be heard, rather than any abridgment or interference with either by taxa-

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exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others. . . . XVI. That the people have a right to freedom of speech, and of writing and publishing their sentiments. That freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."

[5] The Articles of Confederation had references to religion and free speech:

"Article III. The said States hereby severally enter into a firm league of 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 attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

"Article V. . . . Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace."

The Statute of Religious Freedom was passed in Virginia in 1785. The substance was in paragraph II: *"Be it enacted by the General Assembly,* That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." 12 Hening Statutes of Va. 86.

A number of the states' constitutions at the time of the adoption of the Bill of Rights contained provisions as to a free press:

Georgia, Constitution of 1777, Art. LXI. "Freedom of the press

tion in any form.[6] The amendments were proposed by

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and trial by jury to remain inviolate forever." I Poore, Federal and State Constitutions 383.

Maryland, Constitution of 1776, Declaration of Rights, Art. XXXVIII. "That the liberty of the press ought to be inviolably preserved." *Id.* 820.

Massachusetts, Constitution of 1780, Part First, Art. XVI. "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth." *Id.*, 959.

New Hampshire, Constitution of 1784, Part 1, Art. XXII. "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved." II Poore, *id.*, 1282.

North Carolina, Constitution of 1776, Declaration of Rights, Art. XV. "That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained." *Id.*, 1410.

Pennsylvania, Constitution of 1776, Declaration of Rights, Art. XII. "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." *Id.*, 1542.

Virginia, Bill of Rights, 1776, § 12. "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." *Id.*, 1909.

[6] For example, the first amendment as it passed the House of Representatives on Monday, August 24, 1789, read as follows:

"Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

"The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for a redress of grievances, shall not be infringed." Records of the United States Senate, 1A–C2 (U. S. Nat. Archives).

Apparently when the proposed amendments were passed by the Senate on September 9, 1789, what is now the first amendment read as follows:

"Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances." *Id.*

Mr. Madison. He was careful to explain to the Congress the meaning of the amendment on religion. The draft was commented upon by Mr. Madison when it read:

"no religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Congress 729.

He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. *Id.*, 730. No such specific interpretation of the amendment on freedom of expression has been found in the debates. The clearest is probably from Mr. Benson,[7] who said that

"The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government." *Id.*, 731–32.

There have been suggestions that the English taxes on newspapers, springing from the tax act of 10 Anne, c. 19, § CI,[8] influenced the adoption of the First Amendment.[9]

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[7] Egbert Benson was the first attorney general of New York, a member of the Continental Congress and of the New York Convention for ratification of the Constitution. Biographical Directory of the American Congress, 694.

[8] "And be it enacted by the Authority aforesaid, That there shall be raised, levied, collected and paid, to and for the Use of her Majesty, her Heirs and Successors, for and upon all Books and Papers commonly called Pamphlets, and for and upon all News Papers, or Papers containing publick News, Intelligence or Occurrences, which shall, at any Time or Times within or during the Term last mentioned, be printed in *Great Britain*, to be dispersed and made publick, and for and upon such Advertisements as are herein after mentioned, the respective Duties following; that is to say,

These taxes were obnoxious but an examination of the sources of the suggestion is convincing that there is nothing to support it except the fact that the tax on newspapers was in existence in England and was disliked.[10] The simple answer is that, if there had been any purpose of Congress to prohibit any kind of taxes on the press, its knowledge of the abominated English taxes would have led it to ban them unequivocally.

It is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the states.[11] Until then these liberties were not deemed to be guarded from state action by the Federal Constitution.[12] The states placed

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"For every such Pamphlet or Paper contained in Half a Sheet, or any lesser Piece of Paper, so printed, the Sum of one Half-penny Sterling.

"For every such Pamphlet or Paper (being larger than Half a Sheet, and not exceeding one whole Sheet) so printed, a Duty after the Rate of one Penny Sterling for every printed Copy thereof.

"And for every such Pamphlet or Paper, being larger than one whole Sheet, and not exceeding six Sheets in Octavo, or in a lesser Page, or not exceeding twelve Sheets in Quarto, or twenty Sheets in Folio, so printed, a Duty after the Rate of two Shillings Sterling for every Sheet of any kind of Paper which shall be contained in one printed Copy thereof.

"And for every Advertisement to be contained in the *London Gazette*, or any other printed Paper, such Paper being dispersed or made publick weekly, or oftner, the Sum of twelve Pence Sterling."

[9] Stevens, Sources of the Constitution, 221, note 2; Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Hist. Rev. 322, 326; McMaster & Stone, Pennsylvania and the Federal Constitution, 181; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248.

[10] Cf. Collet, Taxes on Knowledge; Chafee, Free Speech in the United States, 17, n. 33.

[11] *Gitlow* v. *New York* (1925), 268 U. S. 652, 666; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307.

[12] *Permoli* v. *First Municipality*, 3 How. 589, 609; *Barron* v. *Baltimore*, 7 Pet. 243, 247.

restraints upon themselves in their own constitutions in order to protect their people in the exercise of the freedoms of speech and of religion.[13] Pennsylvania may be taken as a fair example. Its constitution reads:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship." Purdon's Penna. Stat., Const., Art. I, § 3.

"No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." *Id.*, Art. I, § 4.

"The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ." *Id.*, Art. I, § 7.

It will be observed that there is no suggestion of freedom from taxation, and this statement is equally true of the other state constitutional provisions. It may be concluded that neither in the state or the federal constitutions was general taxation of church or press interdicted.

Is there anything in the decisions of this Court which indicates that church or press is free from the financial

[13] For the state provisions on expression and religion, see 2 Cooley. Constitutional Limitations (8th Ed.) 876, 965; III Constitutions of the States, New York State Const. Conv. Committee 1938.

burdens of government? We find nothing. Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution. *Gibbons* v. *District of Columbia,* 116 U. S. 404. This Court has held that the chief purpose of the free press guarantee was to prevent previous restraints upon publication. *Near* v. *Minnesota,* 283 U. S. 697, 713.[14] In *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250, it was said that the predominant purpose was to preserve "an untrammeled press as a vital source of public information." In that case, a gross receipts tax on advertisements in papers with a circulation of more than twenty thousand copies per week was held invalid because "a deliberate and calculated device in the guise of a tax to limit the circulation. . . ." There was this further comment:

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." *Id.,* 250.

It may be said, however, that ours is a too narrow, technical and legalistic approach to the problem of state taxation of the activities of church and press; that we should look not to the expressed or historical meaning of the First Amendment but to the broad principles of free speech and free exercise of religion which pervade our national way of life. It may be that the Fourteenth Amendment guarantees these principles rather than the more definite concept expressed in the First Amendment. This would mean that as a Court, we should determine what sort of liberty it is that the due process clause of

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[14] To this Professor Chafee adds the right to criticize the Government. Free Speech in the United States (1941) 18 *et seq.* Cf. 2 Cooley's Constitutional Limitations (8th Ed.) 886.

the Fourteenth Amendment guarantees against state restrictions on speech and church.

But whether we give content to the literal words of the First Amendment or to principles of the liberty of the press and the church, we conclude that cities or states may levy reasonable, non-discriminatory taxes on such activities as occurred in these cases. Whatever exemptions exist from taxation arise from the prevailing law of the various states. The constitutions of Alabama and Pennsylvania, with substantial similarity to the exemption provisions of other constitutions, forbid the taxation of lots and buildings used exclusively for religious worship. Alabama (1901), § 91; Pennsylvania (1874), Art. IX, § 1. These are the only exemptions of the press or church from taxation. We find nothing more applicable to our problem in the other constitutions. Surely this unanimity of specific state action on exemptions of religious bodies from taxes would not have occurred throughout our history, if it had been conceived that the genius of our institutions, as expressed in the First Amendment, was incompatible with the taxation of church or press.

Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, ad valorem taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books. Can it be that the Constitution permits a tax on the printing presses and the gross income of a metropolitan newspaper [15] but denies the right to lay an occupational tax on the distributors of the same papers? Does the exemption apply to booksellers or distributors of magazines or only to religious publications? And, if the latter, to what distributors? Or to what books? Or is this Court saying that a religious

[15] *Giragi* v. *Moore*, 301 U. S. 670; 48 Ariz. 33; 49 Ariz. 74.

practice of book distribution is free from taxation because a state cannot prohibit the "free exercise thereof" and a newspaper is subject to the same tax even though the same Constitutional Amendment says the state cannot abridge the freedom of the press? It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The National Government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels. Internal Revenue Code, §§ 22 (b) (6), 101 (6), 812 (d), 1004 (a) (2) (B). Where camp meetings or revivals charge admissions, a federal tax would apply, if Congress had not granted freedom from the exaction. *Id.*, § 1701.

It is urged that such a tax as this may be used readily to restrict the dissemination of ideas. This must be conceded but the possibility of misuse does not make a tax unconstitutional. No abuse is claimed here. The ordinances in some of these cases are the general occupation license type covering many businesses. In the *Jeannette* prosecutions, the ordinance involved lays the usual tax on canvassing or soliciting sales of goods, wares and merchandise. It was passed in 1898. Every power of taxation or regulation is capable of abuse. Each one, to some extent, prohibits the free exercise of religion and abridges the freedom of the press, but that is hardly a reason for denying the power. If the tax is used oppressively, the law will protect the victims of such action.

This decision forces a tax subsidy notwithstanding our accepted belief in the separation of church and state. Instead of all bearing equally the burdens of government, this Court now fastens upon the communities the entire cost of policing the sales of religious literature. That the burden may be heavy is shown by the record in the *Jeannette* cases. There are only eight prosecutions, but one hundred and four Witnesses solicited in Jeannette the day

of the arrests. They had been requested by the authorities to await the outcome of a test case before continuing their canvassing. The distributors of religious literature, possibly of all informatory publications, become today privileged to carry on their occupations without contributing their share to the support of the government which provides the opportunity for the exercise of their liberties.

Nor do we think it can be said, properly, that these sales of religious books are religious exercises. The opinion of the Court in the *Jeannette* cases emphasizes for the first time the argument that the sale of books and pamphlets is in itself a religious practice. The Court says the Witnesses "spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers." "The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." "It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance." "The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature." The record shows that books entitled "Creation" and "Salvation," as well as Bibles, were offered for sale. We shall assume the first two publications, also, are religious books. Certainly there can be no dissent from the statement that

selling religious books is an age-old practice, or that it is evangelism in the sense that the distributors hope the readers will be spiritually benefited. That does not carry us to the conviction, however, that when distribution of religious books is made at a price, the itinerant colporteur is performing a religious rite, is worshipping his Creator in his way. Many sects practice healing the sick as an evidence of their religious faith or maintain orphanages or homes for the aged or teach the young. These are, of course, in a sense, religious practices but hardly such examples of religious rites as are encompassed by the prohibition against the free exercise of religion.

And even if the distribution of religious books was a religious practice protected from regulation by the First Amendment, certainly the affixation of a price for the articles would destroy the sacred character of the transaction. The evangelist becomes also a book agent.

The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods. The card furnished each Witness to identify him as an ordained minister does not go so far as to say the sale is a rite. It states only that the Witnesses worship by exhibiting to people "the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them." On the back of the card appears: "You may contribute twenty-five cents to the Lord's work and receive a copy of this beautiful book." The sale of these religious books has, we think, relation to their religious exercises, similar to the "information march," said by the Witnesses to be one of their "ways of worship" and by this Court to be subject to regulation by license in *Cox* v. *New Hampshire,* 312 U. S. 569, 572, 573, 576.

The attempted analogy in the dissenting opinion in *Jones* v. *Opelika,* 316 U. S. 584, 609, 611, which now be-

comes the decision of this Court, between the forbidden burden of a state tax for the privilege of engaging in interstate commerce and a state tax on the privilege of engaging in the distribution of religious literature is wholly irrelevant. A state tax on the privilege of engaging in interstate commerce is held invalid because the regulation of commerce between the states has been delegated to the Federal Government. This grant includes the necessary means to carry the grant into effect and forbids state burdens without Congressional consent.[16] It is not the power to tax interstate commerce which is interdicted, but the exercise of that power by an unauthorized sovereign, the individual state. Although the fostering of commerce was one of the chief purposes for organizing the present Government, that commerce may be burdened with a tax by the United States. Internal Revenue Code, § 3469. Commerce must pay its way. It is not exempt from any type of taxation if imposed by an authorized authority. The Court now holds that the First Amendment wholly exempts the church and press from a privilege tax, presumably by the national as well as the state government.

The limitations of the Constitution are not maxims of social wisdom but definite controls on the legislative process. We are dealing with power, not its abuse. This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of indefinite extension. We had thought that such an exemption required a clear and certain grant. This we do not find in the language of the First and Fourteenth Amendments. We are therefore of the opinion the judgments below should be affirmed.

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[16] *Brown* v. *Maryland*, 12 Wheat. 419, 445, 448; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 350; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON join in this dissent. MR. JUSTICE JACKSON has stated additional reasons for dissent in his concurrence in *Douglas* v. *Jeannette, post,* p. 166.

MR. JUSTICE FRANKFURTER, dissenting:

While I wholly agree with the views expressed by MR. JUSTICE REED, the controversy is of such a nature as to lead me to add a few words.

A tax can be a means for raising revenue, or a device for regulating conduct, or both. Challenge to the constitutional validity of a tax measure requires that it be analyzed and judged in all its aspects. We must therefore distinguish between the questions that are before us in these cases and those that are not. It is altogether incorrect to say that the question here is whether a state can limit the free exercise of religion by imposing burdensome taxes. As the opinion of my Brother REED demonstrates, we have not here the question whether the taxes imposed in these cases are in practical operation an unjustifiable curtailment upon the petitioners' undoubted right to communicate their views to others. No claim is made that the effect of these taxes, either separately or cumulatively, has been, or is likely to be, to restrict the petitioners' religious propaganda activities in any degree. Counsel expressly disclaim any such contention. They insist on absolute immunity from any kind of monetary exaction for their occupation. Their claim is that no tax, no matter how trifling, can constitutionally be laid upon the activity of distributing religious literature, regardless of the actual effect of the tax upon such activity. That is the only ground upon which these ordinances have been attacked; that is the only question raised in or decided by the state courts; and that is the only question presented to us. No complaint is made against the size of the taxes. If an appropriate claim, indicating that the taxes were oppressive in their effect upon the petition-

ers' activities, had been made, the issues here would be very different. No such claim has been made, and it would be gratuitous to consider its merits.

Nor have we occasion to consider whether these measures are invalid on the ground that they unjustly or unreasonably discriminate against the petitioners. Counsel do not claim, as indeed they could not, that these ordinances were intended to or have been applied to discriminate against religious groups generally or Jehovah's Witnesses particularly. No claim is made that the effect of the taxes is to hinder or restrict the activities of Jehovah's Witnesses while other religious groups, perhaps older or more prosperous, can carry on theirs. This question, too, is not before us.

It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church. A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. And so, no one would suggest that a clergyman who uses an automobile or the telephone in connection with his work thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls. Equally alien is it to our constitutional system to suggest that the Constitution of the United States exempts church-held lands from state taxation. Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.

Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment of course protects the right to publish a newspaper or a magazine or a book. But the crucial question is—how much protection does the Amendment give, and against what is the right protected? It is certainly true that the protection afforded the freedom of the press by the First Amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspaper publishing for bearing the burdens of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press. If the Court could justifiably hold that the tax measures in these cases were vulnerable on that ground, I would unreservedly agree. But the Court has not done so, and indeed could not.

The vice of the ordinances before us, the Court holds, is that they impose a special kind of tax, a "flat license tax, the payment of which is a condition of the exercise of these constitutional privileges [to engage in religious activities]." But the fact that an occupation tax is a "flat" tax certainly is not enough to condemn it. A legislature undoubtedly can tax all those who engage in an activity upon an equal basis. The Constitution certainly does not require that differentiations must be made among taxpayers upon the basis of the size of their incomes or the scope of their activities. Occupation taxes normally are flat taxes, and the Court surely does not mean to hold that a tax is bad merely because all taxpayers pursuing the very same activities and thereby demanding the same governmental services are treated alike. Nor, as I have indicated, can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its payment. It depends upon the nature of the condition that

is imposed, its justification, and the extent to which it hinders or restricts the exercise of the privilege.

As I read the Court's opinion, it does not hold that the taxes in the cases before us in fact do hinder or restrict the petitioners in exercising their constitutional rights. It holds that "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." This assumes that because the taxing power exerted in *Magnano Co.* v. *Hamilton,* 292 U. S. 40, the well-known oleomargarine tax case, may have had the effect of "controlling" or "suppressing" the enjoyment of a privilege and still was sustained by this Court, and because all exertions of the taxing power may have that effect, if perchance a particular exercise of the taxing power does have that effect, it would have to be sustained under our ruling in the *Magnano* case.

The power to tax, like all powers of government, legislative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it. Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223. The fact that a power can be perverted does not mean that every exercise of the power is a perversion of the power. Thus, if a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course it is bad. But it is irrelevant that a tax can suppress or control if it does not. The Court holds that "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of resources necessary for its maintenance." But this is not the same as saying that "Those who do tax the exercise of this religious practice have made its exercise so costly as to deprive it of the resources necessary for its maintenance."

The Court could not plausibly make such an assertion because the petitioners themselves disavow any claim that the taxes imposed in these cases impair their ability to exercise their constitutional rights. We cannot invalidate the tax measures before us simply because there may be others, not now before us, which are oppressive in their effect. The Court's opinion does not deny that the ordinances involved in these cases have in no way disabled the petitioners to engage in their religious activities. It holds only that "Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse." I quite agree with this statement as an abstract proposition. Those who possess the power to tax might wield it in tyrannical fashion. It does not follow, however, that every exercise of the power is an act of tyranny, or that government should be impotent because it might become tyrannical. The question before us now is whether these ordinances have deprived the petitioners of their constitutional rights, not whether some other ordinances not now before us might be enacted which might deprive them of such rights. To deny constitutional power to secular authority merely because of the possibility of its abuse is as valid as to deny the basis of spiritual authority because those in whom it is temporarily vested may misuse it.

The petitioners say they are immune as much from a flat occupation tax as from a licensing fee purporting explicitly to cover only the costs of regulation. They rightly reject any distinction between this occupation tax and such a licensing fee. There is no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue. The state exacts revenue to maintain the costs of government as an entirety. For certain purposes and at certain times a legislature may earmark exactions to cover the costs of specific governmental services. In most instances the revenues of the state are tapped from multitudinous sources for a

common fund out of which the costs of government are paid. As a matter of public finance, it is often impossible to determine with nicety the governmental expenditures attributable to particular activities. But, in any event, whether government collects revenue for the costs of its services through an earmarked fund, or whether an approximation of the cost of regulation goes into the general revenues of government out of which all expenses are borne, is a matter of legislative discretion and not of constitutional distinction. Just so long as an occupation tax is not used as a cover for discrimination against a constitutionally protected right or as an unjustifiable burden upon it, from the point of view of the Constitution of the United States it can make no difference whether such a money exaction for governmental benefits is labeled a regulatory fee or a revenue measure.

It is strenuously urged that the Constitution denies a city the right to control the expression of men's minds and the right of men to win others to their views. But the Court is not divided on this proposition. No one disputes it. All members of the Court are equally familiar with the history that led to the adoption of the Bill of Rights and are equally zealous to enforce the constitutional protection of the free play of the human spirit. Escape from the real issue before us cannot be found in such generalities. The real issue here is not whether a city may charge for the dissemination of ideas but whether the states have power to require those who need additional facilities to help bear the cost of furnishing such facilities. Street hawkers make demands upon municipalities that involve the expenditure of dollars and cents, whether they hawk printed matter or other things. As the facts in these cases show, the cost of maintaining the peace, the additional demands upon governmental facilities for assuring security, involve outlays which have to be met. To say that the Constitution forbids the states to obtain the necessary revenue from the whole of a class that enjoys these benefits

and facilities, when in fact no discrimination is suggested as between purveyors of printed matter and purveyors of other things, and the exaction is not claimed to be actually burdensome, is to say that the Constitution requires not that the dissemination of ideas in the interest of religion shall be free but that it shall be subsidized by the state. Such a claim offends the most important of all aspects of religious freedom in this country, namely, that of the separation of church and state.

The ultimate question in determining the constitutionality of a tax measure is—has the state given something for which it can ask a return? There can be no doubt that these petitioners, like all who use the streets, have received the benefits of government. Peace is maintained, traffic is regulated, health is safeguarded—these are only some of the many incidents of municipal administration. To secure them costs money, and a state's source of money is its taxing power. There is nothing in the Constitution which exempts persons engaged in religious activities from sharing equally in the costs of benefits to all, including themselves, provided by government.

I cannot say, therefore, that in these cases the community has demanded a return for that which it did not give. Nor am I called upon to say that the state has demanded unjustifiably more than the value of what it gave, nor that its demand in fact cramps activities pursued to promote religious beliefs. No such claim was made at the bar, and there is no evidence in the records to substantiate any such claim if it had been made. Under these circumstances, therefore, I am of opinion that the ordinances in these cases must stand.

MR. JUSTICE JACKSON joins in this dissent.

MARTIN *v.* CITY OF STRUTHERS.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 238. Argued March 11, 1943.—Decided May 3, 1943.

A municipal ordinance forbidding any person to knock on doors, ring doorbells, or otherwise summon to the door the occupants of any residence for the purpose of distributing to them handbills or circulars, *held*—as applied to a person distributing advertisements for a religious meeting—invalid under the Federal Constitution as a denial of freedom of speech and press. Pp. 142, 149.

139 Ohio St. 372, 40 N. E. 2d 154, reversed.

APPEAL from the dismissal of an appeal from a judgment affirming a conviction for violation of a municipal ordinance.

Mr. Hayden C. Covington, with whom *Mr. Victor F. Schmidt* was on the brief, for appellant.

Messrs. David C. Haynes and *T. T. Macejko* for appellee.

Miss Dorothy Kenyon filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Con-

stitution's guarantee of free speech and press, possesses this power.[1]

The appellant, espousing a religious cause in which she was interested—that of the Jehovah's Witnesses—went to the homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. In doing so, she proceeded in a conventional and orderly fashion. For delivering a leaflet to the inmate of a home, she was convicted in the Mayor's Court and was fined $10.00 on a charge of violating the following City ordinance:

"It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing."

The appellant admitted knocking at the door for the purpose of delivering the invitation, but seasonably urged in the lower Ohio state court that the ordinance as construed and applied was beyond the power of the State because in violation of the right of freedom of press and religion as guaranteed by the First and Fourteenth Amendments.[2]

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[1] This ordinance was not directed solely at commercial advertising. Cf. *Valentine* v. *Chrestensen,* 316 U. S. 52; *Green River* v. *Fuller Brush Co.,* 65 F. 2d 112. Compare for possible different results under state constitutions *Prior* v. *White,* 132 Fla. 1, 180 So. 347; *Orangeburg* v. *Farmer,* 181 S. C. 143, 186 S. E. 783.

[2] The appellant's judgment of conviction was appealed to the Supreme Court of Ohio which dismissed the appeal on the stated ground that: "No debatable constitutional question is involved." 139 Ohio St. 372, 40 N. E. 2d 154. We at first dismissed the appeal, thinking that the Supreme Court of Ohio meant that no constitutional question had been properly raised in accordance with Ohio procedure. Upon reconsideration we concluded that, since a constitutional question had been presented in the lower state court, the language of the Order of

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.[3] This freedom embraces the right to distribute literature, *Lovell* v. *Griffin,* 303 U. S. 444, 452, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider* v. *State,* 308 U. S. 147, 162. Yet the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. *Cantwell* v. *Connecticut,* 310 U. S. 296, 304. No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that re-

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the Supreme Court of Ohio should be construed as a decision upon the constitutional question.

[3] "The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure." Jefferson to Lafayette, Writings of Thomas Jefferson, Washington ed., v. 7, p. 325.

spect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must "be astute to examine the effect of the challenged legislation" and must "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation." *Schneider* v. *State, supra,* 161.

Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor. The City, which is an industrial community most of whose residents are engaged in the iron and steel industry,[4] has vigorously argued that its inhabitants frequently work on swing shifts, working nights and sleeping days so that casual bell pushers might seriously interfere with the hours of sleep although they call at high noon. In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later.[5] Crime prevention may thus be the purpose of regulatory ordinances.

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[4] 16th Census, "Population—2d Series—Ohio," 133, 151.

[5] For a discussion of such practices, see Soderman and O'Connell, Modern Criminal Investigation, chap. 13 and chap. 20; Federal Bu-

While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. "Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." *Schneider* v. *State, supra,* 164. Many of our most widely established religious organizations have used this method of disseminating their doctrines,[6] and laboring groups have used it in recruiting

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reau of Investigation Law Enforcement Bulletin, July, 1938; 20 Public Management 83 (an analysis of the criminal records of a group of canvassers in Winnetka, Illinois). Sacramento, California, has rested a canvassing ordinance on crime prevention, *In re Hartmann,* 25 Cal. App. 2d 55, 76 P. 2d 709, and courts have been aware of this aspect of the problem in dealing with such ordinances. *Allen* v. *McGovern,* 12 N. J. Misc. 12, 13, 169 A. 345; *Dziatkiewicz* v. *Maplewood,* 115 N. J. L. 37, 178 A. 205.

[6] Representatives of the American Tract Society, an interdenominational organization engaged in colportage since 1841, have visited over twenty-five million families. Article on "American Tract Society," 1 Encyclopedia Americana (1932 ed.) 566; Annual Reports of the American Tract Society (e. g., the 116th Report, 1941, 37–38; 117th Report, 1942, pp. 37–38); Baird, Religion in America (1856), 334–340.

See also the activities of the American Bible Society. Jones, Colportage Sketches (1883); Dwight, The Centennial History of the American Bible Society (1916), 177–81, 293–95, 460; Annual Reports of the American Bible Society (e. g., 126th Report, 1942, *passim*).

For the world-wide colportage activities of the British and Foreign Bible Society, see the Society's 137th Report, 1941, *passim;* For Wayfaring Men (1939), 31–78; Ritson, The World Is Our Parish (1939), 116–18.

This practice has been followed by many religious groups. See, e. g., Barnes, Barnes and Stephenson, Pioneers of Light (1924), 81–

their members.[7] The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house.[8] Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes.[9] Door to door distribution of circulars is essential to the poorly financed causes of little people.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the

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104; Stevens, The First Hundred Years of the American Baptist Publication Society (1925), 30–32. During the fiscal year 1939–1940, representatives of the American Baptist Publication Society visited 52,832 families. More than six million families have been visited over a one hundred year period. Annual of Northern Baptist Convention, 1940, 671, 673; Year Book of the Northern Baptist Convention, 1942, 332–335. See for the practice of other religions, Stewart, Sheldon Jackson (1908), 32; Goodykoontz, Home Missions on the American Frontier (1939), 120–122; Keller, The Second Great Awakening in Connecticut (1942), 117–121.

[7] Lorwin and Flexner, The American Federation of Labor, 352; International Ladies Garment Workers Union, Handbook of Trade Union Methods, 10; Brooks, When Labor Organizes, chap. 1 ("Organizing a Union").

[8] "Women's Handbook," pp. 22 and 63, a publication of the Women's Section of the War Savings Staff of the Department of the Treasury; The Home Front Journal, April, 1943, p. 1, a publication of the same group; "A Program of Action for Clubs," p. 3, a publication of the Department of the Treasury. Presumably a citizen of Struthers distributing to homes the pamphlets recommended in "A Program of Action" would violate the City's ordinance.

[9] Merriam and Gosnell, The American Party System, 317 (The Canvass); Bruce, American Parties and Politics, 407; Ostogoskii, Democracy, 153–155, 453; Pierson, In the Brush, 142 (politics in the old Southwest); Barnes, The Antislavery Impulse, 137–143 (circulation of antislavery petitions). The American Politician, ed. by J. T. Salter, 19, 235, 310, 339, and The American Political Scene, ed. by

preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states,[10] while similar statutes of narrower scope are on the books of at least twelve states more.[11] We know of no state which,

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Edward Logan, 64, 150, indicate by passing references to practices in many states the extent to which the door to door canvass is a staple of political life.

For encouragement of this practice, see Handbook of Club Organization, National Federation of Women's Republican Clubs (1942), 21; and Precinct Organization in War Time, a recent publication of the Democratic National Committee.

[10] Alabama Code (1940), Tit. 14, § 426; Connecticut Gen. Stat. (1930), § 6119; Florida Stat. (1941), § 821.01; Georgia Code Ann. (1938), § 26–3002; Illinois Ann. Stat. (Smith-Hurd, 1935), Ch. 38, § 565; Indiana Stat. (Burns, 1934), § 10–4506; Maryland Ann. Code (Flack, 1939), Art. 27, §§ 24, 286; Massachusetts Ann. Laws (1933), v. 9, Ch. 266, § 120; Mississippi Code Ann. (1930), § 1168; Nebraska Comp. Stat. (1929), §§ 76–807, 8; Nevada Comp. Laws (1929), § 10447; North Carolina Code (1943), § 14–134; Ohio Code Ann. (Throckmorton, 1940), § 12522; Oklahoma Stat. (1937), Tit. 21, § 1835; Oregon Comp. Laws Ann. (1940), §§ 23–593, 4; Pennsylvania Ann. Stat. (Purdon, 1942 Supp.), v. 18, § 4954; South Carolina Code (1942), § 1190; Virginia Code (1936), § 4480a; Washington Rev. Stat. (Remington, 1932), § 2665; Wyoming Rev. Stat. (1931), § 32–337.

[11] Arkansas Stat. (Pope, 1937), § 3181; California Penal Code (Deering, 1941), §§ 602, 627; Colorado Stat. Ann. (1935), v. 3, Ch. 73, § 118; Kentucky Rev. Stat. (Baldwin, 1942), §§ 433.720, 433.490;

as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.[12] The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities [13] which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers.[14] In any case, the problem must be worked

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Louisiana Gen. Stat. (Dart, 1939), § 9463; Maine Rev. Stat. (1930), Ch. 139, § 22; Minnesota Stat. (1941), § 621.57; Montana Rev. Code Ann. (1935), § 11482; New Hampshire Public Laws (1926), Ch. 380, § 11; New Jersey Rev. Stat. (1937), Tit. 4, § 17–2; New York Consol. Laws Ann. (McKinney, 1941), Conservation Law, §§ 361–364; Texas Stat. (Vernon, 1936), P. C. Art. 1377.

[12] Municipalities have occasionally made canvassers trespassers without requiring that the householder give an explicit notice, as the instant ordinance testifies. See e. g. *People* v. *Bohnke*, 287 N. Y. 154, 38 N. E. 2d 478.

[13] Municipalities and the Law in Action (1943), National Institute of Municipal Law Officers, 373. We do not, by this reference, mean to express any opinion on the wisdom or validity of the particular proposals of the Institute.

[14] "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell* v. *Connecticut*, 310 U. S. 296, 306.

out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home.

The Struthers ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press.

The judgment below is reversed for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MURPHY, concurring:

I join in the opinion of the Court, but the importance of this and the other cases involving Jehovah's Witnesses decided today, moves me to add this brief statement.

I believe that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. Cf. *Jones* v. *Opelika,* 316 U. S. 584 at 621. The right extends to the aggressive and disputatious as well as to the meek and acquiescent. The lesson of experience is that—with the passage of time and the interchange of ideas—organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community, or else sink into oblivion. Religious differences are often sharp and pleaders at times resort "to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell* v. *Connecticut,* 310 U. S. 296, 310. If a religious be-

lief has substance, it can survive criticism, heated and abusive though it may be, with the aid of truth and reason alone. By the same method, those who follow false prophets are exposed. Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought.

Also, few, if any, believe more strongly in the maxim, "a man's home is his castle," than I. Cf. *Goldman* v. *United States,* 316 U. S. 129 at 136. If this principle approaches a collision with religious freedom, there should be an accommodation, if at all possible, which gives appropriate recognition to both. That is, if regulation should be necessary to protect the safety and privacy of the home, an effort should be made at the same time to preserve the substance of religious freedom.

There can be no question but that appellant was engaged in a religious activity when she was going from house to house in the City of Struthers distributing circulars advertising a meeting of those of her belief. Distribution of such circulars on the streets cannot be prohibited. *Jamison* v. *Texas,* 318 U. S. 413. Nor can their distribution on the streets or from house to house be conditioned upon obtaining a license which is subject to the uncontrolled discretion of municipal officials, *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Largent* v. *Texas,* 318 U. S. 418, or upon payment of a license tax for the privilege of so doing. *Murdock* v. *Pennsylvania, ante,* p. 105; *Jones* v. *Opelika, ante,* p. 103. Preaching from house to house is an age-old method of proselyting, and it must be remembered that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra,* p. 163.

No doubt there may be relevant considerations which justify considerable regulation of door to door canvassing, even for religious purposes,—regulation as to time, number and identification of canvassers, etc., which will protect the privacy and safety of the home and yet preserve the substance of religious freedom. And, if a householder does not desire visits from religious canvassers, he can make his wishes known in a suitable fashion. The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute "narrowly drawn to cover the precise situation" that calls for remedial action, *Thornhill* v. *Alabama,* 310 U. S. 88, 105; *Cantwell* v. *Connecticut, supra,* at 311. As construed by the state courts and applied to the case at bar, the Struthers ordinance prohibits door to door canvassing of any kind, no matter what its character and purpose may be, if attended by the distribution of written or printed matter in the form of a circular or pamphlet. I do not believe that this outright prohibition is warranted. As I understand it, the distribution of circulars and pamphlets is a relatively minor aspect of the problem. The primary concern is with the act of canvassing as a source of inconvenience and annoyance to householders. But if the city can prohibit canvassing for the purpose of distributing religious pamphlets, it can also outlaw the door to door solicitations of religious charities, or the activities of the holy mendicant who begs alms from house to house to serve the material wants of his fellowmen and thus obtain spiritual comfort for his own soul.

Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure which adequately protects the peace and privacy of the home without suppressing legitimate religious activities. But that does not justify a repressive enactment like the one now before us. Cf. *Schneider* v. *State, supra,* p. 164. Freedom of religion has a higher dignity under the Con-

stitution than municipal or personal convenience. In these days, free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this opinion.

MR. JUSTICE FRANKFURTER:

From generation to generation, fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. Thus it has come to be that the transforming consequences resulting from the pervasive industrialization of life find the Commerce Clause appropriate, for instance, for national regulation of an aircraft flight wholly within a single state. Such exertion of power by the national government over what might seem a purely local transaction would, as a matter of abstract law, have been as unimaginable to Marshall as to Jefferson, precisely because neither could have foreseen the present conquest of the air by man. But law, whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being. Therefore, neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men.

The habits and security of life in sparsely settled rural communities, or even in those few cities which a hundred and fifty years ago had a population of a few thousand, cannot be made the basis of judgment for determining the area of allowable self-protection by present-day industrial communities. The lack of privacy and the hazards

to peace of mind and body caused by people living not in individual houses but crowded together in large human beehives, as they so widely do, are facts of modern living which cannot be ignored.

Concededly, the Due Process Clause of the Fourteenth Amendment did not abrogate the power of the states to recognize that homes are sanctuaries from intrusions upon privacy and of opportunities for leading lives of health and safety. Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be confined within specified hours and otherwise circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors. Acknowledgement is also made that the City of Struthers, the particular ordinance of which presents the immediate issue before us, is one of those industrial communities the residents of which have a working day consisting of twenty-four hours, so that for some portions of the city's inhabitants opportunities for sleep and refreshment require during day as well as night whatever peace and quiet is obtainable in a modern industrial town. It is further recognized that the modern multiple residences give opportunities for pseudo-canvassers to ply evil trades—dangers to the community pursued by the few but far-reaching in their success and in the fears they arouse.

The Court's opinion apparently recognizes these factors as legitimate concerns for regulation by those whose business it is to legislate. But it finds, if I interpret correctly what is wanting in explicitness, that instead of aiming at the protection of householders from intrusion upon needed hours of rest or from those plying evil trades, whether pretending the sale of pots and pans or the distribution of leaflets, the ordinance before us merely penalizes the distribution of "literature." To be sure, the prohibition of this ordinance is within a small circle. But it is not our business to require legislatures to extend the area

of prohibition or regulation beyond the demands of revealed abuses. And the greatest leeway must be given to the legislative judgment of what those demands are. The right to legislate implies the right to classify. We should not, however unwittingly, slip into the judgment seat of legislatures. I myself cannot say that those in whose keeping is the peace of the City of Struthers and the right of privacy of its home dwellers could not single out, in circumstances of which they may have knowledge and I certainly have not, this class of canvassers as the particular source of mischief. The Court's opinion leaves one in doubt whether prohibition of all bell-ringing and door-knocking would be deemed an infringement of the constitutional protection of speech. It would be fantastic to suggest that a city has power, in the circumstances of modern urban life, to forbid house-to-house canvassing generally, but that the Constitution prohibits the inclusion in such prohibition of door-to-door vending of phylacteries or rosaries or of any printed matter. If the scope of the Court's opinion, apart from some of its general observations, is that this ordinance is an invidious discrimination against distributors of what is politely called literature, and therefore is deemed an unjustifiable prohibition of freedom of utterance, the decision leaves untouched what are in my view controlling constitutional principles, if I am correct in my understanding of what is held, and I would not be disposed to disagree with such a construction of the ordinance.

MR. JUSTICE REED, dissenting:

While I appreciate the necessity of watchfulness to avoid abridgments of our freedom of expression, it is impossible for me to discover in this trivial town police regulation a violation of the First Amendment. No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of

his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment.

Freedom to distribute publications is obviously a part of the general freedom guaranteed the expression of ideas by the First Amendment. It is trite to say that this freedom of expression is not unlimited. Obscenity, disloyalty and provocatives do not come within its protection. *Near* v. *Minnesota,* 283 U. S. 697, 712, 716; *Schenck* v. *United States,* 249 U. S. 47, 51; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572, 574. All agree that there may be reasonable regulation of the freedom of expression. *Cantwell* v. *Connecticut,* 310 U. S. 296, 304. One cannot throw dodgers "broadcast in the streets." *Schneider* v. *State,* 308 U. S. 147, 161.

The ordinance forbids "any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates . . . to the door" to receive the advertisement. The Court's opinion speaks of prohibitions against the distribution of "literature." The precise matter distributed appears in the footnote.[1] I do not

[1] "RELIGION as a WORLD REMEDY, The Evidence in Support Thereof. Hear JUDGE RUTHERFORD, Sunday, July 28, 4 P. M., E. S. T. FREE. All Persons of Goodwill Welcome, FREE. Columbus Coliseum, Ohio State Fair Grounds." [On one side.]

"1940's Event of Paramount Importance To YOU! What is it? The THEOCRATIC CONVENTION OF JEHOVAH'S WITNESSES. Five Days—July 24–28—Thirty Cities. All Lovers of Righteousness—Welcome! The strange fate threatening all 'Christendom' makes it imperative that you COME and HEAR the public address on RELIGION AS A WORLD REMEDY, The Evidence in Support Thereof, by Judge Rutherford at the COLISEUM of the OHIO STATE FAIR GROUNDS, Columbus, Ohio, Sunday, July 28, at 4 p. m., E. S. T. 'He that hath an ear to hear' will come to one of the auditoriums of the convention cities listed below, tied in with Columbus by direct wire. Some of the 30 cities are [21 are listed]. For detailed information concerning these conventions write WATCHTOWER CONVENTION COMMITTEE, 117 Adams St., Brooklyn, N. Y." [On the other side.]

read the ordinance as prohibiting the distribution of literature nor can I appraise the dodger distributed as falling into that classification. If the ordinance, in my view, did prohibit the distribution of literature, while permitting all other canvassing, I should believe such an ordinance discriminatory. This ordinance is different. The most, it seems to me, that can be or has been read into the ordinance is a prohibition of free distribution of printed matter by summoning inmates to their doors. There are excellent reasons to support a determination of the city council that such distributors may not disturb householders while permitting salesmen and others to call them to the door. Practical experience may well convince the council that irritations arise frequently from this method of advertising. The classification is certainly not discriminatory.[2]

If the citizens of Struthers desire to be protected from the annoyance of being called to their doors to receive printed matter, there is to my mind no constitutional provision which forbids their municipal council from modifying the rule that anyone may sound a call for the householder to attend his door. It is the council which is entrusted by the citizens with the power to declare and abate the myriad nuisances which develop in a community. Its determination should not be set aside by this Court unless clearly and patently unconstitutional.

The antiquity and prevalence of colportage are relied on to support the Court's decision. But the practice has persisted because the householder was acquiescent. It can hardly be thought, however, that long indulgence of a practice which many or all citizens have welcomed or tolerated creates a constitutional right to its continuance.

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[2] *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224; *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539; *Minnesota* v. *Probate Court,* 309 U. S. 270; *Labar Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 46; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509, 512.

Changing conditions have begotten modification by law of many practices once deemed a part of the individual's liberty.

The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics. Once the door is opened, the visitor may not insert a foot and insist on a hearing. He certainly may not enter the home. To knock or ring, however, comes close to such invasions. To prohibit such a call leaves open distribution of the notice on the street or at the home without signal to announce its deposit. Such assurance of privacy falls far short of an abridgment of freedom of the press. The ordinance seems a fair adjustment of the privilege of distributors and the rights of householders.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON join in this dissent.

See also opinion of MR. JUSTICE JACKSON, *post*, p. 166.

DOUGLAS ET AL. *v.* CITY OF JEANNETTE ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 450. Argued March 10, 11, 1943.—Decided May 3, 1943.

1. Members of Jehovah's Witnesses, in their own behalf and in behalf of all other Jehovah's Witnesses in the State and in adjoining States, brought suit in a federal District Court to restrain a city and its mayor from enforcing against them an ordinance prohibiting the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. The complaint, praying equitable relief, alleged, in substance, that the defendants, by arrest, detention and criminal prosecution of the complainants and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion; and that the defendants threaten to continue to enforce the ordinance by arrests and prosecutions. The suit was not based nor maintainable on the ground of diversity of citizenship, but was alleged to arise

under the Constitution and laws of the United States, including the Civil Rights Act of 1871. *Held:*

(1) The suit was within the jurisdiction of the District Court under 28 U. S. C. § 41 (14) irrespective of the amount in controversy. P. 161.

(2) The federal District Court in the exercise of its discretion should have refused to enjoin the threatened criminal prosecutions in the state courts. P. 165.

2. The guaranties of the First Amendment are protected by the Fourteenth Amendment against encroachment by the States. P. 162.
3. Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance. P. 162.
4. Though a federal court have power as such to decide the cause, it should raise *sua sponte* the question of want of equity jurisdiction where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court. P. 162.
5. It is the policy of Congress generally to leave to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved, and the federal courts should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the States—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. P. 163.
6. It does not appear from the record that petitioners have been threatened with any injury other than that incidental to any criminal prosecution brought lawfully and in good faith; or that a federal court of equity could rightly afford petitioners any protection which they could not secure by prompt trial in the state courts and appeal pursued to this Court; or that, in view of the decision in *Murdock* v. *Pennsylvania, ante,* p. 105, there is ground for supposing that, in order to secure for the future the complainants' constitutional rights, the intervention of a federal court will be either necessary or appropriate. P. 164.

130 F. 2d 652, affirmed.

CERTIORARI, 318 U. S. 749, to review the reversal of a decree, 39 F. Supp. 32, enjoining the enforcement against petitioners of a municipal ordinance.

Mr. Hayden C. Covington for petitioners.

Mr. Fred B. Trescher for respondents.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Petitioners brought this suit in the United States District Court for Western Pennsylvania to restrain threatened criminal prosecution of them in the state courts by respondents, the City of Jeannette (a Pennsylvania municipal corporation) and its Mayor, for violation of a city ordinance which prohibits the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. The ordinance as applied is held to be an unconstitutional abridgment of free speech, press and religion in *Murdock* v. *Pennsylvania, ante,* p. 105. The questions decisive of the present case are whether the district court has statutory jurisdiction as a federal court to entertain the suit, and whether petitioners have by their pleadings and proof established a cause of action in equity.

The case is not one of diversity of citizenship, since some of the petitioners, like respondents, are citizens of Pennsylvania. The bill of complaint alleges that the named plaintiffs are Jehovah's Witnesses, persons who entertain religious beliefs and engage in religious practices which it describes; that the suit is a class suit brought in petitioners' own behalf and in behalf of all other Jehovah's Witnesses in Pennsylvania and adjoining states to restrain respondents from enforcing ordinance No. 60 of the City of Jeannette against petitioners and all other Jehovah's Witnesses because, as applied to them, the ordinance abridges the guaranties of freedom of speech, press, and religion of the First Amendment made applicable to the states by the Fourteenth.

The suit is alleged to arise under the Constitution and laws of the United States, including the Civil Rights Act of 1871. The complaint sets up that in the practice of their religion and in conformity to the teachings of the Bible, Jehovah's Witnesses make, and for many years have made, house to house distribution, among the people of the City of Jeannette, of certain printed books and pamphlets setting forth the Jehovah's Witnesses' interpretations of the teachings of the Bible. Municipal Ordinance No. 60 provides: "That all persons canvassing for or soliciting within said Borough (now City of Jeannette), orders for goods . . . wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited" without first procuring a license and paying prescribed license taxes, shall be punished by fine not exceeding $100 and costs, or if the fine is not paid, by imprisonment from five to thirty days. It is alleged that in April, 1939, respondents arrested and prosecuted petitioners and other Jehovah's Witnesses for violation of the ordinance because of their described activities in distributing religious literature, without the permits required by the ordinance, and that respondents threaten to continue to enforce the ordinance by arrests and prosecutions—all in violation of petitioners' civil rights.

No preliminary or interlocutory injunction was granted but the district court, after a trial, held the ordinance invalid, 39 F. Supp. 32, on the authority of *Reid* v. *Borough of Brookville,* 39 F. Supp. 30, in that it deprived petitioners of the rights of freedom of press and religion guaranteed by the First and Fourteenth Amendments. The court enjoined respondents from enforcing the ordinance against petitioners and other Jehovah's Witnesses.

The Court of Appeals for the Third Circuit sustained the jurisdiction of the district court, but reversed on the merits, 130 F. 2d 652, on the authority of *Jones* v. *Opelika,* 316 U. S. 584. One judge dissented on the ground that the complaint did not sufficiently allege a violation

of the Due Process Clause of the Fourteenth Amendment so as to entitle petitioners to relief under the Civil Rights Act. We granted certiorari, 318 U. S. 749, and set the case for argument with *Murdock* v. *Pennsylvania, supra.*

We think it plain that the district court had jurisdiction as a federal court to hear and decide the question of the constitutional validity of the ordinance, although there was no allegation or proof that the matter in controversy exceeded $3,000. By 8 U. S. C. § 43 (derived from § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, continued without substantial change as R. S. § 1979) it is provided that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As we held in *Hague* v. *C. I. O.*, 307 U. S. 496, 507–14, 527–32, the district courts of the United States are given jurisdiction by 28 U. S. C. § 41 (14) over suits brought under the Civil Rights Act without the allegation or proof of any jurisdictional amount. Not only do petitioners allege that the present suit was brought under the Civil Rights Act, but their allegations plainly set out an infringement of its provisions. In substance, the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future.

The particular provision of the Constitution on which petitioners rely is the Due Process Clause of the Four-

teenth Amendment, violation of which the dissenting judge below thought was not sufficiently alleged to establish a basis for relief under the Civil Rights Act. But we think this overlooks the special relationship of the Fourteenth Amendment to the rights of freedom of speech, press, and religion guaranteed by the First. We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First. *Schneider* v. *State*, 308 U. S. 147, 160, n. 8 and cases cited; *Jamison* v. *Texas*, 318 U. S. 413. Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance. It follows that the bill, which amply alleges the facts relied on to show the abridgment by criminal proceedings under the ordinance, sets out a case or controversy which is within the adjudicatory power of the district court.

Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 69; *Pennsylvania* v. *Williams*, 294 U. S. 176, 181–82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 690; *Pennsylvania* v. *Williams, supra*, 185. Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court.

The power reserved to the states under the Constitution to provide for the determination of controversies in

their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Ins. Assn., supra,* 73; *Matthews* v. *Rodgers,* 284 U. S. 521, 525–26; cf. *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Massachusetts State Grange* v. *Benton,* 272 U. S. 525.

It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207; *Fenner* v. *Boykin,* 271 U. S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the

states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury "both great and immediate." *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Corp.,* 312 U. S. 45, 49, and cases cited; *Watson* v. *Buck,* 313 U. S. 387; *Williams* v. *Miller,* 317 U. S. 599.

The trial court found that respondents had prosecuted certain of petitioners and other Jehovah's Witnesses for distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared their intention further to enforce the ordinance against petitioners and other Jehovah's Witnesses. But the court made no finding of threatened irreparable injury to petitioners or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case.

Before the present suit was begun, convictions had been obtained in the state courts in cases Nos. 480–487, *Murdock et al.* v. *Pennsylvania, supra,* which were then pending on appeal and which were brought to this Court for review by certiorari contemporaneously with the present case. It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. In these respects the case differs from *Hague* v. *C. I. O., supra,* 501–02, where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial.

There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners. If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequence of their violation of a valid state law.

Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class threatened with prosecution for violation of the ordinance. In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party—here the state—are not necessarily identical. *Matthews* v. *Rodgers, supra,* 529–30, and cases cited. Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion.

In any event, an injuction looks to the future. *Texas Co.* v. *Brown,* 258 U. S. 466, 474; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 182. And in view of the decision rendered today in *Murdock* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate.

For these reasons, establishing the want of equity in the cause, we affirm the judgment of the circuit court of appeals directing that the bill be dismissed.

Affirmed.

MR. JUSTICE JACKSON, concurring in the result in this case and dissenting in Nos. 480–487, *Murdock* v. *Pennsylvania, ante,* p. 105, and No. 238, *Martin* v. *Struthers, ante,* p. 141:

Except the case of *Douglas et al.* v. *Jeannette,* all of these cases are decided upon the record of isolated prosecutions in which information is confined to a particular act of offense and to the behavior of an individual offender. Only the *Douglas* record gives a comprehensive story of the broad plan of campaign employed by Jehovah's Witnesses and its full impact on a living community. But the facts of this case are passed over as irrelevant to the theory on which the Court would decide its particular issue. Unless we are to reach judgments as did Plato's men who were chained in a cave so that they saw nothing but shadows, we should consider the facts of the *Douglas* case at least as an hypothesis to test the validity of the conclusions in the other cases. This record shows us something of the strings as well as the marionettes. It reveals the problem of those in local authority when the right to proselyte comes in contact with what many people have an idea is their right to be let alone. The Chief Justice says for the Court in *Douglas* that "in view of the decision rendered today in *Murdock* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate," which could hardly be said if the constitutional issues presented by the facts of this case are not settled by the *Murdock* case. The facts of record in the *Douglas* case and their relation to the facts of the other cases seem to

me worth recital and consideration if we are realistically to weigh the conflicting claims of rights in the related cases today decided.

From the record in *Douglas* we learn:

In 1939, a "Watch Tower Campaign" was instituted by Jehovah's Witnesses in Jeannette, Pennsylvania, an industrial city of some 16,000 inhabitants.[1] Each home was visited, a bell was rung or the door knocked upon, and the householder advised that the Witness had important information. If the householder would listen, a record was played on the phonograph. Its subject was "Snare and Racket." The following words are representative of its contents: "Religion is wrong and a snare because it deceives the people, but that does not mean that all who follow religion are willingly bad. Religion is a racket because it has long been used and is still used to extract money from the people upon the theory and promise that the paying over of money to a priest will serve to relieve the party paying from punishment after death and further insure his salvation." This line of attack is taken by the Witnesses generally upon all denominations, especially the Roman Catholic. The householder was asked to buy a variety of literature for a price or contribution. The

[1] Sixteenth Annual Census of the United States (1940), Population, Volume I (Census Bureau of the United States Department of Commerce) p. 922. The City of Jeannette is included in Westmoreland County, shown by the 1940 Census to have a population of 303,411, an increase over 1930 and 1920. *Ibid.* The 1936 Census of Religious Bodies shows that of the people in Westmoreland County 168,608 were affiliated with some religious body, 80,276 of them with the Roman Catholic Church. Census of Religious Bodies (1936), Volume I (Census Bureau of the United States Department of Commerce) pp. 809–814. According to unpublished information in the files of the Census Bureau, the 1936 Census of Religious Bodies shows that there were in the City of Jeannette 5,520 Roman Catholics. Thus it appears that the percentage of Catholics in the City is somewhat higher than in the County as a whole.

price would be twenty-five cents for the books and smaller sums for the pamphlets. Oftentimes, if he was unwilling to purchase, the book or pamphlet was given to him anyway.

When this campaign began, many complaints from offended householders were received, and three or four of the Witnesses were arrested. Thereafter, the "zone servant" in charge of the campaign conferred with the Mayor. He told the Mayor it was their right to carry on the campaign and showed him a decision of the United States Supreme Court, said to have that effect, as proof of it. The Mayor told him that they were at liberty to distribute their literature in the streets of the city and that he would have no objection if they distributed the literature free of charge at the houses, but that the people objected to their attempt to force these sales, and particularly on Sunday. The Mayor asked whether it would not be possible to come on some other day and to distribute the literature without selling it. The zone servant replied that that was contrary to their method of "doing business" and refused. He also told the Mayor that he would bring enough Witnesses into the City of Jeannette to get the job done whether the Mayor liked it or not. The Mayor urged them to await the outcome of an appeal which was then pending in the other cases and let the matter take its course through the courts. This, too, was refused, and the threat to bring more people than the Mayor's police force could cope with was repeated.

On Palm Sunday of 1939, the threat was made good. Over 100 of the Witnesses appeared. They were strangers to the city and arrived in upwards of twenty-five automobiles. The automobiles were parked outside the city limits, and headquarters were set up in a gasoline station with telephone facilities through which the director of the campaign could be notified when trouble occurred. He furnished bonds for the Witnesses as they were arrested.

As they began their work, around 9:00 o'clock in the morning, telephone calls began to come in to the Police Headquarters, and complaints in large volume were made all during the day. They exceeded the number that the police could handle, and the Fire Department was called out to assist. The Witnesses called at homes singly and in groups, and some of the homes complained that they were called upon several times. Twenty-one Witnesses were arrested. Only those were arrested where definite proof was obtainable that the literature had been offered for sale or a sale had been made for a price. Three were later discharged for inadequacies in this proof, and eighteen were convicted. The zone servant furnished appeal bonds.

The national structure of the Jehovah's Witness movement is also somewhat revealed in this testimony. At the head of the movement in this country is the Watch Tower Bible & Tract Society, a corporation organized under the laws of Pennsylvania, but having its principal place of business in Brooklyn, N. Y. It prints all pamphlets, manufactures all books, supplies all phonographs and records, and provides other materials for the Witnesses. It "ordains" these Witnesses by furnishing each, on a basis which does not clearly appear, a certificate that he is a minister of the Gospel. Its output is large and its revenues must be considerable. Little is revealed of its affairs. One of its "zone servants" testified that its correspondence is signed only with the name of the corporation and anonymity as to its personnel is its policy. The assumption that it is a "non-profit charitable" corporation may be true, but it is without support beyond mere assertion. In none of these cases has the assertion been supported by such usual evidence as a balance sheet or an income statement. What its manufacturing costs and revenues are, what salaries or bonuses it pays, what contracts it has for supplies or services we simply do not

know. The effort of counsel for Jeannette to obtain information, books and records of the local "companies" of Witnesses engaged in the Jeannette campaign in the trial was met by contradictory statements as to the methods and meaning of such meager accounts as were produced.

The publishing output of the Watch Tower corporation is disposed of through converts, some of whom are full-time and some part-time ministers. These are organized into groups or companies under the direction of "zone servants." It is their purpose to carry on in a thorough manner so that every home in the communities in which they work may be regularly visited three or four times a year. The full-time Witnesses acquire their literature from the Watch Tower Bible & Tract Society at a figure which enables them to distribute it at the prices printed thereon with a substantial differential. Some of the books they acquire for 5¢ and dispose of for a contribution of 25¢. On others, the margin is less. Part-time ministers have a differential between the 20¢ which they remit to the Watch Tower Society and the 25¢ which is the contribution they ask for the books. We are told that many of the Witnesses give away a substantial quantity of the literature to people who make no contributions. Apart from the fact that this differential exists and that it enables the distributors to meet in whole or in part their living expenses, it has proven impossible in these cases to learn the exact results of the campaigns from a financial point of view. There is evidence that the group accumulated a substantial amount from the differentials, but the tracing of the money was not possible because of the failure to obtain records and the failure, apparently, to keep them.

The literature thus distributed is voluminous and repetitious. Characterization is risky, but a few quotations will indicate something of its temper.

Taking as representative the book "Enemies," of which J. F. Rutherford, the lawyer who long headed this group,

is the author, we find the following: "The greatest racket ever invented and practiced is that of religion. The most cruel and seductive public enemy is that which employs religion to carry on the racket, and by which means the people are deceived and the name of Almighty God is reproached. There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the 'Christian religion,' because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons." *Id.* at 144–145. It analyzes the income of the Roman Catholic hierarchy and announces that it is "the great racket, a racket that is greater than all other rackets combined." *Id.* at 178. It also says under the chapter heading "Song of the Harlot," "Referring now to the foregoing Scriptural definition of *harlot:* What religious system exactly fits the prophecies recorded in God's Word? There is but one answer, and that is, The Roman Catholic Church organization." *Id.* at 204–205. "Those close or nearby and dependent upon the main organization, being of the same stripe, picture the Jewish and Protestant clergy and other allies of the Hierarchy who tag along behind the Hierarchy at the present time to do the bidding of the old 'whore'." *Id.* at 222. "Says the prophet of Jehovah: 'It shall come to pass in that day, that Tyre (modern Tyre, the Roman Catholic Hierarchy organization) shall be forgotten.' Forgotten by whom? By her former illicit paramours who have committed fornication with her." *Id.* at 264. Throughout the literature, statements of this kind appear amidst scriptural comment and prophecy, denunciation of demonology, which is used to characterize the Roman Catholic religion, criticism of government and those in authority, advocacy of obedience to the law of God instead of the law of man, and an interpretation of the law of God as they see it.

The spirit and temper of this campaign is most fairly stated perhaps in the words, again of Rutherford, in his book "Religion," pp. 196–198:

"God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. 'They shall enter in at the windows like a thief.' They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the 'sourpusses' are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and 'holy water', remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat. The people are enabled to learn that 'purgatory' is a bogeyman, set up by the agents of Satan to frighten the people into the religious organizations, where they may be fleeced of their hard-earned money. Thus the kingdom message plagues the religionists, and the clergy find that they are unable to prevent it. Therefore, as described by the prophet, the message comes to them like a thief that enters in at the windows, and this message is a warning to those who are on the inside that Jesus Christ has come, and they remember his warning words, to wit: 'Behold, I come as a thief.' (Revelation 16: 15.) The day of

Armageddon is very close, and that day comes upon the world in general like a thief in the night."

The day of Armageddon, to which all of this is prelude, is to be a violent and bloody one, for then shall be slain all "demonologists," including most of those who reject the teachings of Jehovah's Witnesses.

In the *Murdock* case, on another Sunday morning of the following Lent, we again find the Witnesses in Jeannette, travelling by twos and threes and carrying cases for the books and phonographs. This time eight were arrested, as against the 21 arrested on the preceding Palm Sunday involved in the *Douglas* case.

In the *Struthers* case, we find the Witness knocking on the door of a total stranger at 4:00 on Sunday afternoon, July 7th. The householder's fourteen year old son answered, and, at the Witness's request, called his mother from the kitchen. His mother had previously become "very much disgusted about going to the door" to receive leaflets, particularly since another person had on a previous occasion called her to the door and told her, as she testified, "that I was doomed to go to hell because I would not let this literature in my home for my children to read." She testified that the Witness "shoved in the door" the circular being distributed,[2] and that she

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[2] This reads as follows:

"RELIGION as a WORLD REMEDY, The Evidence in Support Thereof. Hear JUDGE RUTHERFORD, Sunday, July 28, 4 P. M., E. S. T. FREE, All Persons of Goodwill Welcome, FREE. Columbus Coliseum, Ohio State Fair Grounds." [On one side.]

"1940's Event of Paramount Importance To YOU! What is it? The THEOCRATIC CONVENTION of JEHOVAH'S WITNESSES. Five Days—July 24–28—Thirty Cities. All Lovers of Righteousness—Welcome! The strange fate threatening all 'Christendom' makes it imperative that you COME and HEAR the public address on RELIGION AS A WORLD REMEDY, The Evidence in Support Thereof, by Judge Rutherford at the COLISEUM of the OHIO STATE FAIR GROUNDS, Co-

"couldn't do much more than take" it, and she promptly tore it up in the presence of the Witness, for while she believed "in the worship of God," she did not "care to talk to everybody" and did not "believe that anyone needs to be sent from door to door to tell us how to worship." The record in the *Struthers* case is even more sparse than that in the *Murdock* case, but the householder did testify that at the time she was given the circular the Witness "told me that a number of them were in jail and would I call the Chief of Police and ask that their workers might be released."

Such is the activity which it is claimed no public authority can either regulate or tax. This claim is substantially, if not quite, sustained today. I dissent—a disagreement induced in no small part by the facts recited.

As individuals many of us would not find this activity seriously objectionable. The subject of the disputes involved may be a matter of indifference to our personal creeds. Moreover, we work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls and bear the burden of turning away the unwelcome. But these observations do not hold true for all. The stubborn persistence of the officials of smaller communities in their efforts to regulate this conduct indicates a strongly held conviction that the Court's many decisions in this field are at odds with the realities of life in those communities where the householder himself drops whatever he may be doing to

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lumbus, Ohio, Sunday, July 28, at 4 p. m., E. S. T. 'He that hath an ear to hear' will come to one of the auditoriums of the convention cities listed below, tied in with Columbus by direct wire. Some of the 30 cities are . . . [21 are listed]. For detailed information concerning these conventions write WATCHTOWER CONVENTION COMMITTEE, 117 Adams St., Brooklyn, N. Y." [On the other side.]

answer the summons to the door and is apt to have positive religious convictions of his own.[3]

Three subjects discussed in the opinions in *Murdock* v. *Pennsylvania* and *Martin* v. *Struthers* tend to obscure the effect of the decisions. The first of these relates to the form of the ordinances in question. One cannot determine whether this is mere makeweight or whether it is an argument addressed to the constitutionality of the ordinances; and whatever it is, I cannot reconcile the treatment of the subject by the two opinions. In *Murdock* the Court says "the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations," and again "the ordinance is not narrowly drawn to prevent or control abuses or evils arising from" solicitation from house to house. It follows the recent tendency to invalidate ordinances in this general field that are not "narrowly drawn."

But in *Struthers* the ordinance is certainly narrowly drawn. Yet the Court denies the householder the narrow protection it gives. The city points out that this ordinance was narrowly drawn to meet a particular evil in that community where many men must work nights and rest by day. I had supposed that our question, except in respect to ordinances invalid on their face, is always whether the ordinance as applied denies constitutional rights. Nothing in the Constitution says or implies that real rights are more vulnerable to a narrow ordinance

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[3] Compare Chafee, Freedom of Speech in the United States (1941) p. 407: "I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house."

than to a broad one. I think our function is to take municipal ordinances as they are construed by the state courts and applied by local authorities and to decide their constitutionality accordingly, rather than to undertake censoring their draftsmanship.

Secondly, in neither opinion does the Court give clear-cut consideration to the particular activities claimed to be entitled to constitutional immunity, but in one case blends with them conduct of others not in question, and in the other confuses with the rights in question here certain alleged rights of others which these petitioners are in no position to assert as their own.

In the *Murdock* case, the Court decides to "restore to their high, constitutional position the liberties of itinerant evangelists." That it does without stating what those privileges are, beyond declaring that "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." How can we dispose of the questions in this case merely by citing the unquestioned right to minister to congregations voluntarily attending services?

Similarly, in the *Struthers* case the Court fails to deal with the behavior of the Witnesses on its own merits. It reaches its decision by weighing against the ordinance there in question not only the rights of the Witness but also "the right of the individual householder to determine whether he is willing to receive her message"; concludes that the ordinance "substitutes the judgment of the community for the judgment of the individual householder"; and decides the case on the basis that "it submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." But the hospitable householder thus thrown in the balance with the Witness to make weight against the city ordinance is wholly hypothetical and the assumption is contrary to

the evidence we have recited. Doubtless there exist fellow spirits who welcome these callers, but the issue here is what are the rights of those who do not and what is the right of the community to protect them in the exercise of their own faith in peace. That issue—the real issue—seems not to be dealt with.

Third, both opinions suggest that there are evils in this conduct that a municipality may do something about. But neither identifies it, nor lays down any workable guide in so doing. In *Murdock* the Court says that "the ordinance is not narrowly drawn to prevent or control abuses or evils arising" from house-to-house solicitation. What evils or abuses? It is also said in *Murdock* that we "have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities." What more? The fee of course. But we are told the fee is not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." Is it implied that such a registration for such a fee would be valid? Wherein does the suggestion differ from the ordinance we are striking down? This ordinance did nothing more, it did not give discretion to refuse the license nor to censor the literature. The fee ranged from $1.50 a day for one day to less than a dollar a day for two weeks. There is not a syllable of evidence that this amount exceeds the cost to the community of policing this activity. If this suggestion of new devices is not illusory, why is the present ordinance invalid? The City of Struthers decided merely that one with no more business at a home than the delivery of advertising matter should not obtrude himself farther by announcing the fact of delivery. He was free to make the distribution if he left the householder undisturbed, to take it in in his own time. The Court says the City has not even this much leeway in ordering

its affairs, however complicated they may be as the result of round-the-clock industrial activity. If the local authorities must draw closer aim at evils than they did in these cases I doubt that they ever can hit them. What narrow area of regulation exists under these decisions? The *Struthers* opinion says, "the dangers of distribution can so easily be controlled by traditional legal methods." It suggests that the City may "by identification devices control the abuse of the privilege by criminals posing as canvassers." Of course to require registration and license is one of the few practical "identification devices." Merely giving one's name and his address to the authorities would afford them basis for investigating who the strange callers are and what their record has been. And that is what *Murdock* prohibits the city from asking. If the entire course of concerted conduct revealed to us is immune, I should think it neither fair nor wise to throw out to the cities encouragement to try new restraints. If some part of it passes the boundary of immunity, I think we should say what part and why in these cases we are denying the right to regulate it. The suggestion in *Struthers* that "the problem must be worked out by each community for itself" is somewhat ironical in view of the fate of the ordinances here involved.

Our difference of opinion cannot fairly be given the color of a disagreement as to whether the constitutional rights of Jehovah's Witnesses should be protected in so far as they are rights. These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination. These rights are, and should be held to be, as extensive as any orderly society can tolerate in religious disputation. The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights

of others is not met by pronouncement of general propositions with which there is no disagreement.

If we should strip these cases to the underlying questions, I find them too difficult as constitutional problems to be disposed of by a vague but fervent transcendentalism.

In my view, the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.

It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government can not let any group ride rough-shod over others simply because their "consciences" tell them to do so.

A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witnesses should be exercised by all sects and denominations. If each competing sect in the United States went after the householder by the same methods, I should think it intolerable. If a minority can put on this kind of drive in a community, what can a majority resorting to the same tactics do to individuals and minorities? Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures.

I cannot accept the holding in the *Murdock* case that the behavior revealed here "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." To put them on the same constitutional plane seems to me to have a dangerous tendency towards discrediting religious freedom.

Neither can I think it an essential part of freedom that religious differences be aired in language that is obscene, abusive, or inciting to retaliation. We have held that a Jehovah's Witness may not call a public officer a "God damned racketeer" and a "damned Fascist," because that is to use "fighting words," and such are not privileged. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. How then can the Court today hold it a "high constitutional privilege" to go to homes, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their church a "whore" and their faith a "racket"? [4]

[4] Compare *Valentine* v. *Chrestensen,* 316 U. S. 52, permitting a ban on distribution of a handbill containing a civic appeal on one side and a commercial advertisement on the other.

Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street. For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom.[5]

I find it impossible to believe that the *Struthers* case can be solved by reference to the statement that "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." I doubt if only the slothfully ignorant wish repose in their homes, or that the forefathers intended to open the door to such forced "enlightenment" as we have here.

In these cases, local authorities caught between the offended householders and the drive of the Witnesses, have been hard put to keep the peace of their communities. They have invoked old ordinances that are crude and clumsy for the purpose. I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that the Court has, in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to over-

[5] See Chafee, *supra* footnote 3, pp. 406–407.

ride the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our Constitution which protects all—those in homes as well as those out of them—in the peaceful, orderly practice of the religion of their choice but which gives no right to force it upon others.

Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want. Therefore we must do our utmost to make clear and easily understandable the reasons for deciding these cases as we do. Forthright observance of rights presupposes their forthright definition.

I think that the majority has failed in this duty. I therefore dissent in *Murdock* and *Struthers* and concur in the result in *Douglas*.

I join in the opinions of MR. JUSTICE REED in *Murdock* and *Struthers*, and in that of MR. JUSTICE FRANKFURTER in *Murdock*.

MR. JUSTICE FRANKFURTER joins in these views.

LOCKERTY ET AL. *v.* PHILLIPS, UNITED STATES ATTORNEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 934. Argued May 3, 1943.—Decided May 10, 1943.

1. The Emergency Price Control Act of 1942 sets up a procedure whereby any person subject to any regulation or order promulgated under the Act may on "protest" of the regulation or order secure its review by the Administrator; and, if the protest is denied, the Act confers on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdic-

tion to restrain the enforcement of regulations or price orders under that Act, and withdraws that jurisdiction from every other court, state or federal. P. 186.

2. The Constitution does not require Congress to confer equity jurisdiction on any particular inferior federal court. P. 187.
3. Congress had power to restrict the equity jurisdiction to restrain enforcement of the Emergency Price Control Act, or of regulations under it, to the Emergency Court, and, upon review of its decisions, to this Court, and to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure. P. 188.
4. The Emergency Price Control Act, § 204 (d), in providing that "no court, Federal, State, or Territorial, shall have jurisdiction or power to . . . restrain, enjoin, or set aside . . . any provision of this Act," is not open to the objection that it withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. The Act itself, § 204, saves to the Emergency Court, and, upon review of its decisions, to this Court, authority to determine whether any regulation, order, or price schedule promulgated under it is "not in accordance with law," and this permits that the constitutional validity of the Act, and of orders and regulations under it, be so determined. P. 188.
5. Assuming that review in the Emergency Court is inadequate to protect constitutional rights because § 204 (c) prohibits all interlocutory relief by that court, the separability clause of § 303 would require that effect be given to the other provisions of § 204, including that which withholds from the district courts authority to enjoin enforcement of the Act. P. 189.

49 F. Supp. 513, affirmed.

APPEAL from a decree of the District Court of three judges which dismissed for want of jurisdiction an appeal seeking an injunction against enforcement of price regulations prescribed under the Emergency Price Control Act.

Mr. Arthur T. Vanderbilt, with whom *Mr. Harold Simandl* was on the brief, for appellants.

Mr. Thomas I. Emerson, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Paul A. Freund* were on the brief, for appellee.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The question for our decision is whether the jurisdiction of the district court below to enjoin the enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942, 56 Stat. 23, was validly withdrawn by § 204 (d) of the Act. Appellants brought this suit in the district court for the District of New Jersey for an injunction restraining appellee, the United States Attorney for that district, from the prosecution of pending and prospective criminal proceedings against appellants for violation of §§ 4 (a) and 205 (b) of the Act, and of Maximum Price Regulation No. 169. In view of the provisions of § 204 (d) of the Act, the district court of three judges, 28 U. S. C. § 380a, dismissed the suit for want of jurisdiction to entertain it.

The amended bill of complaint alleges that appellants are established merchants owning valuable wholesale meat businesses, in the course of which they purchase meat from packers and sell it at wholesale to retail dealers; that Maximum Price Regulation No. 169, promulgated by the Price Administrator under the purported authority of § 2 (a) of the Act, as originally issued and as revised, fixed maximum wholesale prices for specified cuts of beef; that in fixing such prices the Administrator had failed to give due consideration to the various factors affecting the cost of production and distribution of meat in the industry as a whole; that the Administrator had failed to fix or regulate the price of livestock; that the conditions in the industry—including the quantity of meat available to packers for distribution to wholesalers, the packers' expectation of profit, and the effect of these conditions upon the prices of meat sold by packers to wholesalers—are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the

prices fixed by Regulation No. 169; that enforcement of the Regulation will preclude appellants' continuance in business as meat wholesalers; that the Act as thus applied to appellants is a denial of due process in violation of the Fifth Amendment of the Constitution, and involves an unconstitutional delegation of legislative power to the Administrator; that appellee threatens to prosecute appellants for each sale of meat at a price greater than that fixed by the Regulation, and to subject them to the fine and imprisonment prescribed by §§ 4 and 205 (b) of the Act for violations of the Act or of price regulations prescribed by the Administrator under the Act; and that such enforcement by repeated prosecutions of appellants will irreparably injure them in their business and property.

Section 203 (a) sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may within sixty days "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." He may also protest later on grounds arising after the expiration of the original sixty days. The subsection directs that within a specified time "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

By § 204 (a), "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), spec-

ifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." Subsection (b) provides that no regulation, order, or price schedule, shall be enjoined "unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious." Under subsections (b) and (d), decisions of the Emergency Court may, by writ of certiorari, be brought for review to the Supreme Court, which is required to advance the cause on its docket and to expedite the disposition of it.

Although by following the procedure prescribed by these provisions of the Act appellants could have raised and obtained review of the questions presented by their bill of complaint, they did not protest the price regulation which they challenge and they took no proceedings for review of it by the Emergency Court. Appellants are thus seeking the aid of the district court to restrain the enforcement of an administrative order without pursuing the administrative remedy provided by the statute (cf. *Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675, 686) and without recourse to the judicial review by the Emergency Court of Appeals and by this Court which the statute affords.

Moreover the statute vests jurisdiction to grant equitable relief exclusively in the Emergency Court and in this Court. Section 204 (d) declares: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regula-

tion, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234, and cases cited; *McIntire* v. *Wood*, 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis*, 3 How. 236, 245; *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330; *Hallowell* v. *Commons*, 239 U. S. 506, 509; *Smallwood* v. *Gallardo*, 275 U. S. 56; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 129. See also *United States* v. *Hudson and Goodwin*, 7 Cranch 32, 33; *Mayor* v. *Cooper*, 6 Wall. 247, 252;

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Stevenson v. *Fain,* 195 U. S. 165, 167; *Kentucky* v. *Powers,* 201 U. S. 1, 24; *Chicot County Dist.* v. *Baxter Bank,* 308 U. S. 371, 376. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.

Appellants argue that the command of § 204 (d) that "no court, Federal, State, or Territorial, shall have jurisdiction or power to . . . restrain, enjoin, or set aside . . . any provision of this Act" extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved, by statute or regulation, their day in court to challenge its constitutionality. But the statute expressly excepts from this command those remedies afforded by § 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is "not in accordance with law, or is arbitrary or capricious." A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. The present Act has at least saved to the Emergency Court, and, upon review of its decisions,

to this Court, authority to determine whether any regulation, order, or price schedule promulgated under the Act is "not in accordance with law, or is arbitrary or capricious." We think it plain that orders and regulations involving an unconstitutional application of the statute are "not in accordance with law" within the meaning of this clause, and that the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.

Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204 (c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For in any event, the separability clause of § 303 of the Act would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no unconstitutional infirmity.

Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

Affirmed.

NATIONAL BROADCASTING CO., INC. ET AL. *v.* UNITED STATES ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 554. Argued February 10, 11, 1943.—Decided May 10, 1943.

1. The regulatory powers of the Federal Communications Commission are not limited to the engineering and technical aspects of radio communication. P. 215.
2. Regulations adopted by the Federal Communications Commission, as "in the public interest," touching the relations between licensed broadcasting stations on the one hand, and network organizations furnishing programs to such stations on the other hand, are sustained as within the powers conferred upon the Commission by the Federal Communications Act, viz.:

   (1) A regulation providing that no license shall be granted to a standard broadcast station having any contract, arrangement, or understanding with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. P. 198.

   (2) A regulation providing that no license shall be granted to a standard broadcast station having any contract, etc., with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization; but not prohibiting any contract between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization. P. 200.

   (3) A regulation declaring that no license shall be granted to a standard broadcast station having any contract, etc., with a network organization which provides for the affiliation of the station with the network organization for a period longer than two years. P. 201.

*Together with No. 555, *Columbia Broadcasting System, Inc.* v. *United States et al.*, also on appeal from the District Court of the United States for the Southern District of New York,—argued February 11, 1943.

(4) A regulation providing that no license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as described in the regulation, and that such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations. P. 202.

(5) A regulation providing that no license shall be granted to a standard broadcast station having any contract, etc., with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. P. 204.

(6) A regulation providing that no license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. P. 206.

(7) A regulation providing that no license shall be granted to a standard broadcast station having any contract, etc., with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. P. 208.

3. Section 311 of the Federal Communications Act, by authorizing the Commission to withhold broadcasting station licenses from persons who have been convicted of violating the Antitrust Laws, does not imply that, in the absence of such conviction, conduct of the applicant amounting to such violation may not be considered by the Commission in determining whether the granting of his application would be contrary to the "public interest." P. 222.

4. The standard of "public interest" governing the exercise of the powers delegated to the Commission by the Act is not so vague and indefinite as to create an unconstitutional delegation of legislative authority. P. 225.
5. The Commission by announcing that it will refuse station licenses to persons who engage in specified network practices contrary to the public interest, convenience or necessity does not thereby deny to such persons the constitutional right of free speech. P. 226.
6. In a suit to enjoin the enforcement of regulations promulgated by the Federal Communications Commission, the District Court properly disposed of the case upon the pleadings and the record made before the Commission, without trial *de novo*. P. 227.

47 F. Supp. 940, affirmed.

APPEALS from judgments of the District Court dismissing suits to enjoin enforcement of chain broadcasting regulations promulgated by the Federal Communications Commission.

Mr. John T. Cahill, with whom *Messrs. A. L. Ashby, Harold S. Glendening,* and *John W. Nields* were on the brief, for the National Broadcasting Co.; and *Mr. E. Willoughby Middleton,* with whom *Mr. Thomas H. Middleton* was on the brief, for the Stromberg-Carlson Telephone Manufacturing Co. (*Mr. David M. Wood* was on the Statement as to Jurisdiction, for the Woodmen of the World Life Insurance Society),—appellants in No. 554. *Mr. Charles E. Hughes, Jr.,* with whom *Messrs. Allen S. Hubbard, Harold L. Smith,* and *John J. Burns* were on the brief, for appellant in No. 555.

Solicitor General Fahy, with whom *Messrs. Richard S. Salant, Charles R. Denny, Harry M. Plotkin,* and *Max Goldman* were on the brief, for the United States et al.; and *Mr. Louis G. Caldwell,* with whom *Messrs. Leon Lauterstein* and *Percy H. Russell, Jr.,* were on the brief, for the Mutual Broadcasting System, Inc.,—appellees.

Briefs of *amici curiae* were filed by *Mr. Isaac W. Digges* on behalf of the Association of National Advertisers,

Inc., and by *Mr. George Link, Jr.*, on behalf of the American Association of Advertising Agencies,—in support of appellants; and by *Messrs. Homer S. Cummings, Morris L. Ernst* and *Benjamin S. Kirsh* on behalf of the American Civil Liberties Union,—in support of appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System* v. *United States,* 316 U. S. 407, and *National Broadcasting Co.* v. *United States,* 316 U. S. 447, that the suits could be maintained under § 402 (a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402 (a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment and dismissed the suits on the merits. 47 F. Supp. 940. The cases are now here on appeal. 28 U. S. C. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain

broadcasting [1] were required in the "public interest, convenience, or necessity." The Commission's order directed that inquiry be made, *inter alia,* in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommenda-

[1] Chain broadcasting is defined in § 3 (p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

tions to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed. Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dis-

sented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks, and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. Simultaneously, the effective date of the Regulations was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power," are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network prac-

tices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue." NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the

stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting," it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. . . . But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which

prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

"Restraints having this effect," the Commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affects the program structure of the entire industry." (Report, pp. 52, 57.) Ac-

cordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. For example, Mutual presented a popular program, known as "The American Forum of the Air," in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the "territorial exclusivity" provision in Mutual's agreements with its outlets. The result was that this program was not available to the people of Buffalo.

The Commission concluded that "It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying

a network program as it would be for it to drown out that program by electrical interference." (Report, p. 59.)

Recognizing that the "territorial exclusivity" clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast available programs. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307 (d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even

though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract." (Report, p. 61.) The Commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: [2] *Provided,* That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time." For CBS affiliates "network optional time" meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates,

[2] Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that "shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest." (Report, pp. 63, 65.)

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry,

without unduly impairing the ability of local stations to develop local program service. Regulation 3.104 called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. The text of the Regulation follows: "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried on the network program." Similarly, the CBS contracts provided that if the station had "reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program,

unless during such notice period such reasonable objection of the station shall be satisfied."

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest." As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. . . .

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case

where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." (Report, pp. 39, 66.)

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competi-

tion among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." (Report, p. 67.)

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable." (Report, p. 68.)

Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Regulation 3.107—Dual network operation. This regulation provides that: "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station

whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the

power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulation of radio [3] begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations

[3] The history of federal regulation of radio communication is summarized in Herring and Gross, Telecommunications (1936) 239–86; Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82–84; 1 Socolow, Law of Radio Broadcasting (1939) 38–61; Donovan, Origin and Development of Radio Law (1930).

were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925,

opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover* v. *Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

"Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operat-

ing than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted." (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4] Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137,

[4] See Morecroft, Principles of Radio Communication (3d ed. 1933) 355–402; Terman, Radio Engineering (2d ed. 1937) 593–645.

"In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . .

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

. . . . .

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

. . . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." §§ 307 (a) (d), 309 (a), 310, 312. In addition, § 307 (b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Com-

mission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303 (g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission

choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303 (g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But

the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the

Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303 (g) (i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that

experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303 (i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4 (h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H. R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

"(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

(j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303 (i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations

engaged in chain broadcasting." The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303 (i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.[5]

[5] In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said: "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that, in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that." 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest." We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render

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to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." 68 Cong. Rec. 2881.

irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our func-

tion to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83 n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24–25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the

words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–38. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Intermountain Rate Cases*, 234 U. S. 476, 486–89; *United States* v. *Lowden*, 308 U. S. 225.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of

"public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

MR. JUSTICE MURPHY, dissenting:

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the

Congress has not granted. Since that is what the Court in substance does today, I dissent.

In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.

The Communications Act of 1934 does not in terms give the Commission power to regulate the contractual relations between the stations and the networks. *Columbia System* v. *United States*, 316 U. S. 407, 416. It is only as an incident of the power to grant or withhold licenses to individual stations under §§ 307, 308, 309 and 310 that this

authority is claimed,[1] except as it may have been provided by subdivisions (g), (i) and (r) of § 303, and by §§ 311 and 313. But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.

In providing for regulation of the radio, the Congress was under the necessity of vesting a considerable amount of discretionary authority in the Commission. The task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one. Nevertheless, in specifying with some degree of particularity the kind of information to be included in an application for a license, the Congress has indicated what general conditions and considerations are to govern the granting and withholding of station licenses. Thus an applicant is required by § 308 (b) to submit information bearing upon his citizenship, character, and technical, financial and other qualifications to operate the proposed station, as well as data relating to the ownership and location of the proposed station, the power and frequencies desired, operating periods, intended use, and such other information as the Commission may require. Licenses, frequencies, hours of operation and power are to be fairly distributed among the several States and communities to provide efficient service to each. § 307 (b). Explicit provision is made for dealing with applicants and licensees

[1] The regulations as first proposed were not connected with denial of applications for initial or renewal station licenses but provided instead that: "No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization," which contained any of the disapproved provisions. After a short time, however, the regulations were cast in their present form, making station licensing depend upon conformity with the regulations.

who are found guilty, or who are under the control of persons found guilty of violating the federal anti-trust laws. §§ 311 and 313. Subject to the limitations defined in the Act, the Commission is required to grant a station license to any applicant "if public convenience, interest, or necessity will be served thereby." § 307 (a). Nothing is said, in any of these sections, about network contracts, affiliations, or business arrangements.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of "public convenience, interest or necessity." We have held that: "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 475. The criterion of "public convenience, interest or necessity" is not an indefinite standard, but one to be "interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, . . ." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285. Nothing in the context of which the standard is a part refers to network contracts. It is evident from the record that the Commission is making its determination of whether the public interest would be served by renewal of an existing license or licenses, not upon an examination of written applications presented to it, as required by §§ 308 and 309, but upon an investigation of the broadcasting industry as a whole, and general findings made in pursuance thereof which relate to the business methods of the network companies rather than

the characteristics of the individual stations and the peculiar needs of the areas served by them. If it had been the intention of the Congress to invest the Commission with the responsibility, through its licensing authority, of exercising far-reaching control—as exemplified by the proposed regulations—over the business operations of chain broadcasting and radio networks as they were then or are now organized and established, it is not likely that the Congress would have left it to mere inference or implication from the test of "public convenience, interest or necessity," or that Congress would have neglected to include it among the considerations expressly made relevant to license applications by § 308 (b). The subject is one of such scope and importance as to warrant explicit mention. To construe the licensing sections (§§ 307, 308, 309, 310) as granting authority to require fundamental and revolutionary changes in the business methods of the broadcasting networks—methods which have been in existence for several years and which have not been adjudged unlawful—would inflate and distort their true meaning and extend them beyond the limited purposes which they were intended to serve.

It is quite possible, of course, that maximum utilization of the radio as an instrument of culture, entertainment, and the diffusion of ideas is inhibited by existing network arrangements. Some of the conditions imposed by the broadcasting chains are possibly not conducive to a freer use of radio facilities, however essential they may be to the maintenance of sustaining programs and the operation of the chain broadcasting business as it is now conducted. But I am unable to agree that it is within the present authority of the Commission to prescribe the remedy for such conditions. It is evident that a correction of these conditions in the manner proposed by the regulations will involve drastic changes in the business of radio broadcasting which the Congress has not

clearly and definitely empowered the Commission to undertake.

If this were a case in which a station license had been withheld from an individual applicant or licensee because of special relations or commitments that would seriously compromise or limit his ability to provide adequate service to the listening public, I should be less inclined to make any objection. As an incident of its authority to determine the eligibility of an individual applicant in an isolated case, the Commission might possibly consider such factors. In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. By means of these regulations and the enforcement program, the Commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the Act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on

the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

An examination of the history of this legislation convinces me that the Congress did not intend by anything in § 303, or any other provision of the Act, to confer on the Commission the authority it has assumed to exercise by the issuance of these regulations. Section 303 is concerned primarily with technical matters, and the subjects of regulation authorized by most of its subdivisions are exceedingly specific—so specific in fact that it is reasonable to infer that, if Congress had intended to cover the subject of network contracts and affiliations, it would not have left it to dubious implications from general clauses, lifted out of context, in subdivisions (g), (i) and (r). I am unable to agree that in authorizing the Commission in § 303 (g) to study new uses for radio, provide for experimental use of frequencies, and "generally encourage the larger and more effective use of radio in the public interest," it was the intention or the purpose of the Congress to confer on the Commission the regulatory powers now being asserted. Manifestly that subdivision dealt with experimental and development work—technical and scientific matters, and the construction of its concluding clause should be accordingly limited to those considerations. Nothing in its legislative history suggests that it had any broader purpose.

It was clearly not the intention of the Congress by the enactment of § 303 (i), authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," to invest the Commission with the authority now claimed over network contracts. This section is a verbatim reënactment of § 4 (h) of the

Radio Act of 1927, and had its origin in a Senate amendment to the bill which became that Act. In its original form it provided that the Commission, from time to time, as public convenience, interest, or necessity required, should:

"When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

It was evidently the purpose of this provision to remedy a situation that was described as follows by Senator Dill (who was in charge of the bill in the Senate) in questioning a witness at the hearings of the Senate Committee on Interstate Commerce:

". . . During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcasted by chain broadcast." (Report of Hearings Before

Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926) p. 123.)

In other words, when the same program was simultaneously broadcast by chain stations, the weaker independent stations were drowned out because of the high power of the chain stations. With the receiving sets then commonly in use, listeners were unable to get any program except the chain program. It was essentially an interference problem. In addition to determining power and wave length for chain stations, it would have been the duty of the Commission, under the amendment, to make other regulations necessary for "equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The last clause should not be interpreted out of context and without relation to the problem at which the amendment was aimed. It is reasonably construed as simply authorizing the Commission to remedy other technical problems of interference involved in chain broadcasting in addition to power and wave length by requiring special types of equipment, controlling locations, etc. The statement in the Senate Committee Report that this provision gave the Commission "complete authority . . . to control chain broadcasting" (S. Rep. No. 772, 69th Cong., 1st Sess., p. 3) must be taken as meaning that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, a problem of technical interference.

While the form of the amendment was simplified in the Conference Committee so as to authorize the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," both Houses were assured in the report of the Conference Committee that "the jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the Commission by . . . the Senate amendment." (Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. No. 1886,

69th Cong., 2d Sess., p. 17). This is further borne out by a statement of Senator Dill in discussing the conference report on the Senate floor:

"What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything except the one program.

"There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec. 3031.)

Section 303 (r) is certainly no basis for inferring that the Commission is empowered to issue the challenged regulations. This subdivision is not an independent grant of power, but only an authorization to: "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." There is no provision in the Act for the control of network contractual arrangements by the Commission, and consequently § 303 (r) is of no consequence here.

To the extent that existing network practices may have run counter to the anti-trust laws, the Congress has expressly provided the means of dealing with the problem. The enforcement of those laws has been committed to the courts and other law enforcement agencies. In addition to the usual penalties prescribed by statute for their violation, however, the Commission has been expressly authorized by § 311 to refuse a station license to any per-

son "finally adjudged guilty by a Federal court" of attempting unlawfully to monopolize radio communication. Anyone under the control of such a person may also be refused a license. And whenever a court has ordered the revocation of an existing license, as expressly provided in § 313, a new license may not be granted by the Commission to the guilty party or to any person under his control. In my opinion these provisions (§§ 311 and 313) clearly do not and were not intended to confer independent authority on the Commission to supervise network contracts or to enforce competition between radio networks by withholding licenses from stations, and do not justify the Commission in refusing a license to an applicant otherwise qualified, because of business arrangements that may constitute an unlawful restraint of trade, when the applicant has not been finally adjudged guilty of violating the anti-trust laws, and is not controlled by one so adjudged.

The conditions disclosed by the Commission's investigation, if they require correction, should be met, not by the invention of authority where none is available or by diverting existing powers out of their true channels and using them for purposes to which they were not addressed, but by invoking the aid of the Congress or the service of agencies that have been entrusted with the enforcement of the anti-trust laws. In other fields of regulation the Congress has made clear its intentions. It has not left to mere inference and guess-work the existence of authority to order board changes and reforms in the national economy or the structure of business arrangements in the Public Utility Holding Company Act, 49 Stat. 803, the Securities Act of 1933, 48 Stat. 74, the Federal Power Act, 49 Stat. 838, and other measures of similar character. Indeed the Communications Act itself contains cogent internal evidence that Congress did not in-

tend to grant power over network contractual arrangements to the Commission. In § 215 (c) of Title II, dealing with common carriers by wire and radio, Congress provided:

"The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress had no difficulty here in expressing the possible desirability of regulating a type of contract roughly similar to the ones with which we are now concerned, and in reserving to itself the ultimate decision upon the matters of policy involved. Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the anti-trust laws or monopolistic in nature, it made specific provision in §§ 311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

MR. JUSTICE ROBERTS agrees with these views.

Counsel for Parties.

FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL BROADCASTING CO., INC. (KOA) ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 585. Argued April 8, 9, 1943.—Decided May 17, 1943.

1. The proprietor of a broadcasting station whose license from the Federal Communications Commission entitles him to employ a specified frequency and a specified power and assigns to him a clear channel at night free from electrical interference is entitled under § 312 (b) of the Federal Communications Commission Act to be made a party to a proceeding before the Commission looking to the granting of an application of another station operating upon the same frequency for an increase of power and for the right to operate at night, the effect of which may be by electrical interference to deprive the first licensee of his clear channel, thus modifying his license. P. 243.
2. Error of the Federal Communications Commission in denying the first licensee the right to intervene in such proceedings was not cured by permission to file a brief and present oral argument. P. 246.
3. In the situation above stated, the first licensee was entitled by § 402 (b) (2) of the Act to appeal to the Court of Appeals for the District of Columbia from the action of the Commission in denying to him the right to intervene and from the order of the Commission granting the application to the other licensee. P. 246.

132 F. 2d 545, affirmed.

CERTIORARI, 317 U. S. 624, to review a judgment of the United States Court of Appeals for the District of Columbia reversing an order of the Federal Communications Commission.

Mr. Paul A. Freund, with whom *Solicitor General Fahy* and *Mr. Harry M. Plotkin* were on the brief, for petitioner.

Mr. Philip J. Hennessey, Jr., with whom *Messrs. Karl A. Smith* and *A. L. Ashby* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents important questions of procedure arising under Title III of the Communications Act of 1934.[1]

The respondent is licensed to operate station KOA at Denver, Colorado, on a frequency of 850 kilocycles. Station WHDH, of Boston, Massachusetts, had a license to operate, daytime only, on the same frequency. October 25, 1938, WHDH applied to the Communications Commission for an increase in power and for operation unlimited in time. The Commission set down the application and designated certain issues for hearing, of which the following are pertinent: To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly KOA and other named stations; to determine whether public interest, convenience or necessity would be served by modifying the rules governing standard broadcast stations to authorize the proposed operation of WHDH.

The Commission's rules precluded the operation of a second station at night on KOA's frequency; [2] provided that an application not filed in accordance with its regulations would be deemed defective, would not be considered, and would be returned to the applicant; [3] and also that if an applicant desired to challenge the validity or wisdom of any rule or regulation he must submit a petition setting forth the desired change and the reasons in support thereof.[4]

The respondent petitioned to intervene. Its petition was denied. It then moved to dismiss WHDH's applica-

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1081; 47 U. S. C. § 301 ff.
[2] §§ 3.22 and 3.25.
[3] § 1.72.
[4] § 1.71.

tion for failure to conform to the rules and regulations. The motion was denied. Meantime the Commission evidently believing that, in view of the possible alteration of the rules concerning standard broadcast stations, questions of policy might be involved and that, consequently, under § 409 (a), the hearing would have to be conducted by a member of the Commission,[5] designated Commissioner Case to conduct the hearing.

No hearing was held under the original notice. A new notice was issued which indicated that the Commission did not then contemplate modification of its substantive rules but intended merely to afford the applicant an opportunity to urge that they be construed in the applicant's favor. Issues specified in the second notice were "to determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application" and to determine the nature, extent, and effect of any interference which would result from a grant of the application, particularly with station KOA and others named. The inquiry thus limited could be heard before an examiner under § 409 (a) and, accordingly, the Commission withdrew the designation of Commissioner Case and assigned an examiner.

A hearing was held January 29 and 30, 1940, but the respondent was not permitted to appear or participate. December 9, 1940, the Commission promulgated proposed findings of fact and conclusions. Two commissioners dissented. All agreed that §§ 3.22 and 3.25 of the regulations precluded a grant of WHDH's application. Three voted to modify those regulations and to grant the

[5] Sec. 409 (a), 47 U. S. C. § 409 (a) provides that, in the administration of Tit. III, an examiner may not hold hearings with respect to a matter involving a change of policy by the Commission or a new kind of use of frequencies.

application. Respondent then filed its second petition to intervene, which was denied. The Commission subsequently, on its own motion, permitted respondent to file briefs and present an oral argument *amicus curiae*. April 7, 1941, the Commission adopted a final order amending § 3.25 of the rules and granting the WHDH application, two commissioners dissenting.

Respondent filed a petition for rehearing pursuant to § 405 of the Act.[6] This was denied. Thereupon respondent gave notice of appeal to the Court of Appeals for the District of Columbia,[7] which concluded that the Commission's action effected a modification of respondent's license and consequently the statute entitled the respondent to be made a party and to participate in the hearing. The court below therefore reversed the Commission's order and remanded the case for further proceedings.[8]

The respondent contends that it was entitled, as a matter of right, to participate in the hearing before the Commission on the question of the granting of WHDH's application and that its rights in this respect were not satisfied by permitting it to file a brief and present argument. It further insists that the Commission's proceeding was invalid due to the provisions of § 409 (a) of the statute, the failure to comply with the rules then in force, and the arbitrary and capricious action taken. Finally, the respondent asserts § 405 entitled it to a rehearing and § 402 (b) (2) granted it an appeal.

The petitioner urges that the grant of WHDH's application did not amount to a substantial modification of KOA's license or so affect KOA's rights as to require that KOA be permitted to intervene, and that, in any event, KOA was not denied any substantial right of participation in the proceeding.

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[6] 47 U. S. C. § 405.

[7] Pursuant to § 402 (b) (2); 47 U. S. C. § 402 (b) (2).

[8] 132 F. 2d 545.

First. We are of opinion that respondent was entitled to be made a party.

Section 312 (b) of the Act provides:

"Any station license hereafter granted . . . may be modified by the Commission . . ., if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license . . . shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The Commission found that there would be interference with KOA's broadcast in the eastern part of the United States if WHDH's application were granted. The Commission's own reports to Congress show that at night a small proportion of the urban population and a much larger proportion of the rural population of the country enjoy only such broadcasting service as is afforded by clear channel stations. KOA, one of the stations upon which this service depends, has operated continuously at Denver since 1924 and has used a clear channel upon which only one station is permitted to operate during the night. Under the Commission's regulations (§§ 3.22 and 3.25) KOA had, therefore, little or no channel interference from any station located within the United States. In addition, its signals throughout the United States were free, and entitled to remain free, of channel interference from any station in Canada, Mexico or Cuba, pursuant to the provisions of the North American Regional Broadcasting Agreement.[9] The Commission's order deprives KOA of freedom from interference in its night service over a large area lying east of the Mississippi River. Furthermore, the order opens the way for Canada, Mexico, and Cuba,

[9] 55 Stat., Part 2, 1005.

signatories to the broadcasting agreement, to acquire the right to operate stations which may cause channel interference at night on KOA's frequency within the United States.

The respondent urges that it can be shown that the service of WHDH, while interfering at night with that of KOA, would not be a service equally useful, and that the grant to WHDH adds a new primary service to an area already heavily supplied with such service. In its petitions to intervene, the respondent called attention to the terms of its existing license, asserting that the grant of WHDH's application would cause interference in areas where KOA's signal was interference free; that respondent would be aggrieved and its interests adversely affected by a grant of the application and that the operation proposed by WHDH would not be in the interest of public convenience and necessity; that a grant of the application would result in a modification of respondent's license in violation of § 312 (b) and would result in a modification of the Commission's regulations without such a hearing as is required by § 303 (f) of the Act. In its petition for rehearing, the respondent elaborated and reiterated the reasons embodied in its motions for dismissal of the petition and in its petitions to intervene.

The Commission says that the section has no application to this case. It asserts that the proceeding was an application by WHDH for modification of its station license and that, under § 309 (a) of the Act, the Commission might have acted on the application without any hearing. So much may be conceded, if nothing more were involved. But the grant of WHDH's application, in the circumstances, necessarily involved the modification of KOA's outstanding license. This petitioner denies, saying KOA's license granted no more than the privilege of operating its station in a prescribed manner and that the grant of WHDH's application in nowise altered the terms

of KOA's license. This contention stems from the circumstance that KOA's license authorizes it to operate a transmitter of 50 kilowatts on the frequency 850 kilocycles at Denver. The petitioner says that the grant of WHDH's application affects none of these terms. But we think this too narrow a view. When KOA's license was granted the Commission's rules §§ 3.21 and 3.25 embodied these provisions:

"A 'clear channel' is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas."

"The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

"(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: . . . The power of the class I stations on these channels shall not be less than 50 kilowatts."

850 kilocycles was one of the frequencies appearing on the schedule forming part of the rule.

These rules were incorporated into the terms of KOA's license which granted it a frequency of 850 kilocycles and a power of 50 kilowatts. To alter the rules so as to deprive KOA of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify KOA's license. This being so, § 312 (b) requires that it be made a party to the proceeding. We can accord no other meaning to the language of the proviso which requires that the holder of the license which is to be modified must have notice in writing of the proposed action and the grounds therefor and must be given a reasonable

opportunity to show cause why an order of modification should not issue. Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. The very notices issued by the Commission show that that body knew there would probably be an interference with KOA's signals if the pending application of WHDH were granted; and that the Commission also realized there was a serious question whether the application could be granted under its existing rules. It is not necessary to discuss at any length the sufficiency of the petitions to intervene if, as we have held, the Act itself provided that, in such an instance as the present, KOA was entitled to be brought in as a party. A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party.

Much is said to the effect that KOA was not in fact injured, because the Commission permitted it to file a brief *amicus curiae* and to present oral argument. It is beside the point to discuss the Commission's rules as to intervention and the privileges accorded by the Commission to one denied intervention, since we are of opinion, as already stated, that, under the terms of the Act, the respondent was entitled to participate in the proceedings.

Second. While the Commission did not urge before the court below, and did not advance as a reason for the grant of certiorari, that respondent was not entitled to appeal to the Court of Appeals, this matter was argued here and, as it raises a question of jurisdiction, we shall consider it.

It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402 (b) (2) permits an appeal to the Court of Appeals for the District of Co-

lumbia by "any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing" any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, we dealt with a similar situation. There the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. We held that it had. We pointed out that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission. Here KOA, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest.

In view of the fact that § 312 (b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

The judgment is

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting:

Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.

In my judgment the decision of the Court in this case imposes a hampering restriction upon the functioning of the administrative process. This is the aspect that lends this case importance and leads me to express the reasons for my dissent.

The Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, directs the Federal Communications Commission to "classify radio stations," "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," and "assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate." § 303 (a) (b) (c). Accordingly, the Commission has established a plan for allocating the available radio facilities among the stations of the country. Under its Rules there are three classes of standard broadcast channels: "clear channels," on which domi-

nant stations render service over extensive areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial part of their secondary service areas; "regional channels," on which several stations serving smaller areas operate simultaneously with powers not in excess of 5 kilowatts; and "local channels," on which many stations serving local areas operate simultaneously with powers not in excess of 250 watts. § 3.21. Similarly, standard broadcast stations are classified into four groups: "class I stations"—dominant stations operating on clear channels and designed to render primary and secondary service over large areas and at relatively long distances; "class II stations"—operating on clear channels and designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations; "class III stations"—operating on regional channels and designed to render service primarily to metropolitan districts and the rural areas contiguous thereto; and "class IV stations"—operating on local channels and designed to render service primarily to cities or towns and the suburban and rural areas contiguous thereto. § 3.22. Section 3.25 divides clear channels into two further groups: I–A channels, to which only one class I station is assigned, with one or more class II stations operating limited time or daytime only, and I–B channels, to which both class I and class II stations may be assigned, with more than one station operating at night.

On October 25, 1938, Station WHDH in Boston, Massachusetts, a class II station licensed to operate during the daytime only on the frequency 830 kilocycles (a class I–A channel) with power of 1 kilowatt, applied to the Commission for modification of its license so that it could operate both night and day on that frequency with increased power of 5 kilowatts. At that time Station KOA in Denver, Colorado, was the dominant class I station

on the frequency 830 kilocycles, operating unlimited time with power of 50 kilowatts. Since the Commission's Rules provided for the assignment of only one station to operate at night on the frequency 830 kilocycles, the WHDH application could not be granted without amendment of § 3.25.

Section 309 (a) of the Act specifies the procedure which the Commission must follow in passing upon applications for modification of licenses, such as that of WHDH: "If upon examination of any application for . . . modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize . . . modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." The Commission, upon its examination of the WHDH application, was unable to find that a grant would serve the public interest, convenience, or necessity. The application was therefore, on September 2, 1939, designated for hearing. Three weeks later, on September 23, 1939, KOA filed a petition to intervene. Its petition, in substance, alleged only that the proposed operation of WHDH would "cause interference to station KOA in areas where KOA's signal is now interference free," that KOA "would be aggrieved and its interests adversely affected" by the proposed operation, and that a grant of the WHDH application would not be in the public interest, convenience, or necessity.

The Court holds that the Commission was required as a matter of law to grant KOA's petition to intervene in the hearing upon the WHDH application. In my judg-

ment the Act precludes such a construction. Section 4 (j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"; § 303 (r) authorizes it to make "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." We have held that by force of these provisions "the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

The breadth of discretion entrusted to the Commission is limited, however, by §§ 303 (f) and 312 (b). The former provides that "changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with." Section 312 (b) authorizes the Commission to modify outstanding station licenses "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified

in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The procedural scheme established by the statute is thus clear: if application is made for a station license, or for modification or renewal of a license, the Commission may grant such application without a hearing if it finds, upon examination of the application, that a grant would be in the public interest. If it is unable to reach such a determination from its study of the application, it must afford the applicant a "hearing." § 309 (a). If a Commission order involves a change in the frequency, authorized power, or hours of operation of an existing station without its consent, such licensee is entitled to a "public hearing." § 303 (f). If a Commission order involves "modification" of an outstanding license, presumably something other than a change in frequency, power, or hours of operation, the modification order cannot become effective until the licensee is given notice in writing and a "reasonable opportunity to show cause why such an order of modification should not issue." § 312 (b). It is relevant here, also, that under § 312 (a) a Commission order revoking a station license cannot take effect "until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation." The Act explicitly provides for a "hearing," therefore, when the Commission proposes to deny an application for a license, or to revoke a license, or to

change the frequency, power, or hours of operation of a station licensee. But when a Commission order merely involves "modification" of the license of an existing station, the latter is entitled only to notice in writing and a "reasonable opportunity to show cause" why the order should not issue.

The Commission has exercised the authority given it by Congress to formulate its administrative procedure. Section 1.102 of its Rules, relating to intervention in Commission proceedings by interested parties, provides as follows:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

Under an earlier rule any person could intervene in a Commission proceeding if his petition disclosed "a substantial interest in the subject matter." § 105.19, Commission's Rules and Regulations (1935). The reasons for the change in the Commission's intervention rule were thus stated by the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Pt. 3, pp. 16–17: "The effects of this complete freedom of intervention [available under the old rule] upon the Commission's activities were very marked. Not only was the record unnecessarily prolonged by the discussion

of noncontroversial issues, but the evidence relevant to each issue was increased manyfold by virtue of the extended cross-examination of witnesses by each intervener. More often than not the interveners presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals. . . . If this [new] provision is enforced intelligently and forcefully, an important step will have been taken both toward the protection of applicants and the increase of the Commission's prestige." Compare In re Hazelwood, Inc., 7 F. C. C. 443.

KOA's petition for intervention was denied, presumably because the showing required by § 1.102 had not been made. And on January 29 and 30, 1940, a hearing upon the WHDH application was held before an examiner of the Commission. Although KOA was denied the right to intervene, it could, under § 1.195 of the Commission's Rules, have appeared and given evidence. That rule provides that the Secretary of the Commission shall maintain "a record of all communications received by the Commission relating to the merits of any application pending before the Commission," and if the application is designated for hearing, the Secretary must notify all persons who have communicated with the Commission regarding the application "in order that such persons will have an opportunity to appear and give evidence at such hearing." Under this rule if KOA had appeared at the hearing upon the WHDH application, it would have been entitled to

present evidence relating to the matters raised in its petition for intervention. But, so far as the record before us shows, it made no effort to take advantage of the right of participation afforded it by § 1.195.

On December 9, 1940, the Commission issued proposed findings and conclusions. Under these the Commission found that the proposed operation of WHDH, with use of a directional antenna, "would not cause any interference to the primary service of Station KOA, Denver, Colorado, and that such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the eastern half of the United States"; that the operation of WHDH as proposed in its application would "enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or to 621,000 more people than are now included within the primary service area of the station"; that by extending WHDH's hours of operation "a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000," would be provided; that, in addition to the improved service to listeners in the Boston area, there would be "an improvement and extension of service which applicant station [WHDH] now endeavors to render over the fishing banks situated off the New England coast"; and that the public interest would be served by amending § 3.25 of the Rules so as to make the frequency 830 kilocycles a I–B channel, upon which more than one station could operate at night, thereby permitting "more efficient use of the frequency."

On December 16, 1940, KOA again petitioned to intervene. Its petition alleged only that the proposed action, if adopted, would result in "interference to Station KOA in areas where KOA's signals are now interference free," would constitute a modification of KOA's license without affording it an opportunity to be heard, and would result in

"a degradation of service on 830 kc which will be prejudicial to the priority rights in the United States on this channel, will discriminate against service to rural listeners in order to furnish additional service to the City of Boston which is already well served." KOA made no offer to contradict or add to the evidence adduced at the hearing, nor did it dispute the Commission's conclusions as to the extent of the interference which KOA would suffer from the proposed operation of WHDH. Accordingly, on January 7, 1941, the Commission denied KOA's second petition to intervene, but it permitted KOA, as well as other "clear channel" stations interested in the proceeding, to participate in the oral argument before the Commission, and to file briefs *amicus*, in order to determine whether the proposed findings should be made final.

Meanwhile, on January 23, 1941, the President proclaimed the North American Regional Broadcasting Agreement, 55 Stat. 1005. The purpose of this Agreement, which was concluded at Havana on December 13, 1937, among Canada, Cuba, Dominican Republic, Haiti, Mexico, and the United States, was to "regulate and establish principles covering the use of the standard broadcast band in the North American Region so that each country may make the most effective use thereof with the minimum technical interference between broadcast stations." The signatory Governments recognized that "until technical developments reach a state permitting the elimination of radio interference of international character, a regional arrangement between them is necessary in order to promote standardization and to minimize interference." The Agreement established priorities in the use of specified clear channels, sixty-three of which were assigned to the United States, and provided that each such channel "shall be used in a manner conforming to the best engineering practice with due regard to the

service to be rendered by the dominant stations operating thereon."

In order to carry out the provisions of the Agreement, the United States was obliged to make extensive adjustments in the assignments of its existing stations. As part of the accommodations required, stations assigned to the frequency 830 kilocycles were to be moved to 850 kilocycles. This change affected both WHDH and KOA. The license of KOA, like that of all other standard broadcast stations, would have expired on August 1, 1940, while the WHDH application was pending. The licenses of all stations, including KOA and WHDH, were successively extended by the Commission, first to October 1, 1940, and then to March 29, 1941, the effective date of the Agreement. KOA had filed an application for renewal of its license to operate on 830 kilocycles, 50 kilowatts, unlimited time. On February 4, 1941, the Commission advised all applicants for renewals, including KOA, that under the Agreement, their operating assignments were to be changed and that their applications for renewals would be regarded as applications to operate upon the new frequencies, unless the applicant wished to operate upon some other frequency, in which event its application would be designated for hearing. So far as appears, KOA did not notify the Commission that it had any objection to its renewal application being regarded as an application to operate on the frequency 850 kilocycles. Accordingly, when its license to operate on 830 kilocycles expired on March 29, 1941, its license was renewed on the frequency 850 kilocycles. In no sense, therefore, did the action of the Commission changing KOA's frequency assignment pursuant to the North American Regional Broadcasting Agreement constitute a modification of KOA's license. And, indeed, KOA makes no such contention here, for review of Commission orders modifying station licenses,

upon the Commission's own motion, can be reviewed only in a suit brought in a district court under § 402 (a). See *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4, 8–9, note 3.

On March 26, 1941, three days before the Agreement was to become effective, the Commission issued an order adopting the proposed findings and conclusions upon the WHDH application, granting WHDH authority to operate on 850 kilocycles, with power of 5 kilowatts, day and night, and amending § 3.25 of its Rules so as to make the frequency 850 kilocycles a I–B channel upon which more than one station could operate at night. This order was made effective April 7, 1941.

On April 25, 1941, KOA filed a petition for rehearing before the Commission, repeating in substance the allegations contained in its earlier petitions to intervene. And on May 20, 1941, the Commission, in an opinion that considered in detail each of the allegations in the petition for rehearing, denied the petition. The Commission stated that "in view of the importance of the matters involved in this proceeding, we shall re-examine our findings and conclusions and the record upon which they are based." In summary, it found that a grant of the WHDH application "would not result in interference to the primary service of Station KOA, Denver, Colorado, and that such interference to the reception of Station KOA as might reasonably be expected to result from a grant of the Matheson [WHDH] application would occur in its secondary service area and would be limited to receivers in the eastern half of the United States, remote from the KOA transmitter; that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity and the signal to interference ratio involved in each individual case"; and "that although petitioner [KOA] contends it is entitled to serve the rural

areas in which it is claimed interference will occur, it fails to allege either that it has been providing a useful service in such areas or point out, in terms of population, the nature and extent of the claimed interference."

On June 7, 1941, KOA filed an appeal from the Commission's order in the Court of Appeals for the District of Columbia under § 402 (b) (2) of the Communications Act of 1934. Section 402 (b) provides for appeals to the Court from decisions of the Commission "in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

The court below could not take jurisdiction of the suit unless KOA had a right to appeal under § 402 (b) (2); in other words, unless it was "aggrieved" or its "interests were adversely affected" by the granting of the WHDH application. Since the Commission in exercising its licensing function must be governed by the public interest and not the private interest of existing licensees, an appellant under § 402 (b) (2) appears only to vindicate the public interest and not his own. *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U. S. 470; *Scripps-Howard Radio* v. *Federal Communications Comm'n,* 316 U. S. 4. That the Commission's order may impair the value of an existing station's license is in itself no ground for invalidating the order; it merely may create standing to attack the validity of the order on other grounds. Whatever doubts may have existed as to whether the ingredients of "case" or "controversy," as defined, for example, in *Muskrat* v. *United States,* 219 U. S. 346, are present in this situation were dispelled by our ruling in the *Sanders*

case that the legality of a Commission order can be challenged by one "aggrieved" or "whose interests are adversely affected" thereby, even though the source of his grievance is not what is claimed to make the order unlawful. But from this it must not be concluded that anyone who claims to be "aggrieved" or who is in any way adversely affected by Commission action has a right to appeal. As the prevailing opinion in the Court of Appeals pointed out: "In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary service areas to total obliteration in the primary field. . . . It seems not unreasonable to read the [*Sanders*] opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review. Likewise, with electrical interference, it is hardly necessary to secure appellate championship by every broadcaster who may be affected in only a remote and insubstantial manner." 132 F. 2d 545, 548.

In order to establish its right to appeal, therefore, KOA had to make a showing that its interests were substantially impaired by a grant of the WHDH application. This, the record makes clear, it failed to do. In its notice of appeal to the court below, KOA made only a general allegation, what courts normally regard as a conclusion of law, that the Commission's action resulted in a "substantial modification" of its license. No supporting allegations of fact were tendered. There was no claim that KOA's economic position was in any way impaired, or that the proposed operation of WHDH would cause substan-

tial interference with KOA, or that such operation would result in a substantial loss of listeners to KOA, or that any areas of substantial size would no longer be able to receive satisfactory service from KOA. Neither in its petitions for intervention, nor in its petition for rehearing before the Commission, nor in its notice of appeal to the court below, did KOA specifically challenge the correctness of the Commission's findings.

The record affords no basis, therefore, for finding that KOA had standing to appeal from the grant of the WHDH application. But even if it had, I do not believe that KOA was afforded less opportunity to participate in the proceedings before the Commission than the statute requires. Assuming that the grant of the WHDH application constituted a "modification" of KOA's license in the sense that the scope of the operations authorized by KOA's license was thereby limited, only § 312 (b) would come into operation. Section 303 (f) is inapplicable because the grant of the WHDH application unquestionably did not change KOA's frequency, power, or hours of operation. Both before and after the Commission's action, KOA's operating assignment was precisely the same: 850 kilocycles, 50 kilowatts, unlimited time. And so the only question on this phase of the case is—was KOA afforded such opportunity of participation in the WHDH proceeding as § 312 (b) requires? That section provides that no order modifying the license of any existing station "shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

KOA does not claim that it did not have sufficient notice, formal and otherwise, of the proceedings upon the

WHDH application. Nor can there be any doubt that it had ample and "reasonable opportunity to show cause" why WHDH's application should not be granted. Under § 1.195 of the Commission's Rules it could have appeared and given evidence at the hearing upon the WHDH application. That it did not take advantage of such an opportunity is certainly no reason for saying that it had none. KOA was permitted to argue before the Commission that the proposed grant of the WHDH application should not be made final. It submitted a petition for rehearing which the Commission considered on its merits and which the Commission denied only after a detailed review of all the contentions made by KOA.

The Court holds, nevertheless, that the Commission was required to afford KOA more than all these opportunities to show cause. Section 312 (b) is construed to require a hearing in which the licensee whose interests may be affected is entitled to intervene as a formal party. Such a construction appears to me to disregard the structure and language of the legislative scheme. Congress might have been explicit and provided in § 312 (b) that every licensee whose interests may be affected by Commission action shall be entitled to a hearing as an intervenor in the proceeding. As has been noted, the draftsmen of the Communications Act of 1934 knew how to use apt words when they wished to afford parties before the Commission the right of "hearing." Section 309 (a) requires the Commission to afford an applicant for a license a "hearing," not notice and an opportunity to show cause, before the application can be denied. Section 312 (a) gives a licensee a "hearing," not notice and an opportunity to show cause, before its license can be revoked. Section 303 (f) provides that the Commission cannot change the frequency, authorized power, or times of operation of a licensee unless it affords such licensee a "public hearing," not merely notice and an opportunity to show cause. But, for rea-

sons which it deemed sufficient, Congress did not choose to make this technical requirement of a "hearing" in specifying the procedure for the protection of licensees who might be affected by Commission action. Congress may well have desired to avoid the litigious waste so abundantly established by the voluminous cases to which the claim of intervention in courts has given rise. The requirement of notice and an opportunity to show cause is not the equivalent of the requirement of a "hearing." By imposing this requirement for the adequate protection of substantial interests, Congress charged the Commission with the duty of devising appropriate procedure which would "best conduce to the proper dispatch of business and to the ends of justice." § 4 (j). The Commission's response was §§ 1.102 and 1.195 of its Rules.

Can it seriously be claimed that the Commission acted beyond its authority in providing that before a licensee can intervene in another proceeding he must indicate some solid ground by setting forth "the facts on which the petitioner bases his claim that his intervention will be in the public interest"? Otherwise anyone who asserts generally that the grant of another's application will affect his license may become a party to a proceeding before the Commission and may, to the extent to which a party can shape and distort the direction of a proceeding, gain all the opportunities that a party has to affect a litigation although he has not made even a preliminary showing that his intervention will be in the public interest. I cannot read the requirement for "reasonable opportunity to show cause why such an order of modification should not issue" as a denial to the Commission of power to make such a reasonable rule for sifting the responsibility of potential intervenors. And if the Commission's rule for intervention was within its discretionary authority in formulating appropriate rules of procedure for the conduct of its proceedings, it is equally clear that the Commission, in the

circumstances of this particular case, was justified in finding that KOA made no substantial claim that the grant of the WHDH application would impair KOA's economic interests or entail a substantial loss of listeners or make any appreciable inroads upon any areas served by KOA or otherwise substantially affect its interest or that of the public.

To deny to the Commission the right to require a preliminary showing, such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests. See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142–44. It is to assume that the modes familiar to courts for the protection of substantial interests are the only permissible modes, regardless of the nature of the subject matter and the tribunals charged with administration of the law. This is to read the discretion given to the Federal Communications Commission to fashion a procedure relevant to the interests for the adjustment of which the Commission was established through the distorting spectacles of what has been found appropriate for courts. We must assume that an agency which Congress has trusted is worthy of the trust. And especially when sitting in judgment upon procedure devised by the Commission for the fair protection of both public and private interests, we must view what the Commission has done with a generous and not a jealous eye.

MR. JUSTICE DOUGLAS, dissenting:

While I am in substantial agreement with the views expressed by MR. JUSTICE FRANKFURTER, there are a few words I desire to add on one phase of the case.

I agree with the Court that if, as we held in the *Sanders* case (309 U. S. 470), a person financially injured by

the grant of a license has a standing to appeal, so does one whose station will suffer from electrical interference if the license is issued. I expressed my doubts, however, in *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 20–21, whether Congress endowed private litigants with the power to vindicate the public interest when it gave the right to appeal under § 402 (b) to a person "aggrieved or whose interests are adversely affected" by a decision of the Commission. I also expressed my concern in that case with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission. See *Muskrat* v. *United States,* 219 U. S. 346. But if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest,[1] then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464.

Any actual controversy which may now be present in this case is between KOA and the Commission. Any controversy which existed between WHDH and the Commission has come to an end. *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116. The interest, if any, of the appellant KOA is the interest of a private person and accordingly must be measured in terms of private injury.

[1] Referred to as a sort of King's proctor by Edgerton, J., in *Colorado Radio Corp.* v. *Federal Communications Commission,* 73 App. D. C. 225, 118 F. 2d 24, 28; and as "private Attorney Generals" by Frank, J., in *Associated Industries* v. *Ickes,* 134 F. 2d 694.

That interest must be substantial and immediate if the standard of the statute and if the constitutional requirements of case or controversy, as interpreted by the *Sanders* and the *Scripps-Howard* cases, are to be satisfied. It is necessary to show in effect that KOA has sustained or is about to sustain some direct and substantial injury (see *Massachusetts* v. *Mellon,* 262 U. S. 447, 488)—an injury which for the purpose of this case must result from electrical interference. The *Sanders* case and the *Scripps-Howard* case do not dispense with that requirement. They merely hold that an appellant has his case decided in light of the standards of the public interest, not by the criteria which give him a standing to appeal.

I do not understand that the opinion of the Court takes a contrary view. It only holds on this phase of the case that KOA made an adequate showing under § 402 (b). I disagree with that conclusion.

UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3. Argued March 12, 13, 1942. Reargued March 1, 2, 1943.—Decided May 17, 1943.

1. Upon this appeal under § 25 of the Tennessee Valley Authority Act, the Circuit Court of Appeals complied with the requirement that it dispose of the matter "upon the record, without regard to the awards or findings theretofore made," and fix the value. P. 272.
2. In a proceeding to condemn lands under § 25 of the Tennessee Valley Authority Act, the burden of establishing their value rests upon the respondent landowner. P. 273.
3. In a proceeding under § 25 of the Tennessee Valley Authority Act, the owner sought to establish a special value for the lands con-

demned upon the ground of their special adaptability, when united with other tracts owned by him and with tracts owned by strangers, for use in forming a multiple-dam, hydro-electric plant which he projected. *Held:*

(1) That in order to permit consideration of such special adaptability there must be a reasonable probability of the condemned tract's being thus combined with other tracts in the near future, otherwise the special use would be too remote and speculative to have any legitimate effect upon the valuation. P. 275.

(2) The landowner's privilege to use the power of eminent domain—granted by the State in which the lands were situate, but not exercised, and revocable by the State—may not be considered in determining whether there is a reasonable probability that the lands condemned could be so united with other tracts into the projected power plant in the reasonably near future. Without the power to condemn, the chances of incorporating lands as contemplated by the project are too remote and slim to have any legitimate effect on the valuation. P. 276.

4 In condemning lands for a federal project, the United States is not required to make compensation for the loss of a business opportunity, dependent upon their owner's privilege to use the state power of eminent domain in acquiring other lands, where such privilege has not been exercised and is revocable by the State, and where the State need not make such compensation were it the sponsor of the project and the taker of the lands in question. P. 284.

118 F. 2d 79, reversed.

CERTIORARI, 314 U. S. 594, to review a judgment of the Circuit Court of Appeals which affirmed with modifications a judgment of the District Court, 33 F. Supp. 519, in a condemnation case.

Solicitor General Fahy and *Mr. William C. Fitts, Jr.* made the original argument for the United States; and *Mr. Fitts* the reargument. *Messrs. Arnold Raum* and *Charles J. McCarthy* were on the briefs.

Messrs. George Lyle Jones and *George H. Wright* argued the cause on the reargument, and *Mr. Arthur T. Vanderbilt* on the original argument, for respondent.

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MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case arises out of condemnation by the United States on behalf of the Tennessee Valley Authority of about 12,000 acres of land in North Carolina lying in and along the Hiwassee River, a major tributary of the Tennessee. The land involved in the case was owned by the respondent Southern States Power Company, a North Carolina corporation, and by its wholly owned subsidiary, the Union Power Company, a Georgia corporation. Since condemnation, the Southern States Power Company has assigned its property interest and rights arising out of these proceedings to the respondent W. V. N. Powelson, its sole stockholder. For convenience Powelson and Southern States will be referred to interchangeably as "respondent."

On January 28, 1936, when the original declaration of taking was filed and these proceedings began, Southern States and Union Power owned a small hydroelectric generating plant on the Nottely River, a tributary of the Hiwassee. This was known as the Murphy plant. It had a distribution system which supplied the town of Murphy, North Carolina, and surrounding territory. These companies also owned about 22,000 acres of land on both sides of the Hiwassee and Nottely Rivers. These included lands at four dam sites which are known as the Powelson (site of the Hiwassee dam), Appalachia, Murphy and Nottely sites, a large part of the land required for the Powelson and Appalachia projects, and some of the land required for the Murphy and Nottely projects. Powelson, an experienced hydroelectric engineer, began as early as 1913 and continued until 1931 to explore, survey, and acquire these lands and to develop and promote a plan for constructing an integrated four-dam hydroelectric plant on these rivers and at these sites. The actual cost

of the lands involved in this case, as distinguished from the total investment in them,[1] was $277,821.56.

Southern States is successor to Carolina-Tennessee Power Co., created by a special act of the North Carolina legislature [2] in 1909. Carolina-Tennessee was granted broad powers and was authorized by the State to take by eminent domain riparian lands and water rights along any non-navigable stream of North Carolina.[3]

The lands condemned by the Government in the present proceedings constitute a part of the site of its Hiwassee dam, a multiple-purpose project constructed by the Tennessee Valley Authority on the Hiwassee River as part of the development of the Tennessee River system for hydroelectric power production, navigation, and flood control. See Report to the Congress on the Unified De-

[1] The sum of $1,061,942.53 had been invested by respondent through 1935 in the entire 22,000 acres of land owned by it. Of this sum Powelson personally contributed $586,196.21. The total expenditure included $188,271.86 for lands not condemned, $73,412.68 for taxes, $82,480.81 for New York office expense, $94,074.71 for legal expenses, $14,321.68 for travelling expenses, $64,358.46 for construction of transmission lines for and operation of the Murphy plant, $194,487.50 for interest and amortization as respects the bonds on the Murphy plant, and expenditures for surveying, engineering studies, advertising and furniture.

[2] N. C., Priv. L. 1909, c. 76, p. 185.

[3] A rival, the Hiawassee River Power Company, organized under the general laws of the State, proceeded to acquire lands and rights by contract, deed and condemnation, and threatened to construct a hydroelectric plant on the Hiwassee River which would interfere with the development projected by Carolina-Tennessee. Carolina-Tennessee engaged in a long litigation to establish its rights as against its rival. That litigation established the prior and dominant right of respondent's predecessor to develop the water power in this territory and sustained its claim to condemn the land and water rights of the Hiawassee River Power Company. *Carolina-Tennessee Power Co.* v. *Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916), 175 N. C. 668, 96 S. E. 99 (1918), 186 N. C. 179, 119 S. E. 213 (1923), 188 N. C. 128, 123 S. E. 312 (1924).

velopment of the Tennessee River System, Tennessee Valley Authority, March 1936, pp. 18–20, 96, 99. The dam itself is situated on land acquired from the respondent and known as the Powelson site. It was stipulated that the Hiwassee River is not navigable at the site of the Hiwassee dam or in any part of its course through respondent's land.[4]

The property condemned includes the Murphy dam and hydroelectric plant on the Nottely River and about 12,000 acres of land along the Hiwassee River in North Carolina. Of these, some 2,000 acres have been cleared and cultivated. The remaining area is rough and mountainous, consisting in large part of rock surface, mountain peaks and gorges. Much of the land was inaccessible at the time of the taking, there being practically no highways thereon, although there were some cartways.

The condemnation proceedings were conducted pursuant to § 25 of the Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58, 16 U. S. C. § 831x.[5] Under the procedure therein specially prescribed for condemnations on behalf of the Tennessee Valley Authority, the District Court appointed three commissioners to take testimony and to determine the value of the property. The Government contends that the property was worth from $95,000 to $165,000. Respondent sought to establish a value of $7,500,000. Respondent's valuation was based on the theory that the property condemned, together with other property owned by respondent, could be united with numerous other tracts owned by strangers for the construction of an elaborate four-dam hydroelectric project. Only one of the four projected dams was to be located on the

[4] And see Tennessee River and Tributaries, H. Doc. No. 328, 71st Cong., 2d Sess., p. 216.

[5] See also, 46 Stat. 1421, 40 U. S. C. § 258a; § 4 (h) (i) of the Tennessee Valley Authority Act of 1933, 48 Stat. 58–61, 16 U. S. C. § 831c (h) (i).

property condemned, viz. at the site of the Hiwassee dam, which, taken alone, was not considered commercially feasible for power development. The Commission found that the land condemned was suitable for use as the site of a hydroelectric power plant; that such use furnished the basis for its greatest inherent value; and that it had a value of $1,437,000,[6] though its cost was only $277,-821.56. The Commission awarded $253,000 in addition as severance damages in respect of lands not condemned but remaining in the ownership of Southern States and Union Power.

Both parties sought review of the award before the three-judge District Court for which § 25 of the Tennessee Valley Authority Act makes provision. The District Court reduced the value of the land condemned to $976,289.40 and severance damages to $211,791.23, $100,000 of which was for the Murphy distribution system. Interest was added from the filing of the initial declarations of taking. 33 F. Supp. 519. The Circuit Court of Appeals excluded severance damages for the taking of the Murphy plant on the Nottely River; and also excluded the $18,907.02 awarded as severance damages with respect to land held by Union Power unless within thirty days after the mandate was filed in the District Court that corporation should be made a party so as to become bound by the judgment. With these modifications it affirmed the judgment of the District Court. 118 F. 2d 79. The case is here on a petition for writ of certiorari which we granted because of the public importance of the issues raised.

I. A preliminary question relates to the scope of review by the Circuit Court of Appeals under § 25 of the Act.

[6] The Commission also awarded $110,000 for the Murphy plant, which sum had been deposited by the United States when it filed its declaration of taking.

That section provides for the appointment of commissioners, who are "to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value" of the lands. The commissioners are required to report such value and make an award. Review of the action of the commissioners is by a three-judge district court, which "shall pass *de novo* upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners." There is an appeal from that court to the circuit court of appeals, which "shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned."

It is contended that the Circuit Court of Appeals did not perform the functions which § 25 placed upon it. That court stated that § 25 permitted it to consider the findings under review "in the light of the record." 118 F. 2d p. 83. It gave weight to the opportunity of the commissioners and judges who took the testimony to see and hear the witnesses. But while it adverted to those circumstances and findings, and modified and "affirmed" the judgment of the three-judge court, we cannot say that it did not perform the functions which Congress gave it under § 25.

The purpose of § 25 was to free the Circuit Court of Appeals from the strictures commonly applicable to its review of disputed questions of fact. Under § 25 it does not sit as a "court of errors." *United States* v. *Reynolds,* 115 F. 2d 294, 296. Its duty is to dispose of the matter

"upon the record, without regard to the awards or findings theretofore made" and to fix the value. But it need not blind itself to the special advantages of the tribunals below in evaluating the evidence. A trial *de novo* with the fresh taking of evidence is not required. An independent revaluation of the property condemned is contemplated. And that requirement was met here.

II. Sec. 25 of the Act authorizes awards covering "the value of the lands sought to be condemned." The storm center of this controversy is whether water power value may be included in respondent's award.

It is argued on behalf of petitioner that even though the Hiwassee River is non-navigable throughout this part of its course, compensation for the loss of any supposed power value is no more permissible than in case of a navigable stream. It is pointed out that *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, held that there is "no private property in the flow" of a navigable stream. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. And it is contended that although the Hiwassee River is non-navigable at the points in question, the flow at those places has such a direct and immediate effect upon the navigable portion of the river farther downstream as to give the United States the same plenary control over both the navigable and non-navigable portions of the river (*United States* v. *Appalachian Power Co., supra; Oklahoma* v. *Atkinson Co.*, 313 U. S. 508), thereby bringing into play the rule of the *Chandler-Dunbar* case. Cf. *United States* v. *Kelly*, 243 U. S. 316. We do not stop to consider that question. For if we assume, without deciding, that rights in the "flow" of a non-navigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, the water power value which respondent sought to establish cannot be allowed.

The burden of establishing the value of the lands sought to be condemned was on respondent. *Ralph* v. *Hazen*,

93 F. 2d 68, 70; *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95, 101. Respondent endeavored to carry that burden by introducing evidence that the property condemned had a fair market value of $7,500,000. As we have said, the theory was that the lands condemned, together with other property owned by respondent, could be united with several hundred other tracts owned by strangers and that a four-dam hydroelectric project could be constructed upon all those lands.[7] As we have noted, only one of the four hypothetical dams was to be located on the lands condemned. That was at the Hiwassee dam site, which, considered alone, was not contended to be profitable for power development. Although respondent owned or controlled some of the other lands necessary for the four-dam project, about half of them were in adverse hands. It was practically conceded that the acquisition of all the property necessary for the four-dam development could not, in all reasonable probability, be accomplished without resort to the power of eminent domain. It was insisted, however, that since that power had been conferred by North Carolina, the case should be viewed as if respondent owned every foot of land required for the hypothetical project. Respondent proceeded from that assumption to other assumptions: an estimated cost of $30,000,000 for the four-dam project; an annual output of 512,500,000 kwh of so-called reserve, or superprimary, or "Saluda-type" energy;[8] a production cost of electricity

[7] While respondent owned most of the lands necessary for the Appalachia reservoir, about half of those not yet acquired lay in the state of Tennessee, in which, so far as appears, it had no power of eminent domain. And, according to respondent's estimates of the lands necessary for the other three projects, it had yet to acquire 22% of the Powelson reservoir, 73% of the Nottely, and 96% of the Murphy.

[8] The theory was that the projected reservoirs would store water during the wet season and that the power would be sold neighboring utilities during the dry season. The name given that type of power is said to derive from the fact that Lexington Water Power Co. sold the output of its Saluda plant to Duke Power Co. on a similar basis.

of 3.75 mills per kwh; and a selling price of 6.34 mills per kwh for all the energy produced. On the basis of those assumptions an assumed net return was computed. That assumed net return was capitalized at a given rate and a portion of that sum, i. e. $7,500,000, was allocated to the lands in question. Petitioner challenged most of those assumptions. It introduced evidence that the cost of the four-dam project would be higher than respondent assumed; that the total annual fixed charges of the project would exceed those estimated; that the production of energy would be less, the cost per kwh would be greater, and the sale price per kwh would be lower than respondent estimated. The Commissioners, the District Court and the Circuit Court of Appeals found on the basis of respondent's estimates of the four-dam project that the lands had a water power value, and that their availability for power purposes constituted the chief element of their value and the basis for the highest value in the property. All agreed, however, that respondent's estimate of $7,500,000 was too high. And as we have noted, the District Court and the Circuit Court of Appeals concluded that the fair market value of the lands for power purposes was some $976,000.

An owner of lands sought to be condemned is entitled to their "market value fairly determined." *United States* v. *Miller,* 317 U. S. 369, 374. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. *Boom Co.* v. *Patterson,* 98 U. S. 403; *McCandless* v. *United States,* 298 U. S. 342. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern* v. *New York,* 229 U. S. 363. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts

for that purpose in the reasonably near future. *Olson* v. *United States,* 292 U. S. 246, 255. In absence of such a showing, the chance of their being united for that special use is regarded "as too remote and speculative to have any legitimate effect upon the valuation." *McGovern* v. *New York, supra,* p. 372.

Respondent seeks to avoid that difficulty by reliance on the power of eminent domain granted by North Carolina. The argument is that the means of effecting a combination of lands is not important—it is whether the landowner had a reasonable chance of doing it. This Court, however, held in the *McGovern* case that in estimating that chance or probability "the power of effecting the change by eminent domain must be left out." 229 U. S. p. 372. And that view was followed in *New York* v. *Sage,* 239 U. S. 57, 61. Respondent attempts to distinguish those cases on the ground that, since the landowners in question did not have the power of eminent domain, they were merely denied recovery for a value dependent upon a combination which they could not reasonably expect to effect. But the thrust of the rule is deeper. If the owner's claim against the sovereign were increased by reason of the power of eminent domain, then the very existence of the right of condemnation would confer on the owner "a value for which he must be paid when the right is exercised." Hale, Value to the Taker in Condemnation Cases, 31 Col. Rev. 1, 13.

The fact that the owner also has a power of eminent domain does not alter the situation. See *Tacoma* v. *Nisqually Power Co.,* 57 Wash. 420, 433, 107 P. 199. The grant of the power of eminent domain is a mere revocable privilege for which a state cannot be required to make compensation. *Adirondack Ry. Co.* v. *New York,* 176 U. S. 335; *Ramapo Water Co.* v. *New York,* 236 U. S. 579; *Western Union Telegraph Co.* v. *Louisville & Nashville R. Co.,* 258 U. S. 13. A revocation of that privilege is but a recall

of a part of its sovereign power for which no price may be exacted. North Carolina follows that view. *Yadkin River Power Co.* v. *Whitney Co.*, 150 N. C. 31, 63 S. E. 188. Accordingly it seems clear that if North Carolina rather than the United States were constructing this public project and condemning the identical lands for the purpose, respondent need not be compensated for the loss of an opportunity to develop a power project through utilization of the right to condemn. In case this was North Carolina's project respondent's chances of combining these numerous tracts into one ownership for a power project would be measured without reference to the power of eminent domain. The inclusion of eminent domain would be but an indirect method of making North Carolina pay for the destruction or impairment of the privilege.[9] That the private company's privilege to use the power of eminent domain need not be reflected in the valuation if the property were taken by the state is indicated by those few cases which seem to have reached the point. See *Tacoma* v. *Nisqually Power Co.*, *supra*. That result is the necessary import of this Court's ruling in *Sears* v. *Akron*, 246 U. S. 242. Suit was brought in that case by the trustee of the property of an Ohio corporation to enjoin the City of Akron from constructing a dam and reservoir on the Cuyahoga River. The corporation had received from the State of Ohio the right to construct and operate a power system on the river. And it was also given by the state

[9] We do not have here the question of a market value affected by market prices which may reflect to some extent the power to condemn. As to that situation this Court stated in *Olson* v. *United States*, *supra*, p. 256: "It is common knowledge that public service corporations and others having that power [eminent domain] frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account."

the power of eminent domain so that it might acquire the property necessary for the project. In that case the land acquisition program of the private company apparently was not as far advanced as was respondent's in the present case. But the difference in degree of development is unimportant since in each case the private project was still inchoate and had not progressed beyond the promotional phase when the public project was launched. This Court held that although the project constructed by the City of Akron might imperil or wholly defeat the company's project, there was no impairment of contract, and no taking or appropriation of the company's property. In the latter connection Mr. Justice Brandeis, speaking for the Court, stated that it was clear "that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken." 246 U. S. p. 250. It was accordingly held that the city was free as against the company "to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation." *Id.* pp. 249–250.

This is a case of first impression. No precedent has been advanced which suggests that a *different* measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case. It has long been assumed that in other respects the national government was under "no greater limitation" by reason of the Fifth Amendment than were the states by virtue of the Fourteenth. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156. That view is implicit in condemnation cases where the amount of just compensation re-

quired by the Fifth Amendment is in issue. See, for example, *Omnia Co.* v. *United States,* 261 U. S. 502, 508–509. We do not see why the protection given to "private property" under the Fifth Amendment imposes upon the United States a duty to provide a *higher* measure of compensation for these lands than would be imposed by the Fourteenth Amendment upon the state if it were the taker.[10] Nor has any reason based on considerations of equity and fair dealing been advanced for justifying a *higher* measure of compensation in the instant case because the lands are being taken for a public project sponsored by the United States rather than by North Carolina. The warrant or authority for putting the United States at such a disadvantage is not apparent.

The right of the United States to exercise the power of eminent domain is "complete in itself" and "can neither be enlarged nor diminished by a State." *Kohl* v. *United States,* 91 U. S. 367, 374. Though the meaning of "property" as used in § 25 of the Act and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. Yet when we look to local law in the present case, we find no indication that for purposes of condemnation proceedings instituted by North Carolina the value of the lands in question would be increased by reason of respondent's privilege to use the power of eminent domain. So far as constitutional compulsions are concerned, it is plain, as we have noted, that that factor need not be included in case the state were the condemnor. Moreover, the result in the present case is not different if we assume with the District Court (33 F. Supp. p. 522) that respondent's "prior right" under North Carolina law "constituted a valuable right, which is destroyed by this condemnation proceeding." It does

[10] Cf. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 233–241, arising under the Fourteenth Amendment.

not follow that that "prior right" was "private property" within the meaning of the Fifth Amendment which was taken by the United States.

The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner. We recently stated in *United States* v. *Miller, supra,* p. 375, that "Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings." Equity and fair dealing do not require the payment by the United States to the landowner of the amount of a valuation of his lands based on the existence of his privilege to use the power of eminent domain. It is "private property" which the Fifth Amendment declares shall not be taken for public use without just compensation. The power of eminent domain can hardly be said to fall in that category. It is not a personal privilege; it is a special authority impressed with a public character and to be utilized for a public end.[11] An award based on the value of that privilege would be an appropriation of public authority to a wholly private end. The denial of such an award to the landowner does no injustice. It is true that respondent's possession of the power of eminent domain was in part the basis of an opportunity to unite the present lands with others into a power project. But he is not being deprived of values which result from his expenditures or activities. The fruits of the exercise of that power

[11] See *Pollard's Lessee* v. *Hagan,* 3 How. 212, 223; *Boom Co.* v. *Patterson,* 98 U. S. 403, 406; *United States* v. *Jones,* 109 U. S. 513, 518–519; *Spencer* v. *Railroad,* 137 N. C. 107, 121–122, 49 S. E. 96; *Jeffress* v. *Greenville,* 154 N. C. 490, 493–494, 70 S. E. 919; *Wissler* v. *Yadkin River Power Co.,* 158 N. C. 465, 74 S. E. 460. In the latter case the Supreme Court of North Carolina stated (pp. 466–467): "This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large."

of eminent domain are not being appropriated. And there is no basis for raising an estoppel against the United States as there was thought to be in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312. See *Omnia Co.* v. *United States, supra,* pp. 513–514. The landowner is, to be sure, deprived of a preferential advantage, which was an incidental attribute of the public authority with which the state endowed him. But that advantage had no higher dignity than a promise of a gratuity. It had not been availed of to develop an existing and going enterprise which the United States appropriated. Respondent's project was only a speculative venture—a promotional scheme wholly *in futuro.* Thus we conclude that respondent had no interest under his unexercised power of eminent domain which rises to the estate of "private property" within the meaning of the Fifth Amendment. Cf. *Rundle* v. *Delaware & R. Canal Co.,* 14 How. 80, 94.

This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken (*United States* v. *Miller, supra; United States* v. *Chandler-Dunbar Co., supra,* p. 81; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195), not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a

statutory mandate (*United States* v. *Miller, supra,* p. 376) the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, Valuation Under Eminent Domain (1936) § 71, § 73. On the one hand are such cases as *Monongahela Navigation Co.* v. *United States,*[12] *supra,* where it was held that the United States had appropriated a going enterprise to its own ends and must make compensation accordingly. But it is well settled in this Court [13] that, "Frustration and appropriation are essentially different things." *Omnia Co.* v. *United States, supra,* p. 513. Thus in *Mitchell* v. *United States,* 267 U. S. 341, the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project even though the business could not be reëstablished elsewhere. This Court, after noting that "settled rules of law" precluded

[12] And see *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *Cincinnati* v. *Louisville & Nashville R. Co.,* 223 U. S. 390; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *De Laval Steam Turbine Co.* v. *United States,* 284 U. S. 61. In the *Monongahela* case the United States condemned a lock and dam constructed at the invitation of the United States and operated by the owner under a franchise from Pennsylvania. This Court held that the special facts of the case required that the franchise or going concern value of the enterprise be included in the compensation payable to the owner. It was said in the first place that the franchise granted to the company by Pennsylvania was a valuable property right, since it was a contract under the rule of *Dartmouth College* v. *Woodward,* 4 Wheat. 518, and protected against impairment by the state. Secondly, the Court noted that the United States did more than destroy the business; it appropriated the enterprise for public purposes. Moreover, as was stated in *Omnia Co.* v. *United States, supra,* pp. 513–514, the *Monongahela* case "rested primarily upon the doctrine of estoppel, as this Court has in several cases since pointed out."

[13] See *Bothwell* v. *United States,* 254 U. S. 231; *Joslin Co.* v. *Providence,* 262 U. S. 668, 675; *Atwater & Co.* v. *United States,* 275 U. S. 188; *United States* v. *Carver,* 278 U. S. 294; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89.

a consideration of "consequential damages" for losses of a business or its destruction, stated: "No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land." 267 U. S. p. 345. That which is not "private property" within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not "taken" in the *Mitchell* case it need not be reflected in the award due the landowner unless Congress so provides.

It is no answer to say that the evidence as to the profits from respondent's hypothetical four-dam project was introduced not as the basis of an award for loss of profits or business but only as a basis for estimating the true water power value of the property. The computation of those profits assumes the very existence of the projected enterprise which the power of eminent domain alone could make possible and which these condemnations frustrated. We repeat that an allowance of any such value would entail a payment for the loss of a business prospect based on an unexercised power of eminent domain. As we have said, no reason based on precedent or principle appears why respondent's privilege to use the power of eminent domain should be treated as "private property" within the meaning of the Fifth Amendment so as to give rise to a private claim against the public treasury. Nor is there any indication that Congress adopted in this regard a more liberalized standard of compensation than would be provided under the Fifth Amendment.

It is suggested that this result would mean that in condemnation proceedings the United States need not pay the value of the property at the time of the taking if the

state where the property is located might destroy or diminish that value through an appropriate exercise of its police power. It is manifest that such is not the case. A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. *Hamilton* v. *Kentucky Distilleries Co., supra; Block* v. *Hirsch,* 256 U. S. 135, 156. While such a change will not be presumed (*United States* v. *River Rouge Co.,* 269 U. S. 411), the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. See *Reichelderfer* v. *Quinn,* 287 U. S. 315, 323. We do not disturb those general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. But we have here a unique situation. The power of eminent domain which respondent seeks to have reflected in the valuation is largely unexercised and need not be reflected in the measure of compensation if the state which conferred the privilege were the taker of the lands. If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed as *Sears* v. *Akron, supra,* indicates. Then the United States would be acquiring a business, not simply frustrating a promotional scheme. We merely hold that the United States, in absence of a specific statutory requirement, need not make compensation for the loss of a business opportunity based on the unexercised privilege to use the power of eminent domain where the state need not do so were it the sponsor of the public project and the taker of the lands. The constitutional obligation of the United States to make compensation does not extend so far.

It is true that this result will reduce an award which the Circuit Court of Appeals noted was approximately equal to respondent's total investment in the lands acquired for its project, plus 3% interest. But the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment. *Minnesota Rate Cases,* 230 U. S. 352, 454; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Olson* v. *United States, supra,* p. 255.

The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain be left out of account, the chances of making the combination appear to be too remote and slim "to have any legitimate effect upon the valuation." *McGovern* v. *New York, supra,* p. 372. Respondent therefore has not established the basis for proof of the water power value which was asserted.

We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken. Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules (*United States* v. *Miller, supra*)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain. We do not reach the question much discussed at the bar and in the briefs whether evidence of the earnings of respondent's hypothetical four-dam project should have been excluded for the further reason that it was too speculative.[14]

[14] See *Sharp* v. *United States,* 191 U. S. 341, 348–350; *San Diego Land & Town Co.* v. *Neale,* 88 Cal. 50, 58–63, 25 P. 977; *Matter of City of New York,* 118 App. Div. 272, 275, 103 N. Y. S. 441; *New*

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE JACKSON, dissenting:

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and I understand the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as matter of law because its projected development might be defeated if the State should revoke the power of eminent domain admittedly possessed by the owner at the time of the taking. We think it denies proper effect to state law and policy in effect at the time of taking.

Unless this decision overrules the law as stated by Mr. Justice Brandeis for a unanimous Court, flowing streams are natural resources owned and governed by the States, and the rights of their grantees and of riparian owners are settled by the local law which is conclusive on us. *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comm'rs*, 168 U. S. 349; *Shively* v. *Bowlby*, 152 U. S. 1; cf. *United States* v. *Oregon*, 295 U. S. 1, 6–7. The States have assumed this to be their right and have written into their laws and constitutions various systems of control and development deemed suitable to their respective climates, industries or economies.[1]

York Central R. Co. v. *Maloney*, 234 N. Y. 208, 218, 137 N. E. 305; *Sparkill Realty Corp.* v. *New York*, 268 N. Y. 192, 197 N. E. 192; *Burt* v. *Wigglesworth*, 117 Mass. 302, 306; *Hamilton* v. *Pittsburg, B. & L. E. R. Co.*, 190 Pa. St. 51, 57, 42 A. 369. Cf. *United Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 317–318.

[1] Typical provisions from state constitutions are:

California, Article XIV, § 3: ". . . Riparian rights in a stream or water course attach to, but to no more than so much of the flow

The Hiwassee River, therefore, is a resource of the State of North Carolina. To obtain the advantage of its latent energy that State by special act of its Legislature created

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thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. . . ."

Colorado, Article XVI, § 6: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

North Dakota, Article XVII, § 210: "All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."

Rhode Island, Article I, § 17: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration."

Utah, Article XVII, § 1: "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."

Washington, Article XVII, § 1: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Article XXI, § 1: "The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use."

Wisconsin, Article XXI, § 1: "The state shall have concurrent juris-

a corporation and gave it extensive powers including the right of eminent domain.[2] The corporation acquired, partly by purchase and partly by condemnation, the dam sites, bed of the stream, riparian lands and key properties necessary to the development. The right to acquire by condemnation any additional lands needed was never repealed or withdrawn but on the other hand was confirmed by the state courts in a series of litigations.[3] There is no finding or evidence that forfeiture, repeal or impairment of these rights has been considered or threatened by the State or is even remotely probable, even if legally possible.

Under its paramount powers over navigation the Federal Government has elected to take this resource out of the control of the State and away from the grantee corporation which is subject to State taxing and regulatory power. This it may do, but only upon making just compensation. But the Court holds that compensation must be computed as if the State had refused to grant what it has granted or had withdrawn what it has given no indication of withdrawing. By thus cancelling for the purpose

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diction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

See also *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254, 272; cf. *International Paper Co.* v. *United States*, 282 U. S. 399.

[2] Private Laws of North Carolina, 1909, c. 76, p 185.

[3] *Carolina-Tennessee Power Co.* v. *Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349 (1916), 175 N. C. 668, 96 S. E. 99 (1918), 186 N. C. 179, 119 S. E. 213 (1923), 188 N. C. 128, 123 S. E. 312 (1924); *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341 (1920), 267 U. S. 586 (1925).

the power of eminent domain, it holds as a matter of law that the project was not feasible to execute and that the lands assembled for power purposes, admittedly physically adaptable to the use and taken by the Government for that purpose, have no power utilization value. This seems to us not easily reconciled with the respect due to local law in a matter of the kind.

Determination of the value of property, particularly as affected by a prospective use, always involves some element of prophecy and some estimation of probabilities. No court that we know of has ever proposed, and we do not propose, to value the power of eminent domain either separately or as an ingredient of property taken. Its existence should be considered only for the purpose of determining the most advantageous probable usefulness of the property as it affects its value. The legal principles governing the solution of the fact questions are laid down in *Olson* v. *United States,* 292 U. S. 246. Of course any uncertainty or limitation as to the right to condemn property or evidence of probable impairment, forfeiture, or withdrawal of it would be weighed with other evidence in arriving at a judgment as to the feasibility of the project and value of the property. This Court has said that a possibility of exercise by a governing body of its power to make changes affecting values is a proper subject for consideration in fixing values. *Reichelderfer* v. *Quinn,* 287 U. S. 315, 323. But never until now has it held that the law requires present values to be determined as if legally possible, but factually improbable, changes have already taken place.

Few properties are so immune from the effects of governmental authority that some action may not be envisioned which would devalue them. One of the items taken by the Federal Government in this case from respondent and out of control of the State was a going concern, an electric generating plant and distributing system. Since both parties accepted the award made for

this plant it is no longer an issue, but is illustrative of the legal problem raised by the Court's opinion. Doubtless the State Government had power to make many innovations detrimental to its success and to impose burdens that would detract from its value and perhaps had reserved powers to annul its corporate or special franchises. But we would not suppose that such hypothetical destruction of property values could be invoked to minimize compensation payable on a taking any more than hypothetical accretions to its rights through state action, possible but never accomplished, could increase such compensation. In many cases the beneficial use and hence the value of abutting property may be decreased if public authority closes or obstructs a public street or canal, or changes the grade of a street, or the location of a county seat.[4]

[4] See examples and citation of cases in *Reichelderfer* v. *Quinn, supra,* at 319.

The validity of the principle adopted by the majority opinion may be tested against hypothetical cases such as the following:

1. *O* owns a dock projecting into a navigable stream in State *S*. The Federal Government may destroy it or require its removal without payment of compensation (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592), but it does not appear likely that it will do so, and the dock is a commercially valuable property. *S* acquires the dock by condemnation, and seeks to avoid payment by relying upon the power of the Federal Government to destroy its value.

2. *O* owns a distillery in State *S*. *S* acquires it by condemnation, and resists payment by asserting the existence of the Federal Government's power to enact a prohibition law and thereby destroy or diminish the value of the distillery without the payment of compensation (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146).

3. *O* owns an option upon land owned by State *S*. The option is revocable at the will of *S*, but revocation seems unlikely, and the option has commercial value. The Federal Government acquires it by condemnation, but resists payment by relying upon *S*'s power of revocation.

These cases can be further complicated by supposing that the condemnation is not by the sovereign itself, but by a private corporation vested by it with the power of eminent domain.

But in all such cases the compensation payable should be the value of the property at the time of taking, allowing for any influence that these contingencies might exert, which would depend upon their probability.

No previous decision of this Court supports or authorizes disregard of a presently existing state right of eminent domain in a federal taking of property. In *McGovern* v. *New York,* 229 U. S. 363, and *New York* v. *Sage,* 239 U. S. 57, the condemnation was by an agency of the State and the condemnees did not have and showed no probability of obtaining such power from the State.

Even less relevant to the question now before us is *Sears* v. *Akron,* 246 U. S. 242. It was not a condemnation case at all but a suit in equity to enjoin the City from construction of a dam and reservoir and diversion of river water. The City did not propose to take any property of the company through which plaintiff as a mortgage creditor derived any rights he asserted. In fact the company did not own any property included in the project, although shortly before commencement of the suit, but after the City's development was practically completed, it acquired two small parcels some distance below the City's dam. But the company's charter gave it a right of eminent domain and, although it had taken no step to do so, it claimed the right to expropriate the same property the City was taking. It sought to enjoin the City upon the ground that its unexercised right to take this property was an indefeasible property right which was being defeated and rendered valueless because the City was ahead of it in preëmpting properties which the company might want to acquire under its power. The State of Ohio had retained power to "revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken." *Id.* at 250. The State of course had revoked the power to the extent that it had authorized the City, its own instrumentality, to take the property. But Jus-

tice Brandeis pointed out that "Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development." *Ibid.* The decision is now relied upon to establish the point it expressly reserved. Moreover, the Ohio company had tried to use its power of condemnation, and Ohio courts had held its charter did not authorize it to take lands essential to its project. *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300. In the case now before us the North Carolina courts had held the power given by that State to this company was complete and prior to every other at the very location involved here.[5]

These cases do not decide what would have been respondent's rights if North Carolina, rather than the United States, had instituted the present condemnation proceedings, thereby expressing her unwillingness to have the respondent carry the project through to completion. They are wholly inapposite to the question we are called upon to decide, which is whether North Carolina's expressed and undoubted willingness that the respondent should do so, and to that end should exercise her sovereign power of eminent domain, may be considered along with all other facts bearing upon the question of the prospects of completion.

The Government and the Court have taken a contrary position to the one now announced when the shoe was on the other foot. In *United States* v. *River Rouge Co.*, 269 U. S. 411, the Government sought to deduct from the value of property condemned the benefits conferred by the improvement upon the severed property. The owner denied that these benefits should be considered because his enjoyment of them would be terminable by the Gov-

[5] See footnote 3, *supra.*

ernment at any time. The Court sustained credit for the benefits, pointing out that "there was nothing in the evidence indicating any probability that the Government would at any time abrogate or curtail this right in any respect." *Id.* at 420.

We think the same rule should apply against as for the Government, and that the property in question was entitled to the benefits at the time being extended by State authority in the absence of evidence of probability that they would be abrogated or curtailed. We do not think that because the power of eminent domain may have been revocable by the State it follows as matter of law that it must be treated as nonexistent, and we dissent from a reversal based on such grounds.

GREAT LAKES DREDGE & DOCK CO. ET AL. *v.* HUFFMAN, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 849. Argued May 5, 6, 1943.—Decided May 24, 1943.

1. In the light of its opinion, findings, and conclusions of law, the District Court's dismissal of the suit rests wholly upon its declaration that as applied to the plaintiffs the state statute is constitutional; and its judgment is, in effect, a declaratory judgment. P. 295.
2. Where federal courts in the exercise of their jurisdiction to render declaratory judgments are called on to adjudicate what are essentially equitable causes of action, they are free upon equitable grounds to grant or withhold the relief prayed; and considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. P. 300.
3. It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the States, and

when asked to enjoin an unconstitutional state tax it is their duty to withhold relief when state law with the right of appeal to this Court affords adequate protection. P. 300.

4. In a suit in the federal district court against a state officer charged with the administration and enforcement of the Louisiana Unemployment Compensation Law, brought by plaintiffs engaged in navigation and operation of vessels used in improving navigable waters of the State, and praying a declaratory judgment that the state law as applied to them and their employees is unconstitutional, it was the duty of the court to withhold such relief, it appearing that under the state law a taxpayer who pays a challenged tax to the appropriate state officer may maintain a suit for reimbursement. P. 300.
5. The Acts of August 21, 1937 and August 30, 1935 do not require a result different from that here reached. P. 301.

134 F. 2d 213, affirmed.

CERTIORARI, 318 U. S. 754, to review the affirmance of a judgment, 43 F. Supp. 981, dismissing a suit for a declaratory judgment.

Mr. R. Emmett Kerrigan, with whom *Mr. James J. Morrison* was on the brief, for petitioners.

Mr. W. C. Perrault, Assistant Attorney General of Louisiana, with whom *Mr. Eugene Stanley,* Attorney General, was on the brief, for respondent.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Petitioners brought this suit in the district court against respondent, a state officer charged with the administration and enforcement of the Louisiana Unemployment Compensation Law (Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the First Extraordinary Session of 1940, and Acts 10 and 11 of 1940). The complaint alleges that petitioners have numerous classes of employees engaged in the navigation and operation of dredges and pile drivers and in the operation of quarter boats, tugs, launches,

barges and other vessels, all used in deepening, dredging, extending and otherwise improving channels underlying the navigable waters of the state; and that the tax or contribution to the state unemployment insurance fund which the state law would exact from each of petitioners exceeded, when the suit was brought, the sum of $3,000. The relief prayed is a declaratory judgment that the state law as applied to petitioners and their employees is unconstitutional and void.

After a trial the district court held the statute applicable to petitioners and their employees and, as applied to them, a valid exercise of state power. 43 F. Supp. 981. The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law. *Metropolitan Co.* v. *Kaw Valley District,* 223 U. S. 519, 523; *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 135; *Clark* v. *Williard,* 292 U. S. 112, 118; *American Propeller Co.* v. *United States,* 300 U. S. 475, 479–80. So interpreted it rests wholly on the court's declaration that the statute applied to petitioners is constitutional; it is thus in effect a declaratory judgment.

The Court of Appeals for the Fifth Circuit affirmed, 134 F. 2d 213, holding that the statute, in exacting from employers contributions to the state unemployment compensation fund, is a valid exercise of the state taxing power (see *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495); that the application of the Act to petitioners would not interfere with any characteristic feature of the general maritime law in its interstate and international aspects so as to fall under the ban of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 and cases following it; and that the Federal Social Security Act, 26 U. S. C. § 1607 (c) (4), by exempting from its operation officers and crews of vessels, has not "preempted the

field" or otherwise precluded the state from applying its law with respect to the employees in question.

Because of the public importance of the questions decided, we granted certiorari, 318 U. S. 754, and set the case for argument with *Standard Dredging Corp.* v. *Murphy* and *International Elevating Co.* v. *Murphy, post,* p. 306. In our order granting the writ, we requested counsel "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

The state act, as the court below held, exacts of employers payments into the state unemployment insurance fund, in the nature of an excise tax upon the exercise of the right or privilege of employing individuals and measured by a percentage of the wages paid. See *Carmichael* v. *Southern Coal & Coke Co., supra.* Petitioners have challenged the state's right to collect the tax, and have interposed, as a barrier to the collection, the present suit in the federal court for a declaratory judgment. The district court, as we have indicated, has in substance given a declaratory judgment, which the Circuit Court of Appeals has sustained. Save for that purpose those courts had no occasion to entertain the suit, or pronounce any judgment in it. Neither court, nor any of the parties, has questioned the sufficiency of the pleadings to present a case for a declaratory judgment. Without raising that issue here we pass at once to the question, submitted to counsel, whether the declaratory judgment procedure may be appropriately resorted to in the circumstances of this case.

In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain

the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision. By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto" shall pay the tax to the appropriate state officer and file suit for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded.

This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. *Matthews* v. *Rodgers,* 284 U. S. 521. This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. *Stratton* v. *St. Louis S. W. Ry. Co.,* 284 U. S. 530, 533–34; *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 69. On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (*United States* v. *Dern,* 289 U. S. 352, 359–360; *Virginian*

Ry. Co. v. *Federation,* 300 U. S. 515, 549–53), should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See *Pennsylvania* v. *Williams,* 294 U. S. 176, 185, and cases cited.

It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved." *Matthews* v. *Rodgers, supra,* 525–26.

Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially when the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

Congress recognized and gave sanction to this practice of federal equity courts by the Act of August 21, 1937, 50

Stat. 738, enacted as an amendment to § 24 of the Judicial Code, 28 U. S. C. § 41 (1). This provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state." The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies, both at law and in equity, which the Judiciary Acts had already conferred. *Aetna Life Ins. Co.* v. *Haworth,* 300

U. S. 227. Thus the Federal Declaratory Judgments Act (Act of June 14, 1934, 48 Stat. 955, as amended, 28 U. S. C. § 400) provides in § 1 that a declaration of rights may be awarded although no further relief be asked, and in § 2 that "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."

The jurisdiction of the district court in the present suit, praying an adjudication of rights in anticipation of their threatened infringement, is analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 263. Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles. The Senate committee report on the bill pointed out that this Court could, in the exercise of its equity power, make rules governing the declaratory judgment procedure. S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6. And the House report declared that "large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure." H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2; and see *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, 494; Borchard, Declaratory Judgments (2d ed.) p. 312.

The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief

when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

The Act of August 21, 1937, was predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid. See S. Rep. No. 1035, 75th Cong., 1st Sess.; H. R. Rep. No. 1503, 75th Cong., 1st Sess. Even though the statutory command be deemed restricted to prohibition of injunctions restraining collection of state taxes, its enactment is hardly an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion.

For like reasons, we think it plain also that the enactment of the Act of August 30, 1935, 49 Stat. 1027, 28 U. S. C. § 400 (1), which excluded from the operation of the Declaratory Judgments Act all cases involving federal taxes, cannot be taken to deprive the courts of their discretionary authority to withhold declaratory relief in other appropriate cases. This amendment was passed merely for the purpose of "making it clear" that the Declaratory Judgments Act would not permit "a radical departure from the long-continued policy of Congress" to require prompt payment of federal taxes. See S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11; H. R. Rep. No. 1885, 74th Cong., 1st Sess., p. 13.

The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declar-

atory judgment should have been denied without consideration of the merits.

Affirmed.

UNITED STATES ET AL. *v.* JOHNSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

No. 840. Argued May 11, 12, 1943.—Decided May 24, 1943.

Upon the facts of this case, the District Court should have granted the Government's motion to dismiss the suit as collusive. P. 305.

48 F. Supp. 833, vacated.

APPEAL from the dismissal of a complaint in a suit in which the United States had intervened and in which the District Court held unconstitutional the Emergency Price Control Act of 1942.

Mr. Paul A. Freund, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Kenneth L. Kimble, Robert L. Wright, Richard S. Salant,* and *Thomas I. Emerson* were on the brief, for the United States.

Mr. Vernon M. Welsh, with whom *Mr. Weymouth Kirkland* was on the brief, for appellee.

PER CURIAM.

One Roach, a tenant of residential property belonging to appellee, brought this suit in the district court alleging that the property was within a "defense rental area" established by the Price Administrator pursuant to §§ 2 (b) and 302 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23; that the Administrator had promulgated Maximum Rent Regulation No. 8 for the area; and that the rent paid by Roach and collected by appellee was in

excess of the maximum fixed by the regulation. The complaint demanded judgment for treble damages and reasonable attorney's fees, as prescribed by § 205 (e) of the Act. The United States, intervening pursuant to 28 U. S. C. § 401, filed a brief in support of the constitutionality of the Act, which appellee had challenged by motion to dismiss. The district court dismissed the complaint on the ground—as appears from its opinion (48 F. Supp. 833) and judgment—that the Act and the promulgation of the regulation under it were unconstitutional because Congress by the Act had unconstitutionally delegated legislative power to the Administrator.

Before entry of the order dismissing the complaint, the Government moved to reopen the case on the ground that it was collusive and did not involve a real case or controversy. This motion was denied. The Government brings the case here on appeal under § 2 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 349a, and assigns as error both the ruling of the district court on the constitutionality of the Act, and its refusal to reopen and dismiss the case as collusive.

The appeal of the plaintiff Roach to this Court was also allowed by the district court and is now pending. But this appeal has not been docketed here because of his neglect to comply with the Rules of this Court. As the record is now before us on the Government's appeal, we have directed that the two appeals be consolidated and heard as one case. We accordingly find it unnecessary to consider the question which we requested counsel to discuss, "whether any case or controversy exists reviewable in this Court, in the absence of an appeal by the party plaintiff in the district court."

The affidavit of the plaintiff, submitted by the Government on its motion to dismiss the suit as collusive, shows without contradiction that he brought the present pro-

ceeding in a fictitious name; that it was instituted as a "friendly suit" at appellee's request; that the plaintiff did not employ, pay, or even meet, the attorney who appeared of record in his behalf; that he had no knowledge who paid the $15 filing fee in the district court, but was assured by appellee that as plaintiff he would incur no expense in bringing the suit; that he did not read the complaint which was filed in his name as plaintiff; that in his conferences with the appellee and appellee's attorney of record, nothing was said concerning treble damages and he had no knowledge of the amount of the judgment prayed until he read of it in a local newspaper.

Appellee's counter-affidavit did not deny these allegations. It admitted that appellee's attorney had undertaken to procure an attorney to represent the plaintiff and had assured the plaintiff that his presence in court during the trial of the cause would not be necessary. It appears from the district court's opinion that no brief was filed on the plaintiff's behalf in that court.

The Government does not contend that, as a result of this coöperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action. Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both. *Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S. Appendix, ciii.

Here an important public interest is at stake—the validity of an Act of Congress having far-reaching effects

on the public welfare in one of the most critical periods in the history of the country. That interest has been adjudicated in a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne. He has been only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen. Such a suit is collusive because it is not in any real sense adversary. It does not assume the "honest and actual antagonistic assertion of rights" to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345; and see *Lord* v. *Veazie,* 8 How. 251; *Cleveland* v. *Chamberlain,* 1 Black 419; *Bartemeyer* v. *Iowa,* 18 Wall. 129, 134–35; *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15. Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them. The district court should have granted the Government's motion to dismiss the suit as collusive. We accordingly vacate the judgment below with instructions to the district court to dismiss the cause on that ground alone. Under the statute, 28 U. S. C. § 401, the Government is liable for costs which may be taxed as in a suit between private litigants; costs in this Court will be taxed against appellee.

So ordered.

STANDARD DREDGING CORPORATION *v.* MURPHY, ACTING INDUSTRIAL COMMISSIONER, ET AL.*

APPEAL FROM THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

No. 722. Argued May 5, 1943.—Decided May 24, 1943.

1. A state unemployment insurance tax, laid on employers in respect of maritime employees whose work is aboard vessels on navigable waters within the State, is not forbidden by Art. 3, § 2, of the Constitution, which gives the federal courts exclusive admiralty jurisdiction. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, distinguished. Pp. 307, 310.
2. Such a tax is not objectionable as inconsistent with the power of Congress where Congress has not exercised its power in the same field. P. 309.
3. The provision of the Federal Social Security Act exempting from the federal tax thereby imposed the employers of persons employed as officers or members of the crews of vessels on navigable waters of the United States does not operate to exempt such employers from state unemployment insurance taxes. P. 310.

289 N. Y. 119, 44 N. E. 2d 391, affirmed.

APPEALS from judgments of the Court of Appeals of New York (entered in the Supreme Court, Appellate Division, on remittitur) reversing judgments of the Appellate Division, 263 App. Div. 773, 31 N. Y. S. 2d 183; 262 App. Div. 654, 30 N. Y. S. 2d 721, and affirming orders of the State Unemployment Board.

Mr. Cletus Keating, with whom *Messrs. H. Maurice Fridlund* and *Charles S. Cunningham* were on the brief, for appellant in No. 722; and *Mr. Robert B. Lisle*, with whom *Messrs. Arthur E. Goddard* and *Jules Haberman* were on the brief, for appellant in No. 723.

*Together with No. 723, *International Elevating Co.* v. *Murphy, Acting Industrial Commissioner, et al.*, also on appeal from the Supreme Court of New York, Appellate Division, Third Department.

Mr. Orrin G. Judd, Solicitor General of New York, with whom *Messrs. Nathaniel L. Goldstein,* Attorney General, *William Gerard Ryan,* and *Francis R. Curran,* Assistant Attorneys General, were on the brief, for appellees.

Briefs of *amici curiae* were filed by *Mr. Matthew S. Gibson* on behalf of the Gulf Oil Corporation, urging reversal; and by *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Robert L. Stern,* and *Jack B. Tate* on behalf of the United States, urging affirmance.

Mr. Justice Black delivered the opinion of the Court.

The issue in these cases is whether the New York Unemployment Insurance tax may be collected from employers of certain employees engaged in maritime employment on the wages of those employees. The New York Act levies a payroll tax on all employers of four or more persons, with exceptions not here material, and the sum thus collected is paid into a general fund for the benefit of all unemployed persons covered.[1] The employee in 722 is an assistant cook on a dredge, and the employee in 723 is a grain worker on a floating elevator. The vessels on which both employees served were engaged primarily on work in the waters of the state of New York during the tax period. The appellants challenge the validity of the statute as applied on two grounds: (1) imposition of the tax on maritime employees violates Article 3, § 2 of the Constitution, which gives federal courts exclusive admiralty jurisdiction; (2) Congress has declared either expressly or by implication that no such tax shall be imposed on maritime employers. No other questions of jurisdiction to tax are before us. The New York Court of Appeals

[1] For a description of the New York act, see *Chamberlain, Inc.* v. *Andrews,* 271 N. Y. 1, 2 N. E. 2d 22; 299 U. S. 515.

overruled both these contentions [2] and the cases are here on appeal under § 237 (a) of the Judicial Code.

In approaching this problem, we may put aside two questions at the beginning. It is contended that these two employees are not "members of a crew" and hence are outside the scope both of admiralty jurisdiction and of the relevant statutes.[3] In the view we take, it is immaterial whether or not the employees are crew members. We also need not consider whether these taxes affect interstate or foreign commerce, since Congress has expressly provided that a state shall not be prohibited from levying the tax because the employer is engaged in interstate or foreign commerce, 26 U. S. C. 1600; *Perkins* v. *Pennsylvania,* 314 U. S. 586. The added contention that a vessel's federal license may bar state taxation is only another form of the argument that the tax burdens interstate commerce,[4] and need not be considered separately.

That the state is vested with power to impose taxes in general upon employers to alleviate unemployment, and that the authority of the state is in no wise impaired by reason of blending the imposition of a tax with the relief of unemployment has already been decided by this Court. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495; *Steward*

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[2] 289 N. Y. 119, 44 N. E. 2d 391.

[3] The employees here, because of the nature of their work, are arguably not within the scope of that portion of admiralty jurisdiction which has been said to be necessarily exclusive. Cf. *Davis* v. *Department of Labor,* 317 U. S. 249. On the other hand, certain decisions of the Bureau of Internal Revenue might provide the basis for contention that these employees are "members of a crew" within the meaning of the federal act. As to whether a dredge is a vessel, see S. S. T. 78, C. B. 1937–1, 408; as to whether a floating grain elevator is a vessel and whether a grain processor is a member of a crew, see S. S. T. 204, C. B. 1937–2, 427; S. S. T. 210, C. B. 1937–2, 429.

[4] Counsel refers us to *Gibbons* v. *Ogden,* 9 Wheat. 1; *Hall* v. *DeCuir,* 95 U. S. 485; *Moran* v. *New Orleans,* 112 U. S. 69; *Helson* v. *Kentucky,* 279 U. S. 245; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167.

Machine Co. v. *Davis,* 301 U. S. 548. In a series of cases, however, beginning with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, this Court called attention to the necessity of uniformity in certain aspects of maritime law, and invalidated several state workmen's compensation acts as applied on the ground that their enforcement would interfere with that essential uniformity. We are now asked to apply the *Jensen* doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity. The effect on admiralty of an unemployment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the *Jensen* doctrine into this new area. Indeed, the *Jensen* case has already been severely limited,[5] and has no vitality beyond that which may continue as to state workmen's compensation laws. Cf. *Parker* v. *Motor Boat Sales,* 314 U. S. 244.

Granting that the federal government might choose to operate its own uniform unemployment insurance system for maritime workers if it chose,[6] "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just* v. *Chambers,* 312 U. S. 383, 392. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure. But in dealing with unemployment in-

[5] *Just* v. *Chambers,* 312 U. S. 383; *Davis* v. *Department of Labor, supra,* and, for an account of the development of the Jensen doctrine, 252, 253.

[6] Cf. 46 U. S. C. § 688 (the Jones Act, dealing with recovery for injuries by seamen); 33 U. S. C. §§ 901–950 (the Longshoremen's and Harborworkers' Act dealing with recovery for injuries by longshoremen and harborworkers).

surance "exclusive federal jurisdiction" is not affected at all. Congress retains the power to act in the field, and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of state taxation. Taxes on vessels and other business activities of operators have previously been upheld.[7] We hold that nothing in Article 3, § 2 of the Constitution places this tax beyond the authority of the State.

The second contention is that the federal Act precludes coverage of these employers by the state. Title 9 of the Federal Social Security Act (26 U. S. C. §§ 1600–11) taxes employers of eight or more employees but provides for a 90% credit against this federal tax for payments made into a state unemployment fund approved by the federal government. 26 U. S. C. §1607 exempts from this federal tax certain types of employers of persons including those employed "as an officer or member of the crew of a vessel on the navigable waters of the United States." We do not believe that the exemption of these employers from the federal Act can operate to exempt them from state unemployment insurance taxes. The federal Act, from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the field of unemployment insurance, *Buckstaff Bath House Co.* v. *McKinley,* 308 U. S. 358, 363, but the absence of an invitation as to employers of maritime workers is not to be construed as a barrier to state action. These employers appear to have been exempted from the federal Act because of certain administrative difficulties involved in their coverage, and because of some doubt that states could, under the *Jensen* line of cases, constitutionally enter this field;[8] but we are

[7] *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63; *Old Dominion Steamship Co.* v. *Virginia,* 198 U. S. 299.

[8] The provision exempting officers and members of crews from the federal unemployment insurance tax are similar to those in Titles II and VIII of the Social Security Act, dealing with the old age retirement

pointed to nothing in the legislative history of the Act which indicates that Congress meant to forbid a state from risking the possible constitutional barriers to state coverage, and undertaking the difficult administrative task. The legislative history of other exemptions may indicate that they were intended to oust the states of jurisdiction—on this question we need express no opinion now; but current administrative practice under the Act indicates that there is nothing in the mere existence of a federal exemption which necessarily required that states not undertake to expand the social security program in this field. The federal Act covers only employers of eight or more persons; approximately one-half the states cover employers with fewer employees. Several states cover casual laborers and domestic servants, both groups exempted by the section of the federal Act which includes the exemption of maritime workers.

Employers of martime workers, otherwise subject to state unemployment insurance taxing acts, are not excluded from the coverage of such acts either by Article 3, § 2 of the Constitution, or by Congressional enactments.

Affirmed.

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pensions. Cf. 53 Stat. 1384, repealing the exemption as to certain maritime workers for old age retirement purposes. The report of the Ways and Means Committee of the House of Representatives on the original Act indicates that the exception was based on the anticipation of administrative difficulties. House Report 615, 74th Cong., 1st Sess., 33. There was also some fear of possible constitutional objection to state coverage of maritime employees. See statements of Rep. Vinson and Rep. McCormack, 79 Cong. Rec. 5903.

ADAMS ET AL. *v.* UNITED STATES ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 889. Argued May 10, 1943.—Decided May 24, 1943.

1. Under the Act of October 9, 1940, the Government of the United States acquired no jurisdiction to prosecute and punish for rape committed on land acquired by the United States within a State after the date of the Act, where jurisdiction "exclusive or partial" over the area has not been accepted by the United States in the manner which the Act prescribes. P. 313.
2. The term "partial jurisdiction" as used in the Act includes concurrent jurisdiction. P. 314.

RESPONSE to questions submitted by the Circuit Court of Appeals with respect to an appeal from a sentence imposed by the District Court in a prosecution for rape at a military camp.

Mr. Thurgood Marshall, with whom *Mr. W. Robert Ming, Jr.,* was on the brief, for Richard P. Adams et al.

Mr. Robert L. Stern, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* were on the brief, for the United States et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Circuit Court of Appeals for the Fifth Circuit has certified to us two questions of law pursuant to § 239 of the Judicial Code. The certificate shows that the three defendants were soldiers and were convicted under 18 U. S. C. §§ 451, 457, in the federal District Court for the Western District of Louisiana, for the rape of a civilian woman. The alleged offense occurred within the confines of Camp Claiborne, Louisiana, a government military camp, on land to which the government had acquired title at the time of the crime. The ultimate question is

whether the camp was, at the time of the crime, within the federal criminal jurisdiction.

The Act of October 9, 1940, 40 U. S. C. § 255, passed prior to the acquisition of the land on which Camp Claiborne is located, provides that United States agencies and authorities may accept exclusive or partial jurisdiction over lands acquired by the United States by filing a notice with the Governor of the state in which the land is located or by taking other similar appropriate action. The Act provides further: "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." The government had not given notice of acceptance of jurisdiction at the time of the alleged offense.[1]

The questions certified are as follows:

"1. Is the effect of the Act of Oct. 9, 1940, above quoted, to provide that, as to lands within a State thereafter acquired by the United States, no jurisdiction exists in the United States to enforce the criminal laws embraced in United States Code Title 18, Chapter 11, and especially Section 457 relating to rape, by virtue of Section 451, Third, as amended June 11, 1940, unless and until a consent to accept jurisdiction over such lands is filed in behalf of the United States as provided in said Act?

"2. Had the District Court of the Western District of Louisiana jurisdiction, on the facts above set out, to try and sentence the appellants for the offense of rape committed within the bounds of Camp Claiborne on May 10, 1942?"

Since the government had not given the notice required by the 1940 Act, it clearly did not have either "exclusive or partial" jurisdiction over the camp area. The only pos-

[1] Exclusive jurisdiction over the lands on which the Camp is located was accepted for the federal government by the Secretary of War in a letter to the Governor of Louisiana, effective January 15, 1943.

sible reason suggested as to why the 1940 Act is inapplicable is that it does not require the government to give notice of acceptance of "concurrent jurisdiction." This suggestion rests on the assumption that the term "partial jurisdiction" as used in the Act does not include "concurrent jurisdiction."

The legislation followed our decisions in *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Mason Co.* v. *Tax Commission*, 302 U. S. 186; and *Collins* v. *Yosemite Park Co.*, 304 U. S. 518. These cases arose from controversies concerning the relation of federal and state powers over government property and had pointed the way to practical adjustments. The bill resulted from a coöperative study by government officials, and was aimed at giving broad discretion to the various agencies in order that they might obtain only the necessary jurisdiction.[2] The Act created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained "no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction." [3]

Both the Judge Advocate General of the Army [4] and the Solicitor of the Department of Agriculture [5] have construed the 1940 Act as requiring that notice of acceptance be filed if the government is to obtain concurrent jurisdiction. The Department of Justice has abandoned the view of jurisdiction which prompted the institution of this pro-

[2] In the words of a sponsor of the bill, the object of the act was flexibility, so "that the head of the acquiring agency or department of the Government could at any time designate what type of jurisdiction is necessary; that is, either exclusive or partial. In other words, it definitely contemplates leaving the question of extent of jurisdiction necessary to the head of the land-acquiring agency." Hearings, House Committee on Buildings and Grounds, H. R. 7293, 76th Cong., 1st Sess., p. 5.

[3] *Ibid.*, 7.

[4] Ops. J. A. G. 680.2.

[5] Opinion No. 4311, Solicitor, Department of Agriculture.

ceeding, and now advises us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the Act. These agencies coöperated in developing the Act, and their views are entitled to great weight in its interpretation. Cf. *Bowen* v. *Johnston*, 306 U. S. 19, 29–30. Besides, we can think of no other rational meaning for the phrase "jurisdiction, exclusive or partial" than that which the administrative construction gives it.

Since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorized the government to take jurisdiction, since at the critical time the jurisdiction had not been taken.[6]

Our answer to certified question No. 1 is Yes and to question No. 2 is No.

It is so ordered.

BURFORD ET AL. *v.* SUN OIL CO. ET AL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 495. Argued February 8, 9, 1943. Reargued April 14, 15, 1943.—Decided May 24, 1943.

1. Jurisdiction by appeal from a state administrative body can not be conferred on the federal District Court by a state statute. P. 317.
2. A federal court having jurisdiction, whether by diversity of citizenship or by federal question, of a suit to enjoin enforcement of an

[6] Dart's Louisiana Stat. (Supp.) 2898. In view of the general applicability of the 1940 Act, it is unnecessary to consider the effect of the Weeks Forestry Act, 16 U. S. C. 480, and the Louisiana statute dealing with jurisdiction in national forests, Dart's Louisiana Stat. 3329, even though the land involved here was originally acquired for forestry purposes.

*Together with No. 496, *Sun Oil Co. et al.* v. *Burford et al.*, also on writ of certiorari, 317 U. S. 623, to the Circuit Court of Appeals for the Fifth Circuit.

administrative order of a state commission, may, in its sound discretion, refuse such relief if to grant it would be prejudicial to the public interest. P. 317.

3. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the independence of state governments in carrying out their policies. P. 318.
4. In the exercise of a sound discretion, this suit to enjoin the execution of an order of the State Railroad Commission of Texas, permitting the drilling of wells in the East Texas Oil Field separated by distances less than the minimum prescribed for the field in general, should have been dismissed. Pp. 318–332.

130 F. 2d 10, reversed; District Court affirmed.

CERTIORARI, 317 U. S. 621, to review a judgment reversing a judgment of the District Court which dismissed the complaint of the Sun Oil Company in a suit against the Railroad Commission of Texas et al., to enjoin the execution of an order of the Commission permitting the drilling and operation of certain oil wells in the East Texas Oil Field, and also dismissing the complaint of the Magnolia Petroleum Company, Intervener. The judgment of the District Court had at first been affirmed, 124 F. 2d 467.

Messrs. James P. Hart and *Ed Roy Simmons,* Assistant Attorney General of Texas, with whom *Mr. Gerald C. Mann,* Attorney General, was on the brief, for petitioners in No. 495 and respondents in No. 496.

Mr. J. A. Rauhut argued the cause on the original argument for the Sun Oil Co. and on the reargument for the Sun Oil Co. et al.; *Mr. J. B. Robertson* argued the cause on the original argument for the Magnolia Petroleum Co., and was on the briefs with *Mr. Rauhut* for respondents in No. 495 and petitioners in No. 496.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this proceeding brought in a federal district court, the Sun Oil Co. attacked the validity of an order of the

Texas Railroad Commission granting the petitioner Burford a permit to drill four wells on a small plot of land in the East Texas oil field.[1] Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an "appeal" from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; [2] but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction,[3] and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order.

Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of di-

[1] The Magnolia Petroleum Co. was permitted to intervene with a similar complaint against the validity of the order. The parties defendant include Burford; Burford's assignee, the X Y Z Oil and Gas Co.; and the Commission. Hereafter the original plaintiffs will be referred to as the Companies and the defendants will be referred to as Burford or as the Commission. The case is here on a petition for certiorari by the Commission and on a cross-petition for certiorari by the Companies.

[2] For a description of the nature of the so-called "appeal," see *Stanolind Oil & Gas Co.* v. *Midas Oil Co.*, 123 S. W. 2d 911, 913; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Texas 59, 73, 131 S. W. 2d 73.

[3] See the discussion in the opinion below, 130 F. 2d 10, 17; cf. *Tennessee Coal Co.* v. *George*, 233 U. S. 354, 359, 360 and *Texas Pipe Line* v. *Ware*, 15 F. 2d 171. A statute similar to that involved in the instant case, which permits suit in any competent court of Travis County, Texas, has been construed to be an expression by the State of willingness to allow these proceedings to be brought in a federal court, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 392. Since federal equity jurisdiction depends on federal statutes, the Texas statutory provision has little meaning as applied to such cases.

versity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest";[4] for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."[5] While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

The order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579. The East Texas field, in which the Burford tract is located, is one of the largest in the United States. It is approximately forty miles long and between five and nine miles wide, and over 26,000 wells have been drilled in it.[6] Oil exists in the pores and crevices of rocks and sand and moves through these channels. A large area of this sort is called a pool or reservoir and the East

[4] *United States* v. *Dern*, 289 U. S. 352, 360.

[5] *Pennsylvania* v. *Williams*, 294 U. S. 176, 185. "Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. . . . There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence." *Hawks* v. *Hamill*, 288 U. S. 52, 61.

[6] For a description of the East Texas field see *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 574; Tucker, Today's East Texas Problems Analyzed in Survey of Field, Oil and Gas Journal, April 1, 1937, p. 10; Weber, East Texas As It Is Today, Oil and Gas Journal, April 27, 1939, p. 12. The latter article includes a map of the area showing various developments in the field. For a simple outline map, see 1941 Annual Report, Oil & Gas Division, Texas Railroad Commission, p. 34.

Texas field is a giant pool. The chief forces causing oil to move are gas and water, and it is essential that the pressures be maintained at a level which will force the oil through wells to the surface. As the gas pressure is dissipated, it becomes necessary to put the well "on the pump" at great expense;[7] and the sooner the gas from a field is exhausted, the more oil is irretrievably lost. Since the oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir. The practice of attempting to drain oil from under the surface holdings of others leads to offset wells and other wasteful practices; and this problem is increased by the fact that the surface rights are split up into many small tracts.[8] There are approximately nine hundred operators in the East Texas field alone.

For these and many other reasons based on geologic realities, each oil and gas field must be regulated as a unit for conservation purposes. Compare *Railroad Commission* v. *Rowan & Nichols Co.*, 311 U. S. 570, 574. The federal government, for the present at least, has chosen to leave the principal regulatory responsibility with the States, but does supplement state control.[9] While there is no question of the constitutional power of the State to take appropriate action to protect the industry and pro-

[7] Geological factors making for the necessity of pumping are described in Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1220. The relation of natural gas to oil production is described in Miller, Function of Natural Gas in the Production of Oil.

[8] Wells in the East Texas field considered unnecessary from the engineering standpoint are said to have cost $160,000,000. For a discussion of this superfluous well problem, see Ely, The Conservation of Oil, *supra*, 1232. In 1941 there were 910 operators in the East Texas field. 1941 Railroad Commission Report, *supra*, 208.

[9] 15 U. S. C. § 715, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; note 12, *infra*.

tect the public interest, *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, the state's attempts to control the flow of oil and at the same time protect the interest of the many operators have from time to time been entangled in geological-legal problems of novel nature.

Texas' interests in this matter are more than that very large one of conserving gas and oil, two of our most important natural resources. It must also weigh the impact of the industry on the whole economy of the State and must consider its revenue, much of which is drawn from taxes on the industry and from mineral lands preserved for the benefit of its educational and eleemosynary institutions.[10] To prevent "past, present, and imminent evils" in the production of natural gas, a statute was enacted "for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production." The primary task of attempting adjustment of these diverse interests is delegated to the Railroad Commission, which Texas has vested with "broad discretion" in administering the law.[11]

The Commission, in coöperation with other oil producing States, has accepted state oil production quotas and has undertaken to translate the amount to be produced for the State as a whole into a specific amount for each field and for each well.[12] These judgments are made with due re-

[10] The problem of gaining an adequate revenue from the petroleum industry was particularly serious in Texas during the period 1930–35. The question was discussed by Governor Sterling in messages to the legislature in 1931, 1932, and 1933, and by Governor Allred in 1935. See The Texas Senate Journal, Jan. 13–May 23, 1931, p. 526; *ibid.*, July–August, 1931, p. 594; *ibid.*, September–October, 1931, p. 164; *ibid.*, August–September, 1932, p. 60; *ibid.*, Reg. Sess., 1933, pp. 20, 24; *ibid.*, Reg. Sess., 1935, pp. 587, 589–90.

[11] Vernon's Texas Stat. (1936), Art. 6008, §§ 1, 22.

[12] For description of the methods of regulation of the oil industry, see Marshall and Meyers, Legal Planning of Petroleum Production,

gard for the factors of full utilization of the oil supply, market demand, and protection of the individual operators, as well as protection of the public interest. As an essential aspect of the control program, the State also regulates the spacing of wells. The legislature has disavowed a purpose of requiring that "the separately owned properties in any pool [should] be unitized under one management, control or ownership" [13] and the Commission

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41 Yale L. Jour. 33; Marshall and Meyers, Legal Planning of Petroleum Production: Two Years of Proration, 42 Yale L. Jour. 702; Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209; Hardwicke, Legal History of Conservation of Oil in Texas, in The American Bar Association's publication, Legal History of Conservation of Oil and Gas, 214; Walker, The Problem of the Small Tract Under Spacing Regulations, 17 Tex. L. Rev. (Appendix) 157; Summers, Oil Production Regulation—Due Process, 19 Texas L. Rev. 1; Davis, Judicial Emasculation of Administrative Action, 19 Tex. L. Rev. 29. The Interstate Oil Compact Commission is described in its own publication, The Interstate Compact to Conserve Oil and Gas (1942), published over the signature of Governor Phillips of Oklahoma. Federal wartime regulations concerning the drilling of wells have been issued by the Petroleum Administration for War. See Conservation Order M–68 as amended, 8 Fed. Reg. 3955, discussed in 10 George Washington L. Rev. 926.

The Commission has described its own regulatory program as follows:

"The Railroad Commission of Texas carries out its functions of production control or proration by an elaborate system of orders, schedules, and reports. In order to keep the production of oil for the State during any period within the limits of a predetermined figure, the Commission sets by order the maximum allowable production for the State. This total allowable is then distributed among the various fields, and the allowable for each field in turn is allocated among the component properties so that the Commission, under this process, fixes the daily allowable for each well during the effective period of each allowable order. After these calculations have been made, a schedule of these allowables is prepared, printed, and mailed to each operator so that he may know how much oil may be produced from each of his leases during the month." 1939 Annual Report of the Oil and Gas Division, Texas Railroad Commission, p. 9.

[13] Vernon's Texas Stat. (1936), Art. 6014–g.

must thus work out the difficult spacing problem with due regard for whatever rights Texas recognizes in the separate owners to a share of the common reservoir. At the same time it must restrain waste, whether by excessive production or by the unwise dissipation of the gas and other geologic factors that cause the oil to flow.

Since 1919 the Commission has attempted to solve this problem by its Rule 37. The rule provides for certain minimum spacing between wells, but also allows exceptions where necessary "to prevent waste or to prevent the confiscation of property." The prevention of confiscation is based on the premises that, insofar as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be permitted to withdraw the oil under his surface area, and that no one else can fairly be permitted to drain his oil away. Hence the Commission may protect his interest either by adjusting his amount of production upward, or by permitting him to drill additional wells. "By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." [14]

Additional wells may be required to prevent waste as has been noticed, where geologic circumstances require immediate drilling: "The term 'waste,' as used in oil and gas Rule 37, undoubtedly means the ultimate loss of oil. If a substantial amount of oil will be saved by the drilling of a well that otherwise would ultimately be lost, the permit to drill such well may be justified under one of the exceptions provided in Rule 37 to prevent waste." *Gulf Land*

[14] *Brown* v. *Humble Oil Co.*, 126 Tex. 296, 312, 83 S. W. 2d 935, 87 S. W. 2d 1069. This principle is a limitation upon the so-called "Rule of Capture" under which the surface owner is entitled not only to the amount of oil under his land but to all other oil which he can drain from under his neighbor's land to his own. The rule of capture is discussed by Ely, *supra*, note 12, at 1218.

Co. v. *Atlantic Refining Co.*, 134 Tex. 59, 70, 131 S. W. 2d 73.

The delusive simplicity with which these principles of exception to Rule 37 can be stated should not obscure the actual non-legal complexities involved in their application.[15] While the surface holder may, subject to qualifications noted, be entitled under current Texas law to the oil under his land, there can be no absolute certainty as to how much oil actually is present, *Railroad Commission* v. *Rowan & Nichols Co.*, 311 U. S. 570, 576, and since the waste and confiscation problems are as a matter of physical necessity so closely interrelated, decision of one of the questions necessarily involves recognition of the other.[16]

[15] "We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil producing area should be divided into drilling units and what size and shape the units should be. . . . In performing its functions as a fact-finding body, the Corporation Commission is empowered . . . to take evidence upon all these subjects and others found by scientific investigation and research to have a bearing upon securing the greatest possible recovery from the common source of supply, and by application of the principles of physics, chemistry, geology, and mathematics, can determine by certain calculations at what intervals of space wells should be located in order to bring about such recovery and thus prevent waste and also protect the correlative rights of all the owners of interests therein." *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okla. 155, 161, 162, 77 P. 2d 83.

[16] In *Danciger Oil & Refining Co.* v. *Railroad Commission*, 49 S. W. 2d 837, 842, the court describes the geological phenomena which are the basis of the rules of law dealing with leaseholders who, through full utilization of their own tracts, might cause waste for others, and continues: "No particular lease or well can therefore be taken as a unit, but must be considered in its relation to adjacent leases or wells, with a view to conserving the whole, and is subject to regulation accordingly."

The well spacing program and the proration program can not be considered separately; "the two are a part of a single integrated system and must be considered together." Davis, note 12, *supra*, at 55. For

The sheer quantity of exception cases makes their disposition of great public importance. It is estimated that over two-thirds of the wells in the East Texas field exist as exceptions to the rule, and since each exception may provoke a conflict among the interested parties, the volume of litigation arising from the administration of the rule is considerable.[17] The instant case arises from just such an exception. It is not peculiar that the State should be represented here by its Attorney General, for cases like this, involving "confiscation," are not mere isolated disputes between private parties. Aside from the general principles which may evolve from these proceedings, the physical facts are such that an additional permit may affect pressure on a well miles away. The standards applied by the Commission in a given case necessarily affect the entire state conservation system. Of far more importance than any other private interest is the fact that the over-all plan of regulation, as well as each of its case by case manifestations, is of vital interest to the general public which must be assured that the speculative interests of individual tract owners will be put aside when necessary to prevent the irretrievable loss of oil in other parts of the field. The Commission in applying the statutory standards of course considers the Rule 37 cases as a part

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a discussion of the interrelation of spacing and proration, see Ely, *supra*, note 12, at 1229. Because of the economic consequences of granting exceptions under Rule 37, the Commission must be given fair latitude to exercise "sound judgment and discretion." *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 79, 131 S. W. 2d 73. And because of the difficulties of decision, the Commission must be allowed a "reasonable margin for error." *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 75, 161 S. W. 2d 1022.

[17] The Commission dealt with approximately sixty Rule 37 cases, including this one, in one or another court in 1941. Annual Report of the Railroad Commission of Texas, 1941, pp. 15–26. Ely, *supra*, note 12, 1230, estimates that 17,000 wells in the East Texas field are operated under exception permits.

of the entire conservation program with implications to the whole economy of the State.[18]

With full knowledge of the importance of the decisions of the Railroad Commission both to the State and to the oil operators, the Texas legislature has established a system of thorough judicial review by its own state courts. The Commission orders may be appealed to a state district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the State Supreme Court.[19] While the constitutional power of the Commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, *Brown* v. *Humble Oil Co.*, 126 Tex. 296, 307, 83 S. W. 2d 935, 87 S. W. 2d 1069, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of state law posed in these proceedings.

In describing the relation of the Texas court to the Commission, no useful purpose will be served by attempting to label the court's position as legislative, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, or judicial, *Bacon* v. *Rutland R. Co.*, 232

[18] "The Commission is charged generally with the conservation of oil and gas in their production, storage, transportation. . . . The Commission must make rules, regulations, and orders to accomplish conservation of oil and gas. . . . One of the things that the Commission must do to conserve oil and gas is to see that oil and gas fields are drilled in an orderly and scientific manner. In order to accomplish orderly drilling, the Commission has simply promulgated a rule fixing minimum spacing distances at which wells may be drilled without application, notice, or hearing. Anyone desiring to drill a well at a lesser distance must secure a special permit, after notice and hearing." *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 69, 131 S. W. 2d 73.

[19] Vernon's Texas Stat. (1936), Art. 6049c, § 8.

U. S. 134—suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. The Commission is charged with principal responsibility for fact finding and for policy making and the courts expressly disclaim the administrative responsibility, *Gulf Land Co.* v. *Atlantic Refining Co.,* 134 Tex. 59, 131 S. W. 2d 73, but on the other hand, the orders of the Commission are tested for "reasonableness" by trial de novo before the court, *Railroad Commission* v. *Shell Oil Co.,* 139 Tex. 66, 76–80, 161 S. W. 2d 1022, and the court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. *Railroad Commission* v. *Gulf Production Co.,* 134 Tex. 122, 132 S. W. 2d 254. The court has fully as much power as the Commission to determine particular cases, since after trial de novo it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them. Thus, in the *Shell Oil* case, *supra,* at 73, the court took the responsibility of "laying down some standard to guide the Commission in the exercise of its discretion" in Rule 37 cases; and in *Brown* v. *Humble Oil Co., supra,* 312, the court explicitly suggested a revision in Rule 37.

To prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the state district courts of Travis County. The Texas courts have authoritatively declared the purpose of this restriction: "If an order of the commission, lawful on its face, can be collaterally attacked in the various courts and counties of the state on grounds such as those urged in the instant case, interminable confusion would result." *Texas Steel Co.* v. *Fort Worth & D. C. Ry. Co.,* 120 Tex. 597, 604, 40

S. W. 2d 78. To permit various state courts to pass upon the Commission's rules and orders, "would lead to intolerable confusion. If all district courts of this State had jurisdiction of such matters, different courts of equal dignity might reach different and conflicting conclusions as to the same rule. Manifestly, the jurisdictional provision under discussion was incorporated in the act for the express purpose of avoiding such confusion." *Alpha Petroleum Co.* v. *Terrell,* 122 Tex. 257, 273, 59 S. W. 2d 364, 372. Time and experience, say the Texas courts, have shown the wisdom of this rule.[20] Concentration of judicial supervision of Railroad Commission orders permits the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field. At the present time, less than ten per cent of these cases come before the federal district court.[21]

The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts. Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review. The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a state court as to state law. See *MacMillan* v. *Railroad Commission,*

[20] *West Texas Compress Co.* v. *Panhandle & S. F. Ry. Co.,* 15 S. W. 2d 558, 561.

[21] Summary of Litigation, Annual Report of the Oil and Gas Division, Railroad Commission of Texas, 1941, 15 *et seq.*

51 F. 2d 400, 287 U. S. 576, and *Danciger Oil & Refining Co.* v. *Railroad Commission,* 49 S. W. 2d 837; 122 Tex. 243, 56 S. W. 2d 1075. In those cases, the federal court attributed a given meaning to the state statute which went to the heart of the control program. The Court of Civil Appeals disagreed, but before ultimate review could be had either in Texas or here, the legislature amended its statutes so that the cases became moot. Had the Texas Civil Appeals decision come first, it would have been unnecessary to make the changes which were made in an effort to stay within the limit thought by the Governor of Texas to have been set by the tone of the federal court's opinion.[22] The Texas legislature later changed the law back to its original state, as clear an example of waste motion as can be imagined.[23] The federal court has been called upon constantly to determine whether the Railroad Commission has acted within the scope of statutory authority, while the important constitutional issues have, as the federal court has repeatedly said, been fairly well settled from the beginning.[24]

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[22] In his message of August 3, 1931, to the Texas legislature, concerning the *MacMillan* decision, Governor Sterling said: "At the time the opinion was written, the court, knowing that the Legislature was in session, it may reasonably be assumed that if the court had thought the laws were invalid, would have held so as to give this Legislature an opportunity to eliminate and correct any cause for invalidity. The court having failed to do this, we are justified in assuming that our existing conservation laws are valid. . . . It appeals to me, in view of this decision of the United States Court, that it would be unwise to attempt radical changes in our existing laws. Any attempt at their amendment or modification should retain their general structure and ideas, and not inject changes that would invite any new attacks upon them." Texas Senate Journal, July-August, 1931, p. 594.

[23] Hardwicke, *supra,* note 12, 230–239.

[24] In 1936, in an action to restrain the enforcement by the State Commission of an order limiting the production of gas, the federal court said: "This controversy has been long drawn out. In varying

These federal court decisions on state law have created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission. The Governor of Texas, as has been noted above, felt called upon to forge his oil program in the light of the remotest inferences of federal court opinions. In one instance he thought it necessary to declare martial law.[25] Special sessions of the legislature have been occupied with consideration of federal court decisions.[26] Legislation passed under the cir-

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forms, under different statutes, but always to the same purport and effect as to these complainants, order after order has been drawn, enjoined, and drawn again. This is the fifth time this court has written. Texoma Natural Gas Co. *v.* Railroad Commission, 59 F. 2d 750; Texoma Natural Gas Co. *v.* Terrell, 2 F. Supp. 168; Canadian River Gas Co. *v.* Terrell, 4 F. Supp. 222; Texas Panhandle Gas Co. *v.* Thompson, 12 F. Supp. 462." *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F. Supp. 318, 328.

In summarizing litigation prior to 1934, the federal court said: "In not a single one of these cases did we find the statute unreasonable or invalid. In not a single one did we find the orders invalid because, though complying with the statute, they violated the Constitution. In each of the cases in which injunctions issued we made it clear it was because we thought the orders had been entered in the teeth of statutes forbidding the commission's doing what it attempted to do." *Amazon Petroleum Corp.* v. *Railroad Commission,* 5 F. Supp. 633, 635.

For a survey of litigious history of the East Texas field, see Hardwicke and Davis, note 12, *supra.*

[25] For a discussion of the martial law interlude, see *Sterling* v. *Constantin,* 287 U. S. 378; Hardwicke, *supra,* note 12, 233–236.

[26] The special session of July and August, 1931, was in session when *MacMillan* v. *Railroad Commission* was decided, and, as has been noted above, the *MacMillan* case provided the special session with the bulk of its business. *Peoples' Petroleum Producers* v. *Smith,* 1 F. Supp. 361, was the cause of the special session of November, 1932. In his introductory message to the special session, Governor Sterling said: "Most assuredly, I would not, at this time, have called you into extraordinary session except I believe a grave crisis again confronts the State and our people, on account of the federal court having held that the Railroad Commission has gone beyond the authority given in this statute enacted

cumstances of the strain and doubt created by these decisions was necessarily unsatisfactory.[27] The Railroad Commission has had to adjust itself to the permutations of the law as seen by the federal courts. The most recent example was in connection with the *Rowan & Nichols* case, in which the Commission felt compelled to adopt a new proration scheme to comply with the demands of a federal court decision which was reversed when it came to this Court. 311 U. S. 570, 572.

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at that time in promulgating their orders as to proration and conservation of oil and gas. . . . It is apparent that [as a result of the decision] the state's greatest natural resource—oil and gas—will be wasted and destroyed, resulting in a tremendous financial injury to the State, especially to the taxpayers and the public schools. It is apparent to me that under such conditions, the state's income, as a result of the gross production tax on oil, will be reduced from approximately $16,000 a day to a few thousand dollars per day, thus depriving the State of a tremendous amount of revenue." Texas Senate Journal, Nov. 1932, pp. 3, 4.

[27] Consider for example the plight of the state authorities during the period in which the federal court found it necessary to reject the Commission's expert testimony on a basic matter of policy as "largely theory and speculation" in the *MacMillan* case, *supra,* similar testimony was accepted by the state court in the *Danciger* case, *supra,* and like testimony was in turn accepted by the federal court in *Amazon Petroleum Corp.* v. *Railroad Commission,* 5 F. Supp. 633.

Governor Allred in his message of Jan. 16, 1935, recommended to the legislature that it revise the conservation laws generally. He said, "Much of the trouble of the oil industry and the official life charged with its regulation has been due to misunderstandings, misinformation, and ill-considered criticism by those either unfamiliar or unconcerned with the magnitude or proper solution of its problems or the practical difficulties confronting our public officials in this new and unexplored field of regulation. In the past, not a little of our difficulties has been due to the fact that laws dealing with the production of oil and gas, as well as the rules and regulations of the conservation commission passed thereunder, have been enacted under high pressure at a time when, figuratively speaking, the 'House was on fire.'" Texas Sen. Journal, Reg. Sess. 1935, 84, 89.

As has been noted, the federal court cases have dealt primarily with the interpretation of state law, some of it state law fairly remote from oil and gas problems. The instant case raised a number of problems of no general significance on which a federal court can only try to ascertain state law.[28] For example, we are asked to determine whether a previous Travis county district court decision makes this case res adjudicata and whether another case pending in Travis county deprived the Commission of jurisdiction to consider Burford's application. The existence of these problems throughout the oil regulatory field creates a further possibility of serious delay which can injure the conservation program, for under our decision in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, it may be necessary to stay federal action pending authoritative determination of the difficult state questions.

The conflict between federal courts and Texas has lessened appreciably in recent years primarily as a result of the decisions in the *Rowan & Nichols* case. 310 U. S.

[28] The company presses upon us as significant in the determination of its rights the following four questions of state law:

(1) Burford's 2.33 acres were voluntarily subdivided from a larger portion and therefore the State Commission under the state law has no authority to permit an exception to prevent confiscation.

(2) "As a matter of state law, under the undisputed evidence, the judgment . . . is res adjudicata."

(3) The pendency of a related cause in the state courts, "under the law of the State . . . deprived the Railroad Commission pendente lite of jurisdiction."

(4) "The granting of four locations [was] without authority in the state law" and was arbitrary.

To determine the validity of these assertions, presenting obviously difficult problems of state law, we are asked by the company to analyze at least fifty Texas decisions. If the federal court misinterprets only one of these decisions, we shall have provoked a needless conflict with the Texas courts.

573; 311 U. S. 614; 311 U. S. 570. In those cases we assumed that the principal issue in the review of Railroad Commission orders was whether the Commission had confined itself within the boundaries of due process of law, and held that any special relief provided by state statutes must be pursued in a state court. It is now argued that under the decision of the Texas Supreme Court in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. 2d 1022, the courts, whether federal or state, are required to review the Commission's order not for constitutional validity, but for compliance with a standard of "reasonableness" under the state statute which, it is said, is different from the constitutional standard of due process.

The whole cycle of federal-state conflict cannot be permitted to begin again by acceptance of this view. Insofar as we have discretion to do so, we should leave these problems of Texas law to the state court where each may be handled as "one more item in a continuous series of adjustments." *Rowan & Nichols, supra,* 310 U. S. at 584.

These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of

those powers." *Railroad Commission* v. *Pullman Co., supra,* 500, 501.[29]

The State provides a unified method for the formation of policy and determination of cases by the Commission

[29] Equity's discretion to decline to exercise its jurisdiction may be applied when judicial restraint seems required by considerations of general welfare. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552. It is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a state court to have an opportunity to determine questions of state law which may prevent the necessity of decision on a constitutional question, *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 173. Equity relief may be withheld where the state remedy is adequate, *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.,* 306 U. S. 563, or if a federal court is asked to review the proceedings of a federal agency by injunction, where an adequate statutory method of review has been provided, *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41. In recent years, this Court has refused to permit the exercise of federal equity jurisdiction to enjoin the enforcement of state criminal statutes, *Beal* v. *Missouri Pacific R. Corp.,* 312 U. S. 45; *Watson* v. *Buck,* 313 U. S. 387; *Douglas* v. *Jeannette, ante,* p. 157. We have refused to permit injunctions to interfere with the collection of state taxes, *California* v. *Latimer,* 305 U. S. 255; *Kohn* v. *Central Distributing Co.,* 306 U. S. 531; and see 28 U. S. C. § 41. We have held that an equity court "may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." *Securities & Exchange Comm'n* v. *United States Realty Co.,* 310 U. S. 434, 455; *American United Mutual Life Ins. Co.* v. *Avon Park,* 311 U. S. 138, 145. Equity in its discretion may decline to aid a utility which seeks to prevent a public service commission from making an investigation which is at least arguably within its power, *Petroleum Exploration* v. *Public Service Comm'n,* 304 U. S. 209; or a railroad which has an adequate form of state relief, *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675. Equity may impose terms and conditions upon the party at whose instance it proposes to act and "the power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for." *Inland Steel Co.* v. *United States,* 306 U. S. 153, 156.

and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. *Matthews* v. *Rodgers,* 284 U. S. 521. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

The decision of the Circuit Court of Appeals is reversed and the judgment of the District Court dismissing the complaint is affirmed for the reasons here stated.

Reversed.

MR. JUSTICE DOUGLAS, concurring:

I agree with the opinion of the Court and join in it. But there are observations in the dissenting opinion which impel me to add a few words. If the issues in this case were framed as the dissenting opinion frames them, I would agree that we should reach the merits and not direct a dismissal of the complaint. But the opinion of the Court as I read it does not hold or even fairly imply that "the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts." Any such holding would result in a drastic inroad on diversity jurisdiction—a limitation which I agree might be desirable but which Congress, not this Court, should make. The holding in these cases, however, goes to no such length.

This decision is but an application of the principle expressed in *Pennsylvania* v. *Williams,* 294 U. S. 176, 185, that "federal courts of equity should exercise their discretionary power with proper regard for the rightful inde-

pendence of state governments in carrying out their domestic policy." That case, like the present one, was in the federal court by the diversity of citizenship route. It involved a receivership of an insolvent Pennsylvania corporation. Though the federal proceeding was first in time, this Court held that the federal court should stay its hand and turn over the assets of the corporation to the state administrative agency charged by state law with the responsibility of supervision and liquidation. In that case federal action would have preëmpted the field and excluded the assertion of state authority. In these cases the result of federal action would be potentially much more serious in terms of federal-state relations, as the opinion of the Court makes plain.

The Texas statute which governs suits to set aside these orders of the Railroad Commission has been construed by the Texas courts to give to the supervising courts a large measure of control over the administrative process. That control is much greater, for example, than the control exercised by federal Circuit Courts of Appeals over the orders of such agencies as the National Labor Relations Board. The opinion of the Court calls the Railroad Commission and the Texas courts "working partners." But as its review of Texas decisions shows, the courts may at times be the senior and dominant member of that partnership if they perform the functions which Texas law places on them. The courts do not sit merely to enforce rights based on orders of the state administrative agency. They sit in judgment on that agency. That, to me, is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy. That interference would be a continuing one, as the opinion of the Court points out. Moreover, divided authority would result. Divided authority breeds friction—friction potentially more serious

than would have obtained in *Pennsylvania* v. *Williams,* if the administration of the affairs of that insolvent corporation had been left in the federal court to the exclusion of the state administrative agency.

MR. JUSTICE MURPHY joins in this opinion.

MR. JUSTICE FRANKFURTER, dissenting:

To deny a suitor access to a federal district court under the circumstances of this case is to disregard a duty enjoined by Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties. For I am assuming that law declared by this Court, in contradistinction to law declared by Congress, is something other than the manipulation of words to formulate a predetermined result. Judicial law to me implies at least some continuity of intellectual criteria and procedures in dealing with recurring problems.

I believe it to be wholly accurate to say that throughout our history it has never been questioned that a right created by state law and enforceable in the state courts can also be enforced in the federal courts where the parties to the controversy are citizens of different states. The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive

with rights created by state law and enforceable in state courts.

That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. See 13 Cornell L. Q. 499, 520 *et seq.* But I must decide this case as a judge and not as a legislative reformer.

Aside from the Johnson Act of May 14, 1934, 48 Stat. 775,[1] the many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. Again and again legislation designed to make inroads upon diversity jurisdiction has been proposed to Congress, and on each occasion Congress has deliberately refused to act. See, for example, the recent efforts to restrict diversity jurisdiction which were provoked by the *Black & White Taxicab* decision, 276 U. S. 518; Sen. Rep. No. 626, 70th Cong., 1st Sess.; Sen. Rep. No. 691, 71st Cong., 2d Sess.; Sen. Rep. No. 530 and Sen. Rep. No. 701, 72d Cong., 1st Sess. We

[1] The Johnson Act provides that no district court can enjoin the enforcement of any order issued by a state administrative body where the jurisdiction of the court "is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States," and "where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Since the order under review in this case did not in any way affect rates chargeable by any public utility, the Johnson Act is inapplicable.

are dealing, then, not with a jurisdiction evolved and shaped by the courts but rather with one explicitly conferred and undeviatingly maintained by Congress.

The only limitations upon the exercise of diversity jurisdiction—apart from that which Congress made in the Johnson Act—are, broadly speaking, those illustrated by *Railroad Comm'n* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, as amended in 311 U. S. 614–15; *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496; and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168. In *Rowan & Nichols* the claim based upon state law was derived from a statute requiring proration on a "reasonable basis," and it was not clear from the decisions of the state courts whether such courts might exercise an independent judgment as to what was "reasonable." 311 U. S. at 615. And in *Pullman* it was also "far from clear" whether state law, as authoritatively defined by the local courts, might not displace the federal questions raised by the bill. 312 U. S. at 499. Where the controlling state law is so undefined that a federal court attempting to apply such law would be groping utterly in the dark—where "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination," *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. at 499—a court of equity may "avoid the waste of a tentative decision," *id.*, at 500. The *Pullman* and *Fieldcrest Dairies* cases are merely illustrative of one phase of the basic constitutional doctrine that substantial constitutional issues should be adjudicated only when no alternatives are open. A definitive ruling by the state courts upon the questions of construction of the state statutes might have terminated the controversies in those cases and thus eliminated serious constitutional questions. Under such circumstances it was an affirmation and not a denial of federal jurisdiction in each of those cases for the district court to hold the bill

pending a seasonable determination of the local issues in a proceeding to be brought in the state courts.

If, in a case of this sort, the state right sought to be enforced in the federal courts depended upon a "forecast rather than a determination" of state law, if the federal court was practically impotent to enforce state law because of its inability to fathom the complexities, legal or factual, of local law, the rule of *Rowan & Nichols* would be applicable. In such a situation the line of demarcation between what belongs to the state administrative body and what to its courts should not be drawn by the federal courts. If it could be shown that the circumstances of this case warranted the application of such a doctrine of abstention, I would gladly join in the decision of the Court. But such a showing has not been attempted, nor, I believe, could it be made.

Let us examine briefly the nature of the rights sought here to be enforced in the federal courts. In 1919 the Texas Railroad Commission issued its Rule 37 imposing general spacing limitations upon the drilling of oil wells, "provided that the Commission in order to prevent waste or to prevent the confiscation of property" would grant exceptions from the general restrictions. The order of the Railroad Commission in this case granted a permit to drill a well in exception to Rule 37. Section 8 of Article 6049c of Vernon's Texas Civil Statutes, 1925, provides that any "interested person affected by . . . any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders."

Looking only at the statute, one could find at least two possible sources of ambiguity and confusion. By what

standards should the courts be governed in reviewing the "validity" of Commission orders? Does the statutory limitation of courts "of competent jurisdiction in Travis County, Texas," preclude review in the federal district court sitting in Travis County? Fortunately, we need no longer look only to the words of the statute. These questions are not new. They are not presented in this case for the first time. We are not writing on a clean slate.

It is true that Texas law governing review of Commission orders under Rule 37 has not always been clear and certain, and that there may be parts of the statute and some of the Railroad Commission's Rules, with which we are not now concerned, which, like other legal materials, are not as clear as they might be. But, in a series of recent decisions, the Supreme Court of Texas has not only given precision to the concepts of "waste" and "confiscation of property" employed in Rule 37, it has also defined with clarity the scope of judicial review of Commission action. In *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70–71, 131 S. W. 2d 73, the Court held that "the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent 'confiscation.' It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37." And in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 80, 161 S. W. 2d 1022, decided by the Supreme Court of Texas on March 11, 1942, the scope of judicial review contemplated by Texas law was authoritatively defined: "In Texas, in all trials contesting the validity of an order,

rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material." See also *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. 2d 1035, decided the same day.

In other words, as the Circuit Court of Appeals has said in this case, "We now know the legal requisites of orders and regulations of the Railroad Commission under the conservation laws of Texas. . . . Whether the Commission heard evidence or not is immaterial; it is not required to take testimony or make findings of fact before promulgating its orders. Such procedure is foreign to the law of Texas, although customary under federal statutes. If the facts in existence when the order was made, as later shown by evidence before the court, were such that reasonable minds could not have reached the conclusion arrived at by the Commission, or if the agency exceeded its power, then the order should be set aside by any court of competent jurisdiction." 130 F. 2d 10, 14–15.

Clearly, therefore, the scope of judical review in a Rule 37 case, as declared by the Supreme Court of Texas, is precisely as well defined, for example, as the scope of judicial review by the federal courts of orders of the Interstate Commerce Commission or the National Labor Relations Board. That the scope of review may be different does not make the standards of review any less definite or less susceptible of application by a court. I think there can be no doubt that under the Constitution and laws of Texas, as construed by the decisions of the state courts, such courts exercise a judicial power in these cases precisely similar to that wielded by the federal courts under Article III. Can it be said, therefore, that in considering the

validity of an exception allowed by the Texas Railroad Commission under Rule 37, the federal judges sitting in that state are engaged in duties which are foreign to their experience and abilities? Judges who sit in judgment upon the legality of orders made by the Interstate Commerce Commission are certainly not incompetent to apply the narrowly defined standards of law established by Texas for review of the orders of its Railroad Commission.

We come, then, to the question whether Texas has manifested any desire to confine such review to the state courts sitting in Travis County. A little history will go a long way in answering this question. On April 3, 1891, the Texas legislature enacted a statute creating the Texas Railroad Commission. Section 6 provided that suits to set aside Commission orders could be brought "in a court of competent jurisdiction in Travis County, Texas." And, naturally enough, the question soon arose whether this provision prevented review in the federal court sitting in Travis County. Almost fifty years ago there came before this Court a memorable litigation in which the meaning and purpose of the provision were thoroughly canvassed. In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391–92, decided May 26, 1894, this Court unanimously held that "it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. . . . We need not, however, rest on the general powers of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission . . . The language of this provision [§ 6 of the

1891 statute] is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts."

For almost fifty years the holding in the *Reagan* case has not been questioned. On the contrary, it has always been taken for granted that the District Court for the Western District of Texas is "a court of competent jurisdiction in Travis County" and a suitable forum in which to challenge the validity of orders of the Texas Railroad Commission. One need only look at the tables of cases in both the lower federal courts and in this Court to obtain a sense of the solidity of this exercise of jurisdiction. Section 8 of Article 6049c, the Texas legislation immediately before us, was originally enacted in 1932. The Texas legislature might expressly have sought to restrict judicial proceedings with respect to Commission orders to the state courts of Travis County. This it has done in other situations. See *e. g.*, Art. 911e, § 10 of Vernon's Revised Civil Statutes, 1925 (appeal by applicant for transportation agent's license from denial of application by Railroad Commission); Art. 3286 (suits by heirs or claimants to escheated lands); Art. 5032 (appeals from revocation or suspension of authority with respect to reciprocal insurance); Art. 8307, § 7 (suits to recover penalties from employers failing to report injuries under workmen's compensation law). In these statutory provisions jurisdiction is specifically limited to the "District Court in Travis County, Texas," the state court. But in Article 6049c the Texas legislature used the phrase "in a court of competent jurisdiction in Travis County," precisely the same as that which had been construed by this Court in the *Reagan* case. How, then,

can it be fairly said that the Texas legislature meant to exclude the federal courts from exercising jurisdiction in these cases?

And so, the case really reduces itself to this: in the actual application of the standards governing judicial review of Commission orders allowing exceptions under Rule 37—standards which today have been authoritatively and precisely defined—a different result may be obtained if suit is brought in the federal rather than the state courts. And why? Because federal judges are less competent and less fair than state judges in applying the rules that are binding upon both? If this were true here, it would be equally true as applied to almost all types of litigation brought into federal courts to enforce state-created rights. The explanation may perhaps lie in the realm of what has sometimes been called "psychological jurisprudence." In the assessment of evidence and the other elements which enter into a judicial judgment, a federal judge may make judgments different from those which a state judge may make. Federal judges are perhaps to be regarded as men apart—judges who cannot be trusted to judge fairly and impartially. But if this be our premise, why should it not follow that the federal courts are, because of their putative bias, to be denied the right to hear insurance cases, or cases involving controversies between debtors and creditors, landlords and tenants, employers and employees, and all the other complicated controversies arising out of the local law of the forty-eight states?

It is the essence of diversity jurisdiction that federal judges and juries should pass on asserted claims because the result might be different if they were decided by a state court. There may be excellent reasons why Congress should abolish diversity jurisdiction. But, with all deference, it is not a defensible ground for having this Court by indirection abrogate diversity jurisdiction when, as a matter of fact, Congress has persistently refused to restrict

such jurisdiction except in the limited area occupied by the Johnson Act. The Congressional premise of diversity jurisdiction is that the possibility of unfairness against outside litigants is to be avoided by providing the neutral forum of a federal court. The Court today is in effect withdrawing this grant of jurisdiction in order to avoid possible unfairness against state interests in the federal courts. That which Congress created to assure impartiality of adjudication is now destroyed to prevent what is deemed to be hostility and bias in adjudication.

Of course, the usual considerations governing the exercise of equity jurisdiction are equally applicable to suits in the federal courts where jurisdiction depends upon the diversity of the parties' citizenship. The chancellor certainly must balance the equities before granting relief; he should stay his hand where another court seized of the controversy can do justice to the claims of the parties; he may refuse equitable relief where the asserted right is doubtful because of the substantive law which he must find as declared by the state. But it is too late in the day to suggest that the chancellor may act on whimsical or purely personal considerations or on private notions of policy regarding the particular suit. It is not for us to say that litigation affecting state laws and state policies ought to be tried only in the state courts. Congress has chosen to confer diversity jurisdiction upon the federal courts. It is not for us to reject that which Congress has made the law of the land simply because of our independent conviction that such legislation is unwise.

This is not just an isolated case. To order the dismissal of this litigation, on this record and in the present state of Texas law, is not merely to decide that the federal court in Travis County, Texas, should no longer entertain suits brought under the Texas conservation laws. We are holding, in effect, that the enforcement of state rights created by state legislation and affecting state policies is limited

to the state courts. It means, candidly, that we should reëxamine all of the cases—and there have been many—since the *Reagan* decision almost half a century ago. Do we not owe it to the lower federal courts, for example, to tell them where a case like *Texas Pipe Line Co.* v. *Ware,* 15 F. 2d 171, now stands? In that case the federal court entertained a suit to enforce rights arising under a state workmen's compensation law. Would it be error for a federal judge to do so today? See, also, *Lane* v. *Wilson,* 307 U. S. 268.

Perhaps no judicial action calls for a more cautious exercise of discretion than the appointment of a receiver by a court of equity, especially where the enterprise to be administered relates to important public interests. Such a situation was presented to this Court in *Pennsylvania* v. *Williams,* 294 U. S. 176, in which—solely on the score of diversity of citizenship—a federal court was asked to assume the management of a Pennsylvania building and loan association. The problem before this Court was not whether the controversy should be adjudicated by a federal rather than a state court, but whether, as a matter of sound judicial administration, a court of equity should take hold of the affairs of the association by putting a judicial officer in charge when in fact the state had established an administrative system whereby "the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent," 294 U. S. at 184, was entrusted to a permanent, experienced state agency. The question was not at all whether a federal court should abdicate its authority in favor of a state court where the rules of law which would govern a suit in a state court would be precisely the same as those which a federal court would be bound to apply. The *Williams* case, in other words, is but an application of the traditional doctrine that a court of equity should stay its hand from the improvident appointment of a receiver.

To talk about courts as "working partners" with administrative agencies whenever there is judicial review of administrative action is merely another way of saying that legislative policies are enforced partly through administrative agencies and partly through courts. See *United States* v. *Morgan,* 307 U. S. 183, 191. But the use of such colloquial expressions can hardly obliterate the distinction between judicial power and legislative power, whether the latter be exercised directly by the legislature or indirectly through its administrative agencies. The courts of Texas sit in judgment upon the Railroad Commission of Texas only in so far as they have been charged by Texas law with the duty of ascertaining the validity of Commission action. They no more "participate in the fashioning of the state's domestic policy" than the federal courts participate in the fashioning of the transportation policy of the federal government in reviewing orders of the Interstate Commerce Commission under the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47.

Therefore, unless all functions of courts heretofore deemed to be judicial in nature even though they involve appropriately defined review of actions taken by administrative agencies are now to be deemed administrative in nature, the circumstance that a right asserted before a court arises from a controversy that originated before an administrative agency cannot alter either the nature of the power being exercised by the court or its capacity to entertain jurisdiction. One might choose, for example, to describe this Court as the "working partner" of the Securities and Exchange Commission, the Comptroller of the Currency, the Commissioner of Internal Revenue, and the score of other administrative bodies the validity of whose actions frequently comes here for review. But such a characterization of our rôle in reviewing administrative orders does not make this exercise of our power any the

less judicial or any the more administrative. Nor should it be adequate to wipe out a distinction that is so embedded in our constitutional history and practice.

The opinion of the Court cuts deep into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress. But I cannot justify translation of the circumstance of my membership on this Court into an opportunity of writing my private view of legislative policy into law and thereby effacing a far greater area of diversity jurisdiction than Senator Norris, as chairman of the Senate Judiciary Committee, was ever able to persuade Congress itself to do.

MR. JUSTICE ROBERTS and MR. JUSTICE REED join in this dissent.

The CHIEF JUSTICE expresses no views as to the desirability, as a matter of legislative policy, of retaining the diversity jurisdiction. In all other respects he concurs in the opinion of MR. JUSTICE FRANKFURTER.

HASTINGS ET AL. *v.* SELBY OIL & GAS CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 528. Argued February 9, 1943. Reargued April 15, 1943.—Decided May 24, 1943.

Decided on the authority of *Burford* v. *Sun Oil Co., ante,* p. 315. Reversed and ordered dismissed.

CERTIORARI, 317 U. S. 621, to review a judgment of the District Court enjoining the enforcement of an order of the Railroad Commission of Texas permitting two of the defendants to drill for and extract oil and gas on a small tract of land in the East Texas Oil Field.

Mr. W. Edward Lee for O. L. Hastings et al.; and *Mr. James D. Smullen,* Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *E. R. Simmons,* Assistant Attorney General, were on the briefs, for the Railroad Commission of Texas et al.,—petitioners.

Mr. Dan Moody argued the cause on the original argument, and submitted on the reargument, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is an action in the nature of an equity proceeding brought by the respondents to cancel an order of the Texas Railroad Commission granting petitioners Hastings and Dodson a permit under Rule 37 of the Railroad Commission to drill an oil well. The respondents contend that the order granting a permit to the petitioners deprives them of property without due process of law, and that the order is invalid as a matter of Texas law. Jurisdiction is rested on diversity of citizenship.

There are no significant differences between the problems presented here and those in *Burford* v. *Sun Oil Co., ante,* p. 315. For the reasons set forth in that opinion, the decision below is reversed and the cause is remanded with instructions to dismiss the complaint.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE REED, and MR. JUSTICE FRANKFURTER dissent for the reasons stated by them in dissent to *Burford* v. *Sun Oil Co., ante,* p. 315.

BAILEY, ADMINISTRATRIX, *v.* CENTRAL VERMONT RAILWAY, INC.

CERTIORARI TO THE SUPREME COURT OF VERMONT.

No. 640. Argued April 13, 1943.—Decided May 24, 1943.

In this suit under the Federal Employers Liability Act, brought in a state court against a carrier to recover damages for the death of an employee, the evidence was sufficient to go to the jury on the question whether, as alleged in the complaint, the defendant was negligent in failing to use reasonable care to furnish the employee a safe place to work. P. 354.

113 Vt. 8, 28 A. 2d 639, reversed.

CERTIORARI, 318 U. S. 751, to review the reversal of a judgment upon a verdict for the plaintiff in a suit under the Federal Employers Liability Act.

Mr. Joseph A. McNamara, with whom *Messrs. Robert W. Larrow* and *T. Tracy Lawson* were on the brief, for petitioner.

Mr. Horace H. Powers for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This action was brought under the Federal Employers Liability Act (45 U. S. C. § 51) in the state courts of Vermont to recover damages for the death of Bernard E. Bailey, one of respondent's employees. At the close of all the evidence respondent moved for a directed verdict. The court denied the motion and submitted the case to the jury which returned a verdict for petitioner. On appeal the Supreme Court of Vermont reversed, by a divided vote, holding that the motion for a directed verdict should have been granted because negligence was not shown. 113 Vt. 8, 28 A. 2d 639. The case is here on certiorari.

Bailey had worked for respondent as a sectionman for about five years. On the day in question—May 14, 1940—he went to work on a work train to a point on the road in Williston, Vt., where he and other members of the crew unloaded track material to be used on the roadbed. Instructions were then received to unload a car filled with cinders. The evidence of the accident viewed in a light favorable to petitioner was as follows:

The car was pulled onto a bridge over a cattle pass so that the cinders could be dumped through the ties in the bridge floor onto the roadway below. The floor of the bridge was about 18 feet above the ground. The only available footing at the side of the car was about 12 inches wide. Of this space 8 or 9 inches were taken up by a raised stringer, i. e., a timber which lay across the ties and was set in 3 or 4 inches from their ends. There was no guard rail. The cinders to be unloaded were in a hopper car. That type of car has doors in the floor which are closed by a chain which winds up on a shaft running crossways of the car. The doors are opened from the side by one man turning a nut on the end of the shaft while another disengages from a ratchet a dog which holds the shaft. A wrench is applied to the nut at the end of the shaft, the operator pulls its handle back to relieve the tension on the dog, the other person releases the dog, the operator of the wrench pushes back on it to open the hopper, and the weight of the material in the car opens the doors. When the hopper starts to open, the shaft spins, and the operator must disengage the wrench or let go of it, lest he be thrown off balance or knocked down. The wrench used by Bailey was a heavy frog wrench—open jaws and a handle about three feet long. It had been used for many years for that purpose and no one had been injured by it. Bailey certainly was unskilled and perhaps unfamiliar in the opening of hopper cars. No one had ever seen him open one. Such an operation was usually

performed by men older in point of service. Bailey had been present on a few occasions when hopper cars were unloaded but usually he was on top of the car at the time. Cinders were dumped at this bridge about once a year. As Bailey walked out on the stringer on the bridge and put the wrench on the nut, the section foreman said, "Be careful the wrench doesn't catch you." Bailey at once pushed on the wrench but the hopper did not open; he gave another push on the wrench, the hopper opened, the nut spun, and Bailey was thrown by the wrench into the roadway below. The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.

Bailey died from the injuries resulting from the fall.

There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work.

Sec. 1 of the Act makes the carrier liable in damages for any injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents, or employees." The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases,* 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492; *Chesapeake & Ohio Ry. Co.* v. *Kuhn,* 284 U. S. 44. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line Ry.* v. *Horton, supra*) except as Congress has written into the Act different standards. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt,

Master & Servant (2d ed.) § 917. That rule is deeply engrained in federal jurisprudence. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 664, and cases cited; *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 256, 257; *Kenmont Coal Co.* v. *Patton*, 268 F. 334, 336. As stated by this Court in the *Patton* case, it is a duty which becomes "more imperative" as the risk increases. "Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery." 179 U. S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co.* v. *Deal*, 231 F. 604; *Northwestern Pacific R. Co.* v. *Fiedler*, 52 F. 2d 400; *Thomson* v. *Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a "continuing one" (*Kreigh* v. *Westinghouse & Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S.

443, 445; *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." *Jacob* v. *New York City*, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Since the evidence of respondent's negligence in failing to provide Bailey with a safe place to work is sufficient to support the verdict of the jury and the judgment of the trial court, we do not reach the other issues which have been presented by petitioner.

Reversed.

MR. JUSTICE ROBERTS:

I am of opinion that this case is one of a type not intended by Congress to be brought to this court for review. Actions under the Federal Employers Liability Act constitute but one category of the great total of actions triable in federal district courts and in the courts of the forty-eight states which may come to this court. While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to

which these principles are applicable rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the legal effect of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history.

While a litigant has no constitutional right of appellate review, Congress has seen fit to grant it. And, until 1891, this court was, with negligible exceptions, the only instrument of such review. The increasing volume of our appellate work bade fair to render the court incompetent to give needed consideration to important cases which the public interest required that it decide. To preserve the privilege of appellate review, and to provide an appellate tribunal where most federal litigation should end without resort of this court, Congress created the Circuit Courts of Appeals.[1] The relief thus afforded this court prevented the substantial break-down of our appellate function. But the relief proved insufficient, and Congress continued to adopt means to render it possible for us to do the indispensable work of the court. In 1915 it made the judgments of Circuit Courts of Appeals final in certain classes of cases arising in Puerto Rico and Hawaii, and also in bankruptcy cases, subject, as to the latter, to our discretionary power to take cases involving important questions.[2] The House Committee in its report said as to the objects of the bill:[3]

"Relieving the Supreme Court of the United States from the necessity of reviewing such cases from the Supreme Courts of Porto Rico and Hawaii as involve no Federal question, but depend entirely upon the local or general

[1] Act of March 3, 1891, 26 Stat. 826.

[2] Act of January 28, 1915, 38 Stat. 803.

[3] H. Rep. No. 1182, 63d Cong., 2d Sess.

law. Under the law as it now stands the decisions of the Supreme Courts of Porto Rico and Hawaii are reviewable by the Supreme Court of the United States not only when some Federal right is in controversy, but also in all cases which involve more than $5,000, without respect to the character of the questions involved. This section as amended includes Porto Rico with Hawaii and continues the existing right to review in the Supreme Court when Federal rights are in controversy, but leaves all other cases to be dealt with upon a petition for a writ of certiorari, as is now the law with respect to most of the cases in the circuit court of appeals."

The great mass of litigation in state and federal courts arising under the Employers Liability Act and railway safety appliance legislation still could be brought to this court as of right under existing law.[4] In 1916 Congress abolished the right and made the judgments of state appellate courts and Circuit Courts of Appeals final in this class of cases, subject to our discretionary review.[5] The Senate Committee report on the bill was entitled "Relief of the Supreme Court," and to it was appended a memorandum prepared by the clerk of this court exhibiting the congested state of our docket.[6] Finally, in 1925, Congress dealt in the same fashion with all litigation sought to be brought here for review from state and federal tribunals, save for certain narrowly restricted classes.[7]

Without the benefit of this restriction of its obligatory jurisdiction this court could not have attained the end and aim of its creation. But there remains the constant danger that, by taking cases lying outside defined areas

[4] *Southern Ry. Co.* v. *Crockett*, 234 U. S. 725.

[5] Act of Sept. 6, 1916, c. 448, 39 Stat. 726, § 3. See *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272.

[6] S. Rep. No. 775, 64th Cong., 1st Sess. See also the House Report No. 794, 64th Cong., 1st Sess.

[7] Act of February 13, 1925, 43 Stat. 936.

of importance, the court will limit its ability adequately to deal with those which all will agree it must adjudicate.

And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence. And it is irrelevant to the question of our exercise of the power of review that if we had been charged with the responsibility of a trial judge or a member of the court below, we might have held the case one for submission to a jury.

In almost every litigation, the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries.

There is no reason why a preference should be given, in these respects, to actions instituted under the Federal Employers Liability Act, over others founded on other

federal statutes, over contract cases, or admiralty cases, where a failure properly to rule on the facts is asserted to have wrought injury to one of the parties.[8]

It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government.

Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence.

MR. JUSTICE FRANKFURTER joins in this opinion.

MR. CHIEF JUSTICE STONE:

I agree with MR. JUSTICE ROBERTS that the present case is not an appropriate one for the exercise of our discretion-

[8] See the dissent in *Deputy* v. *Du Pont*, 308 U. S. 488, 499.

ary power to afford a second appellate review of the state court judgment by writ of certiorari. But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided.

ALTVATER ET AL. *v.* FREEMAN ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 696. Argued April 19, 1943.—Decided May 24, 1943.

1. The issue of validity may be raised by a counterclaim in a suit for infringement of a patent. P. 363.
2. The requirements as to the existence of a case or controversy in suits in the federal courts are no less strict in suits under the Declaratory Judgments Act than in others. P. 363.
3. The requirements as to the existence of a case or controversy are met where payment of a claim is demanded as of right and payment is made, but where a right to recover the amount paid or to challenge the legality of the claim is preserved by the coercive nature of the exaction. P. 365.
4. Although the decision of non-infringement of the patent disposed of the bill and answer in this suit, it did not dispose of the counterclaim, which raised the question of the validity of the patent; and the Circuit Court of Appeals erred in treating the issues raised by the counterclaim as moot. Pp. 363, 365.

130 F. 2d 763, reversed.

CERTIORARI, 318 U. S. 750, to review a decree which modified and affirmed a decree dismissing the bill and granting the prayer of a counterclaim in a patent case.

Messrs. Edmund C. Rogers and *Lawrence C. Kingsland* for petitioners.

Mr. Marston Allen for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit, lodged in the federal District Court by reason of diversity of citizenship, was brought by respondents for specific performance of a license agreement under reissue patent No. 20,202 issued to Freeman in 1936 for a cut-out machine for shoe uppers, it being alleged that the reissue patent was substituted under the agreement for the original patent—No. 1,681,033.[1] The bill alleged that contrary to the provisions of the license agreement petitioners were manufacturing and selling certain devices which infringed the reissue patent and that they had not confined themselves to the territory in which the license agreement permitted them to make sales of the patented article. The bill asked for specific performance, for an injunction, and for an accounting. Petitioners answered denying generally the allegations of the bill and setting up various defenses. They charged among other things that the two reissue patents obtained on the surrender of the original patent were invalid; and they asserted that while they had made payments of royalties under the reissue patents, they did so in protest and that those payments did not substitute the reissue patents for the original patent under the license agreement. Petitioners also filed a counterclaim praying for a declaratory judgment. They alleged in the counterclaim that the license agreement did not cover the reissue patents; that they were willing to pay royalties if the agreement covered the reissues and if they

[1] Two reissue patents—No. 20,202 and No. 20,203—were obtained for Patent No. 1,681,033 which was surrendered. The contract was based upon the latter patent. It licensed petitioners to make certain dies coming within the original patent, within a limited territory and for use with certain machines, upon payment of royalties. Petitioners likewise agreed not to make any machines coming within the original patent; and they waived the right to contest the validity of the patent during its life.

were valid; that the reissues were not valid, but that if petitioners cancelled the license agreement and refused to pay any royalties under it, they would be subject to infringement suits. They accordingly alleged that in order to protect the business built up in good faith under the license, an adjudication of the controversy and dispute between the parties was necessary. They prayed that the reissue patents be declared invalid, but that, if they were held to be valid, the license agreement be extended to them. In a reply to the counterclaim, respondents denied its essential allegations and alleged among other things that there was no justiciable controversy between the parties as set forth in the counterclaim and therefore that petitioners had no right to the declaratory judgment.

A brief summary of earlier litigation between the parties will help sharpen the outlines of the present controversy. The license under the original patent was executed in 1929. Shortly thereafter petitioners marketed a machine known as Model T, which respondents claimed violated the agreement. They accordingly brought a suit for specific performance of the agreement, charging violation of its covenants and infringement. The court held in *Freeman* v. *Altvater,* 66 F. 2d 506, that the validity of the patent was not in issue, since petitioners, being licensees, were estopped to assert its invalidity. The court concluded, however, that the machine did infringe. An accounting was ordered. Respondents endeavored later on to have the accounting cover the accused devices involved in the present suit. That effort was not successful. Meanwhile *Premier Machine Co.* v. *Freeman,* 84 F. 2d 425, was decided. It was a suit for infringement of the original patent, the defense being invalidity. Of the 94 claims of the patent, 26 were involved in that suit. The court held that only three of that group were valid. That was in June 1936. In November 1936 Freeman filed a dis-

claimer covering all claims held invalid in the *Premier Machine* case. Later in 1936 he surrendered his original patent and obtained reissue patents. The invalidity of the reissue patents was asserted in the present suit on the grounds, among others, that the disclaimer was improper and that the reissue patents were devoid of patentable subject matter.

The District Court after a hearing found that the accused devices did not infringe respondents' reissue patents; that the decision in the *Premier Machine* case, 84 F. 2d 425, holding only three of the twenty-six claims of the original patent valid, constituted an eviction under the license agreement; that the license agreement terminated with the surrender of the original patent in 1936; that petitioners did not make the reissue patents the basis for a new license contract; that while petitioners since the date of the reissue patents paid certain royalties they did so under protest and pursuant to the injunction which was entered in the first *Altvater* case, 66 F. 2d 506; and that the reissue patents were invalid. The District Court accordingly dismissed the bill of complaint and granted the prayer of the counterclaim. The Circuit Court of Appeals affirmed (129 F. 2d 494), holding that the District Court was warranted in concluding that the original license agreement was at an end and that the continuance of royalty payments did not indicate an acceptance of the reissue patents to form a new contract; that the issue of infringement involved only claim 6 of reissue patent No. 20,202, the charges that other claims were infringed having been abandoned; and that the accused devices did not infringe. On a petition for rehearing and motion to modify the opinion and revise the decree, the Circuit Court of Appeals ruled that when the District Court found no contract of license and no infringement, the other issues became moot and there was no longer a justiciable controversy between the parties. 130 F. 2d 763. It accordingly modified the

decree by striking from it the provisions which held that Freeman was evicted from his monopoly by the decision in the *Premier Machine* case and that the reissue patents were invalid, and the further provision which resolved the issues on the counterclaim in favor of petitioners, saying that it expressed no opinion on those questions. The case is here on a petition for writ of certiorari which we granted because of the apparent misinterpretation by the Circuit Court of Appeals of our decision in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241.

That case was tried only on bill and answer. The District Court adjudged a claim of a patent valid although it dismissed the bill for failure to prove infringement. We held that the finding of validity was immaterial to the disposition of the cause and that the winning party might appeal to obtain a reformation of the decree. To hold a patent valid if it is not infringed is to decide a hypothetical case.[2] But the situation in the present case is quite different. We have here not only bill and answer but a counterclaim. Though the decision of non-infringement disposes of the bill and answer, it does not dispose of the counterclaim which raises the question of validity. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, is authority for the proposition that the issue of validity may be raised by a counterclaim in an infringement suit.[3] The requirements of case or controversy are of course no less strict under the Declaratory Judgments Act (48 Stat. 955, 28 U. S. C. § 400) than in case of other suits. *United States* v. *West Virginia*, 295 U. S. 463, 475; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Maryland Casualty Co.* v. *Pacific Coal Co.*, 312 U. S. 270. But we are of the view that the issues raised by the present counter-

[2] See *Cover* v. *Schwartz*, 133 F. 2d 541.

[3] And see *Leach* v. *Ross Heater & Mfg. Co.*, 104 F. 2d 88; Borchard, Declaratory Judgments (2d ed.) pp. 812–814.

claim were justiciable and that the controversy between the parties did not come to an end (*United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116) on the dismissal of the bill for non-infringement, since their dispute went beyond the single claim and the particular accused devices involved in that suit.

It is said that so long as petitioners are paying royalties they are in no position to raise the issue of invalidity—the theory being that as licensees they are estopped to deny the validity of the patents and that, so long as they continue to pay royalties, there is only an academic, not a real controversy, between the parties. We can put to one side the questions reserved in the *Sola Electric Co.* case—whether, as held in *United States* v. *Harvey Steel Co.*, 196 U. S. 310, a licensee is estopped to challenge the validity of a patent and, if so, whether that rule of estoppel is one of local law or of federal law. In the present case both the District Court and the Circuit Court of Appeals have found that the license agreement was terminated on the surrender of the original patent and was not renewed and extended to cover the reissue patents. The fact that royalties were being paid did not make this a "difference or dispute of a hypothetical or abstract character." *Aetna Life Ins. Co.* v. *Haworth, supra,* p. 240. A controversy was raging, even apart from the continued existence of the license agreement. That controversy was "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth, supra,* pp. 240–241. That controversy concerned the validity of the reissue patents.[4] Those patents had many claims in addition to the single one involved in the issue of infringement. And petitioners were

[4] Shortly after the grant of the reissue patents, petitioners filed a suit for declaration of their invalidity. The Circuit Court of Appeals sustained a dismissal of the bill on the ground that all of the matters placed at issue in that suit could be settled in the present one. *Western Supplies Co.* v. *Freeman,* 109 F. 2d 693.

manufacturing and selling additional articles claimed to fall under the patents. Royalties were being demanded and royalties were being paid. But they were being paid under protest and under the compulsion of an injunction decree. It was to lift the heavy hand of that tribute from the business that the counterclaim was filed. Unless the injunction decree were modified,[5] the only other course was to defy it, and to risk not only actual but treble damages in infringement suits. Rev. Stat. § 4919, 35 U. S. C. § 67. It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity. S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2–3. And see Borchard, Declaratory Judgments (2d ed.) pp. 927 *et seq.* And certainly the requirements of case or controversy are met where payment of a claim is demanded as of right and where payment is made, but where the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of the claim. See *Maxwell* v. *Griswold,* 10 How. 242, 255–256; *United States* v. *Lawson,* 101 U. S. 164, 169; *Swift & Co.* v. *United States,* 111 U. S. 22, 28–30; *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* 223 U. S. 280, 286; *Gaar, Scott & Co.* v. *Shannon,* 223 U. S. 468, 471; *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 70; Woodward, The Law of Quasi Contracts (1913) § 218.

Our conclusion is that it was error for the Circuit Court of Appeals to have treated the issues raised by the counter-

[5] On April 15, 1943, while this case was pending here, the Circuit Court of Appeals granted petitioners leave to apply to the District Court to vacate the decree in the first Altvater suit, 66 F. 2d 506. The basis of that motion appears to be substantially the same as the counterclaim in the present suit. This underlines and gives added emphasis to the claim that there is a controversy between the parties with respect to the validity of the patents growing out of events subsequent to the first Altvater case. It further serves to demonstrate that the required payment of royalties under that decree does not establish the absence of a controversy.

claim as moot. They were not moot; and the District Court had passed on them. Accordingly, the Circuit Court of Appeals should have reviewed that adjudication.[6] The judgment is reversed and the cause remanded to the Circuit Court of Appeals for that purpose.

Reversed.

MR. JUSTICE FRANKFURTER:

We are concerned here with a problem in judicial administration, not a question in algebra as to which there is a demonstrably right or wrong answer. The case before us presents only one phase of an extensive, complicated patent litigation involving numerous technical and interdependent issues. The question which we must now decide is this—in view of the present posture of the controversy, shall one of these issues be adjudicated in the manner indicated by the Circuit Court of Appeals, or shall this Court direct that it be adjudicated upon the defendants' counterclaim for a declaratory judgment? We are all agreed that while a district court may have jurisdiction of a suit or claim under the Federal Declaratory Judgments Act, 28 U. S. C. § 400, it is under no compulsion to exercise such jurisdiction. If another proceeding is pending in which the claim in controversy may be satisfactorily adjudicated, a declaratory judgment is not a mandatory rem-

[6] The proposal that the cause should be remanded to the District Court so that it might pass on those issues once more before the Circuit Court of Appeals reviews them does not emanate from the Circuit Court of Appeals. Its refusal to review that adjudication rests on a misinterpretation of *Electrical Fittings Corp.* v. *Thomas & Betts Co., supra,* not on any inadequacy or insufficiency of the findings of the District Court. If the standards of good judicial administration be considered, we fail to see why petitioners should be put to two trials of the same issues before a review by the Circuit Court of Appeals may be had. Nor would it comport with sound judicial administration to uphold a denial of appellate review where the controversy between the parties still rages and where the appeal was dismissed because of a mistaken view of the law.

edy. Sound judicial administration requires, in my view, that we decline to interfere with the procedure which the court below has provided for the adjudication of the claims for which the defendants sought a declaratory judgment.

This litigation is wrapt in confusion, but from it I extract the following history of its course through the courts. In the early 1930's a suit for infringement of a shoe machine patent was brought by the patentee, Freeman, against Altvater, a licensee. This resulted in a ruling in 1933 by the Circuit Court of Appeals for the Eighth Circuit in *Freeman* v. *Altvater,* 66 F. 2d 506, that the patent had been infringed and that the licensee was estopped to assert its invalidity. Pursuant to this decision a decree was entered requiring Altvater to pay royalties under the license agreement. Freeman thereafter brought suit against another alleged infringer. In this proceeding the Circuit Court of Appeals for the First Circuit held, in *Premier Machine Co.* v. *Freeman,* 84 F. 2d 425, that 23 of the 94 claims of Freeman's patent were invalid. Accordingly, Freeman subsequently filed a disclaimer covering the 23 claims thus held invalid, surrendered his patent, and obtained reissue patents on the remaining claims as well as some other claims not involved in the *Premier* suit.

Shortly thereafter Freeman brought a second suit against Altvater and another company. In this suit—which resulted in the action of the Circuit Court of Appeals now under review—Freeman alleged that the defendants were violating the terms of the license agreement and prayed for specific performance of the agreement. The defendants denied this allegation, and, by way of counterclaim, asked for a declaration that (1) the license contract and the original patent "be interpreted in the light of the decision" in the *Premier* case; (2) the license contract "be interpreted by this Court to readjust the relationship between its parties in the light of the facts transpiring since it was entered into"; (3) the license agreement be declared

terminated as of the date of the surrender of the original patent; (4) the reissue patents be declared invalid, "but, if either is valid, then to interpret it or them into its or their proper scope in the light of the facts occurred"; (5) in the event that the reissue patents be found valid, the plaintiffs be directed "to grant to the defendants a license under them of a scope to permit their business to be continued to the extent it could operate under the original contract, and at a royalty commensurate with the protection afforded by the patents"; and (6) the injunction against violation of the license agreement be declared terminated because of the expiration of such agreement.

The district court found that the license agreement ended with the surrender of the original patent in 1936, that the reissue patents had not been made the basis of a new contract between the parties, and that, in any event, the reissue patents included claims "not definitely distinguishable from claims disclaimed" and hence were "inherently invalid for improper disclaimer." Accordingly, the bill was dismissed. The decree recited also that "The issues on the counterclaim are found in favor of defendants and the counterclaim is granted."

Upon appeal to the Circuit Court of Appeals this ruling of the district court was affirmed, 129 F. 2d 494, but upon rehearing the court held that once it was found that the license agreement had terminated and that the reissue patents were not infringed, the remaining issues in the case, *i. e.*, those relating to the validity of the reissue patents, were "moot" in the sense that there was no longer a justiciable controversy for the solution of which a declaration was needed. 130 F. 2d 763. While the appeal was pending before the Circuit Court of Appeals, however, the defendants petitioned the district court to vacate the decree entered under the decision of the Circuit Court of Appeals in *Freeman* v. *Altvater,* 66 F. 2d 506. This motion was based upon two grounds: (1) that the license

agreement ended when Freeman surrendered the original patent after the decision in the *Premier* case, and (2) that there had been no valid reissue of the patent claims. Accordingly, the defendants asked that the injunction be lifted and that they be relieved of their continuing obligation to pay royalties under the license agreement. The plaintiffs objected to the jurisdiction of the district court to entertain such a motion while the appeal was pending in the Circuit Court of Appeals. The district court sustained this objection, and the defendants appealed. On April 15, 1943, after the decision of the Circuit Court of Appeals upon rehearing and while the case was pending here on certiorari, the Circuit Court of Appeals granted the defendants, the petitioners in this Court, leave to proceed in the district court to vacate the 1933 decree. In its opinion the court below expressly stated that "Whether the reissue patents are wholly invalid, as defendants contend, or, if not, whether the claims as reissued are within the protective scope of the existing injunction is a matter which the district court will have to determine." 135 F. 2d 212, 213.

The Circuit Court of Appeals has thus committed to the district court substantially the same questions as those raised by the defendants' counterclaim, *i. e.*, those relating to the validity of the reissue patents. By this action the Circuit Court of Appeals had effectively recalled its previous ruling that these questions were "moot." Whatever might be said, therefore, as to the correctness of its ruling that the validity of the reissue patents presented "non-justiciable" questions, the inescapable fact remains that there is now before the district court for determination a proceeding initiated by the petitioners involving the very questions raised by the counterclaim. By putting the whole case in the charge of the district court, the Circuit Court of Appeals has made it academic for us to consider the correctness of its earlier ruling that there re-

mained no justiciable issues in the controversy between the parties. Review of the grant or denial of a declaratory judgment, like an appeal in equity, calls for disposition of the case on the basis of the circumstances found to exist when the appeal is decided. The Circuit Court of Appeals may have been in error in holding that the questions relating to the validity of the reissue patents could not be passed upon because there was no longer a "justiciable" controversy once non-infringement was found. But its subsequent action, directing the district court to pass upon these questions, is a timely correction, if such was called for, of its earlier ruling.

Therefore, it seems to me that good judicial administration should stay our interference with the Circuit Court of Appeals' exercise of its discretion in adjusting the manner by which the issues as to the validity of the reissue patents should be adjudicated. It is the Circuit Court of Appeals which, by its action of April 15, 1943, has in effect remanded the cause to the district court for determination of these issues. No valid reason appears for disturbing the disposition it has made of the litigation. The lower federal courts ought not to be narrowly confined in determining whether a declaratory judgment is an appropriate remedy under all the circumstances. We need not speculate too far as to the reasons which may have prompted the Circuit Court of Appeals in this case to remand the issues as to the validity of the patents to the district court. It may have been of the opinion, for example, that the findings of the district court lacked sufficient clarity, especially in view of the cloudiness of the pleadings. In any event, however, this seems to me to be the kind of a case in which this Court should be most reluctant to interfere with the procedure determined upon by the Circuit Court of Appeals.

If we are to consider the correctness of the ruling that the issues relating to the validity of the reissue patents are

not "justiciable," I find it too difficult to accept the reasoning of my Brethren. The Court's conclusion that the Circuit Court of Appeals erred in finding "mootness" as to the questions raised by the counterclaim rests substantially upon the notion that a controversy still exists because the defendants are laboring under the "heavy" obligation of paying royalties under the license agreement. But we have held that the controversy must be "definite and concrete," "real and substantial," in order that a declaratory judgment may be given. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–41; and see *Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273. The defendants' obligation to pay royalties under the license agreement cannot be very substantial at the present time, since both the district court and the Circuit Court of Appeals have held that the license agreement terminated in 1936 with the surrender of the original patent. In view of these rulings the defendants' need for "relief" is practically infinitesimal, since all that remains to be done is the entry of a formal order vacating the 1933 decree. The "insecurity" and "peril" from which litigants can be saved only by a declaratory judgment are conspicuous by their absence from this case at this time. It may very well be that one who infringes a patent should be entitled to obtain a declaration as to its validity even though he is under no contractual obligation to pay royalties as a licensee. The existence of an invalid patent may substantially impair the economic position of those who market articles which infringe such a patent, even though no infringement suits may be immediately threatened. Potential purchasers may naturally be reluctant to establish business relations upon so insecure a basis. But the Court has not chosen to sustain the propriety of a declaratory judgment here upon this ground, and it is therefore idle to consider its merits.

MR. JUSTICE ROBERTS joins in this opinion.

GALLOWAY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 553. Argued March 9, 1943.—Decided May 24, 1943.

1. In this suit against the United States to recover benefits under a contract of war risk insurance, on account of alleged total and permanent disability resulting from insanity of the insured while the policy was in force, *held* that the evidence was insufficient to support a judgment for the plaintiff and the trial court properly granted the Government's motion for a directed verdict. P. 386.
2. The Seventh Amendment has no application of its own force to this suit against the United States. P. 388.
3. Upon the record in this case, the direction of the verdict for the defendant did not deprive the plaintiff of the right to a jury trial. P. 396.

130 F. 2d 467, affirmed.

CERTIORARI, 317 U. S. 622, to review the affirmance of a judgment upon a verdict directed for the Government in a suit to recover benefits under a contract of war risk insurance.

Mr. Warren E. Miller for petitioner.

Mr. Lester P. Schoene, with whom *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Wilbur C. Pickett, W. Marvin Smith,* and *Keith L. Seegmiller* were on the brief, for the United States.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Petitioner seeks benefits for total and permanent disability by reason of insanity he claims existed May 31, 1919. On that day his policy of yearly renewable term insurance lapsed for nonpayment of premium.[1]

[1] The contract was issued pursuant to the War Risk Insurance Act and insured against death or total permanent disability. (Act of Oct.

The suit was filed June 15, 1938. At the close of all the evidence, the District Court granted the Government's motion for a directed verdict. Judgment was entered accordingly. The Circuit Court of Appeals affirmed. 130 F. 2d 467. Both courts held the evidence legally insufficient to sustain a verdict for petitioner. He says this was erroneous and, in effect, deprived him of trial by jury, contrary to the Seventh Amendment.

The constitutional argument, as petitioner has made it, does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict.[2] The contention is merely that his case as made was substantial, the courts' decisions to the contrary were wrong, and therefore their effect has been to deprive him of a jury trial. Petitioner relies particularly upon *Halliday* v. *United States,* 315 U. S. 94, and *Berry* v. *United States,* 312 U. S. 450, citing also *Gunning* v. *Cooley,* 281 U. S. 90. These cases and others relied upon are distinguishable upon the facts, as will appear. Upon the record and the issues as the parties have made them, the only question is whether the evidence was sufficient to sustain a verdict for petitioner. On that basis, we think the judgments must be affirmed.

I.

Certain facts are undisputed. Petitioner worked as a longshoreman in Philadelphia and elsewhere prior to en-

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6, 1917, c. 105, § 400, 40 Stat. 398, 409.) Pursuant to statutory authority (Act of May 20, 1918, c. 77, § 13, 40 Stat. 555), T. D. 20 W. R., promulgated March 9, 1918, provided:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed . . . to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. . . ." (Regulations and Procedure, U. S. Veterans Bureau, Part I, p. 9.)

[2] See, however, Part III, *infra.*

listment in the Army November 1, 1917.[3] He became a cook in a machine gun battalion. His unit arrived in France in April, 1918. He served actively until September 24. From then to the following January he was in a hospital with influenza. He then returned to active duty. He came back to the United States, and received honorable discharge April 29, 1919. He enlisted in the Navy January 15, 1920, and was discharged for bad conduct in July. The following December he again enlisted in the Army and served until May 1922, when he deserted. Thereafter he was carried on the Army records as a deserter.

In 1930 began a series of medical examinations by Veterans' Bureau physicians. On May 19 that year his condition was diagnosed as "Moron, low grade; observation, dementia praecox, simple type." In November, 1931, further examination gave the diagnosis, "Psychosis with other diseases or conditions (organic disease of the central nervous system—type undetermined)." In July, 1934, still another examination was made, with diagnosis: "Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild."

Petitioner's wife, the nominal party in this suit, was appointed guardian of his person and estate in February, 1932. Claim for insurance benefits was made in June, 1934, and was finally denied by the Board of Veterans' Appeals in January, 1936. This suit followed two and a half years later.

Petitioner concededly is now totally and permanently disabled by reason of insanity and has been for some time prior to institution of this suit. It is conceded also that

[3] The record does not show whether this employment was steady and continuous or was spotty and erratic. But there is no contention petitioner's behavior was abnormal before he arrived in France in April, 1918.

he was sound in mind and body until he arrived in France in April, 1918.

The theory of his case is that the strain of active service abroad brought on an immediate change, which was the beginning of a mental breakdown that has grown worse continuously through all the later years. Essential in this is the view it had become a total and permanent disability not later than May 31, 1919.

The evidence to support this theory falls naturally into three periods, namely, that prior to 1923; the interval from then to 1930; and that following 1930. It consists in proof of incidents occurring in France to show the beginnings of change; testimony of changed appearance and behavior in the years immediately following petitioner's return to the United States as compared with those prior to his departure; the medical evidence of insanity accumulated in the years following 1930; and finally the evidence of a physician, given largely as medical opinion, which seeks to tie all the other evidence together as foundation for the conclusion, expressed as of 1941, that petitioner's disability was total and permanent as of a time not later than May of 1919.

Documentary exhibits included military, naval and Veterans' Bureau records. Testimony was given by deposition or at the trial chiefly by five witnesses. One, O'Neill, was a fellow worker and friend from boyhood; two, Wells and Tanikawa, served with petitioner overseas; Lt. Col. Albert K. Mathews, who was an Army chaplain, observed him or another person of the same name at an Army hospital in California during early 1920; and Dr. Wilder, a physician, examined him shortly before the trial and supplied the only expert testimony in his behalf. The petitioner also put into evidence the depositions of Commander Platt and Lt. Col. James E. Matthews, his superior officers in the Navy and the Army, respectively, during 1920–22.

What happened in France during 1918–19 is shown chiefly by Wells and Tanikawa. Wells testified to an incident at Aisonville, where the unit was billeted shortly after reaching France and before going into action. Late at night petitioner created a disturbance, "hollering, screeching, swearing. . . . The men poured out from the whole section." Wells did not see the incident, but heard petitioner swearing at his superior officers and saw "the result, a black eye for Lt. Warner." However, he did not see "who gave it to him."[4] Wells personally observed no infraction of discipline except this incident, and did not know what brought it on. Petitioner's physical appearance was good, he "carried on his duties as a cook all right," and the witness did not see him after June 1, except for about three days in July when he observed petitioner several times at work feeding stragglers.

Tanikawa, Hawaiian-born citizen, served with petitioner from the latter's enlistment until September, 1918, when Galloway was hospitalized, although the witness thought they had fought together and petitioner was "acting queer" at the Battle of the Argonne in October. At Camp Greene, North Carolina, petitioner was "just a regular soldier, very normal, . . . pretty neat." After reaching France "he was getting nervous . . ., kind of irritable, always picking a fight with other soldiers." This began at Aisonville. Tanikawa saw Galloway in jail, apparently before June. It is not clear whether these are references to the incident Wells described.

Tanikawa described another incident in June "when we were on the Marne," the Germans "were on the other side and we were on this side." It was a new front, without trenches. The witness and petitioner were on guard duty with others. Tanikawa understood the Germans

[4] Wells heard of another incident at Monthurel in June, but his testimony concerning this was excluded as hearsay.

were getting ready for a big drive. "One night he [petitioner] screamed. He said, 'The Germans are coming' and we all gagged him." There was no shooting, the Germans were not coming, and there was nothing to lead the witness to believe they were. Petitioner was court-martialed for the matter, but Tanikawa did not know "what they did with him." He did not talk with Galloway that night, because "he was out of his mind" and appeared insane. Tanikawa did not know when petitioner left the battalion or what happened to him after (as the witness put it) the Argonne fight, but heard he went to the hospital, "just dressing station I guess." The witness next saw Galloway in 1936, at a disabled veterans' post meeting in Sacramento, California. Petitioner then "looked to me like he wasn't all there. Insane. About the same . . . as compared to the way he acted in France, particularly when they gagged him . . ."

O'Neill was "born and raised with" petitioner, worked with him as a longshoreman, and knew him "from when he come out of the army for seven years, . . . I would say five or six years." When petitioner returned in April or May, 1919, "he was a wreck compared to what he was when he went away. The fallow's mind was evidently unbalanced." Symptoms specified were withdrawing to himself; crying spells; alternate periods of normal behavior and nonsensical talk; expression of fears that good friends wanted "to beat him up"; spitting blood and remarking about it in vulgar terms. Once petitioner said, "G— d— it, I must be a Doctor Jekyll and Mr. Hyde."

O'Neill testified these symptoms and this condition continued practically the same for about five years. In his opinion petitioner was "competent at times and others was incompetent." The intervals might be "a couple of days, a couple of months." In his normal periods Galloway "would be his old self . . . absolutely O. K."

O'Neill was definite in recalling petitioner's condition and having seen him frequently in 1919, chiefly however, and briefly, on the street during lunch hour. He was not sure Galloway was working and was "surprised he got in the Navy, I think in the Navy or in the Government service."

O'Neill maintained he saw petitioner "right on from that [1920] at times." But his recollection of dates, number of opportunities for observation, and concrete events was wholly indefinite. He would fix no estimate for the number of times he had seen petitioner: "In 1920 I couldn't recall whether it was one or a thousand." For later years he would not say whether it was "five times or more or less." When he was pinned down by cross-examination, the effect of his testimony was that he recalled petitioner clearly in 1919 "because there was such a vast contrast in the man," but for later years he could give little or no definite information. The excerpt from the testimony set forth in the margin [5] shows this con-

[5] "X Can you tell us approximately how many times you saw him in 1919?

"A. No; I seen him so often that it would be hard to give any estimate.

"X And the same goes *for 1920?*

"A. *I wouldn't be sure about 1920. I remember him more when he first came home because there was such a vast contrast in the man.* Otherwise, if nothing unusual happened, I wouldn't probably recall him at all, you know, that is, recall the particular time and all.

"X Well, do you recall him *at all in 1920?*

"A. *I can't say.*

"X And could you swear whether or not you ever saw him *in 1921?*

"A. I think I seen him both in 1921 and 1920 and 1921 and right on. I might not see him for a few weeks or months at a time, but I think I saw him a few times in all the years right up to, as I say, at least five years after.

"X Can you give us *an estimate* as to the number of times you saw him *in 1920?*

"A. *No, I would not.*

"X Was it *more than five times or less?*

trast. We also summarize below [6] other evidence which explains or illustrates the vagueness of the witness' recollection for events after 1919. O'Neill recalled one specific occasion after 1919 when petitioner returned to Philadelphia, "around 1920 or 1921, but I couldn't be sure," to testify in a criminal proceeding. He also said, "After he was away for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that. He was back in Philadelphia for five or six months or so, and he was still just evidently all right, and then he would be off."

Lt. Col. (Chaplain) Mathews said he observed a Private Joseph Galloway, who was a prisoner for desertion and a patient in the mental ward at Fort MacArthur Sta-

"A. In 1920 *I couldn't recall whether it was one or a thousand. The time I recall him well is when he first come home,* but I know that I seen him right on from that at times.

"X And the same goes for 1921, 1922, 1923 and 1924?

"A. I would say for five years afterwards, but I don't know just when or how often I seen him except when he first come home for the first couple of months.

"X *But for years after his return you couldn't say definitely whether you saw him five times or more or less, could you?*

"A. *No,* because it was a thing that *there was a vast contrast when he first come home* and everybody noticed it and remarked about it and it was more liable to be remembered. You could ask me about some more friends I knew during those years and I wouldn't know except there was something unusual." (Emphasis added.)

[6] Petitioner's own evidence shows without dispute he was on active duty in the Navy from January 15, 1920, to July of that year, and in the Army from December, 1920, to May 6, 1922. As is noted in the text, O'Neill was not sure he was working and "was surprised he got in the Navy, I think in the Navy or in the Government service." He only "heard some talk" of petitioner's having reënlisted in the Army, but "*if it was the fact,* I would be surprised that he could do it owing to his mental condition." (Emphasis added.) O'Neill was not certain that he saw Galloway in uniform after the first week of his return to Philadelphia from overseas, although he said he saw petitioner during "the periods of those reënlistments . . . but I can't recall about it."

tion Hospital, California, during a six weeks period early in 1920. The chaplain's testimony gives strong evidence the man he observed was insane. However, there is a fatal weakness in this evidence. In his direct testimony, which was taken by deposition, the chaplain said he was certain that the soldier was petitioner. When confronted with the undisputed fact that petitioner was on active duty in the Navy during the first half of 1920, the witness at first stated that he might have been mistaken as to the time of his observation. Subsequently he reasserted the accuracy of his original statement as to the time of observation, but admitted that he might have been mistaken in believing that the patient-prisoner was petitioner. In this connection he volunteered the statement, "Might I add, sir, that I could not now identify that soldier if I were to meet him face to face, and that is because of the long lapse of time." The patient whom the witness saw was confined to his bed. The record is barren of other evidence, whether by the hospital's or the Army's records or otherwise, to show that petitioner was either patient or prisoner at Fort MacArthur in 1920 or at any other time.

Commander Platt testified that petitioner caused considerable trouble by disobedience and leaving ship without permission during his naval service in the first half of 1920. After "repeated warnings and punishments, leading to courts martial," he was sentenced to a bad conduct discharge.

Lt. Col. James E. Matthews (not the chaplain) testified by deposition which petitioner's attorney interrupted Dr. Wilder's testimony to read into evidence. The witness was Galloway's commanding officer from early 1921 to the summer of that year, when petitioner was transferred with other soldiers to another unit. At first, Colonel Matthews considered making petitioner a corporal, but found him unreliable and had to discipline him. Petitioner "drank

considerably," was "what we called a bolshevik," did not seem loyal, and "acted as if he was not getting a square deal." The officer concluded "he was a moral pervert and probably used narcotics," but could not secure proof of this. Galloway was court-martialed for public drunkenness and disorderly conduct, served a month at hard labor, and returned to active duty. At times he "was one of the very best soldiers I had," at others undependable. He was physically sound, able to do his work, perform close order drill, etc., "very well." He had alternate periods of gaiety and depression, talked incoherently at times, gave the impression he would fight readily, but did not resent orders and seemed to get along well with other soldiers. The officer attributed petitioner's behavior to alcohol and narcotics, and it occurred to him at no time to question his sanity.

Dr. Wilder was the key witness. He disclaimed specializing in mental disease, but qualified as having given it "special attention." He first saw petitioner shortly before the trial, examined him "several times." He concluded petitioner's ailment "is a schizophrenic branch or form of praecox." Dr. Wilder heard the testimony and read the depositions of the other witnesses, and examined the documentary evidence. Basing his judgment upon this material, with inferences drawn from it, he concluded petitioner was born with "an inherent instability," though he remained normal until he went to France; began there "to be subjected to the strain of military life, then he began to go to pieces." In May, 1919, petitioner "was still suffering from the acuteness of the breakdown . . . He is going down hill still, but the thing began with the breakdown . . ." Petitioner was "definitely insane, yes, sir," in 1920 and "has been insane at all times, at least since July, 1918, the time of this episode on the Marne"; that is, "to the point that he was unable to adapt himself. I don't mean he has not had moments when he could not [*sic*] perform some routine tasks," but "from an occupa-

tional standpoint . . . he has been insane." He could follow "a mere matter of routine," but would have no incentive, would not keep a steady job, come to work on time, or do anything he didn't want to do. Dr. Wilder pointed to petitioner's work record before he entered the service and observed: "At no time after he went into the war do we find him able to hold any kind of a job. He broke right down." He explained petitioner's enlistment in the Navy and later in the Army by saying, "It would have been no trick at all *for a man who was reasonably conforming* to get into the Service." (Emphasis added.)

However, the witness knew "nothing whatever except his getting married" about petitioner's activities between 1925 and 1930, and what he knew of them between 1922 and 1925 was based entirely on O'Neill's testimony and a paper not of record here.[7] Dr. Wilder at first regarded knowledge concerning what petitioner was doing between 1925 and 1930 as not essential. "We have a continuing disease, quite obviously beginning during his military service, and quite obviously continuing in 1930, and *the minor incidents* don't seem to me——" (Emphasis added.) Counsel for the government interrupted to inquire, "Well, if he was continuously employed for eight hours a day from 1925 to 1930 would that have any bearing?" The witness replied, "It would have a great deal." Upon further questioning, however, he reverted to his first position, stating it would not be necessary or helpful for him to know what petitioner was doing from 1925 to 1930: "I testified from the information I had."

II.

This, we think, is the crux of the case and distinguishes it from the cases on which petitioner has relied.[8] His bur-

[7] It is to be noted the witness did not refer to Chaplain Mathews' testimony.

[8] None of them exhibits a period of comparable length as to which evidence is wholly lacking and under circumstances which preclude inference the omission was unintentional.

den was to prove total and permanent disability as of a date not later than May 31, 1919. He has undertaken to do this by showing incipience of mental disability shortly before that time and its continuance and progression throughout the succeeding years. He has clearly established incidence of total and permanent disability as of some period prior to 1938, when he began this suit.[9] For our purposes this may be taken as medically established by the Veterans' Bureau examination and diagnosis of July, 1934.[10]

But if the record is taken to show that some form of mental disability existed in 1930, which later became total and permanent, petitioner's problem remains to demonstrate by more than speculative inference that this condition itself began on or before May 31, 1919, and con-

[9] He has not established a fixed date at which contemporaneous medical examination, both physical and mental, establishes totality and permanence prior to Dr. Wilder's examinations in 1941.

Dr. Wilder testified that on the evidence concerning petitioner's behavior at the time of his discharge in 1919, and without reference to the testimony as to later conduct, including O'Neill's, he would reserve his opinion on whether petitioner was then "crazy"—"I wouldn't have enough—"

[10] The previous examinations of 1930 and 1931 show possibility of mental disease in the one case and existence of psychosis with other disease, organic in character but with type undetermined, in the other. These two examinations without more do not prove existence of total and permanent disability; on the contrary, they go far toward showing it could not be established then medically.

The 1930 diagnosis shows only that the examiner regarded petitioner as a moron of low grade, and recommended he be observed for simple dementia praecox. Dr. Wilder found no evidence in 1941 that petitioner was a moron. The 1931 examination is even less conclusive in one respect, namely, that "psychosis" takes the place of moronic status. Dr. Wilder also disagreed with this diagnosis. However, this examination first indicates existence of organic nervous disease. Not until the 1934 diagnosis is there one which might be regarded as showing possible total and permanent disability by medical evidence contemporaneous with the fact.

tinuously existed or progressed through the intervening years to 1930.

To show origin before the crucial date, he gives evidence of two abnormal incidents occurring while he was in France, one creating the disturbance before he came near the fighting front, the other yelling that the Germans were coming when he was on guard duty at the Marne. There is no other evidence of abnormal behavior during his entire service of more than a year abroad.

That he was court-martialed for these sporadic acts and bound and gagged for one does not prove he was insane or had then a general breakdown in "an already fragile mental constitution," which the vicissitudes of a longshoreman's life had not been able to crack.

To these two incidents petitioner adds the testimony of O'Neill that he looked and acted like a wreck, compared with his former self, when he returned from France about a month before the crucial date, and O'Neill's vague recollections that this condition continued through the next two, three, four, or five years.

O'Neill's testimony apparently takes no account of petitioner's having spent 101 days in a hospital in France with influenza just before he came home. But, given the utmost credence, as is required, it does no more than show that petitioner was subject to alternating periods of gaiety and depression for some indefinite period after his return, extending perhaps as late as 1922. But because of its vagueness as to time, dates, frequency of opportunity for observation, and specific incident, O'Neill's testimony concerning the period from 1922 to 1925 is hardly more than speculative.

We have then the two incidents in France, followed by O'Neill's testimony of petitioner's changed condition in 1919 and its continuance to 1922.[11] There is also the

[11] Chaplain Mathews' testimony would be highly probative of insanity existing early in 1920, if petitioner were sufficiently identified as its subject. However, the bare inference of identity which might other-

testimony of Commander Platt and Lt. Col. James E. Matthews as to his service in the Navy and the Army, respectively, during 1920–1922. Neither thought petitioner was insane or that his conduct indicated insanity. Then follows a chasm of eight years. The only evidence [12] we have concerning this period is the fact that petitioner married his present guardian at some time within it, an act from which in the legal sense no inference of insanity can be drawn.

This period was eight years of continuous insanity, according to the inference petitioner would be allowed to have drawn. If so, he should have no need of inference. Insanity so long and continuously sustained does not hide itself from the eyes and ears of witnesses.[13] The assidu-

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wise be drawn from the mere identity of names cannot be made reasonably, in view of its overwhelming contradiction by other evidence presented by petitioner and the failure to produce records from Fort MacArthur Hospital or the Army or from persons who knew the fact that petitioner had been there at any time. The omission eloquently testifies, in a manner which no inference could overcome, that petitioner never was there. The chaplain's testimony therefore should have been stricken, had the case gone to the jury, and petitioner can derive no aid from it here.

Tanikawa, it may be recalled, did not profess to have seen petitioner between October, 1918, and 1936.

[12] Apart from O'Neill's vague recollection of petitioner's return to Philadelphia on one occasion.

[13] The only attempt to explain the absence of testimony concerning the period from 1922 to 1930 is made by counsel in the reply brief: "The insured, it will be observed, was never apprehended after his desertion from the Army in 1922. It is only reasonable that a person with the status of a deserter at large . . ., whose mind was in the condition of that of this insured, would absent himself from those with whom he would usually associate because of fear of apprehension and punishment. His mental condition . . . at the time of trial . . . clearly shows that he could not have testified. . . . A lack of testimony from 1922 to 1930 is thus explained, and the jury could well infer that only the then [1941?] admittedly insane insured was in a position to know where he was and what he was doing during

ity which produced the evidence of two "crazy" incidents during a year and a half in France should produce one during eight years or, for that matter, five years in the United States.

Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this. Knowledge of petitioner's activities and behavior from 1922 or 1925 to 1930 was peculiarly within his ken and that of his wife, who has litigated this cause in his and presumably, though indirectly, in her own behalf. His was the burden to show continuous disability. What he did in this time, or did not do, was vital to his case. Apart from the mere fact of his marriage, the record is blank for five years and almost blank for eight. For all that appears, he may have worked full time and continuously for five and perhaps for eight, with only a possible single interruption.[14]

No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. That is shown by the thoroughness with which the record was prepared for all other periods, before and after this one, and by the fact petitioner's wife, though she married him during the period and was available, did not testify. The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since

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these years; as he had lost his mental faculties, the reason for lack of proof during these years is apparent."

The "explanation" is obviously untenable. It ignores the one fact proved with relation to the period, that petitioner was married during it. His wife was nominally a party to the suit, and obviously available as a witness. It disregards the fact petitioner continued in the status of deserter after 1930, yet produced evidence relating to the period from that time on. It assumes he was insane during the eight years, yet succeeded during that long time in absenting himself from persons who could testify in his favor.

[14] *Cf.* note 12, *supra.*

such matters, including tactical ones, are for the judgment of counsel), to present no evidence or perhaps to withhold evidence readily available concerning this long interval, and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand.[15] To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof. Furthermore, the inference would be more plausible perhaps if the evidence of insanity as of May, 1919, were stronger than it is, such for instance as Chaplain Mathews' testimony would have furnished if it could be taken as applying to petitioner. But, on this record, the evidence of insanity as of that time is thin at best, if it can be regarded as at all more than speculative.[16]

Beyond this, there is nothing to show totality or permanence. These come only by what the Circuit Court of Appeals rightly characterized as "long-range retroactive diagnosis." That might suffice, notwithstanding this crucial inference was a matter of opinion, if there were factual evidence over which the medical eye could travel and find continuity through the intervening years. Cf. *Halliday* v. *United States, supra.* But eight years are too many to permit it to skip, when the bridgeheads (if the figure may be changed) at each end are no stronger than

[15] Compare *Bishop* v. *Copp,* 96 Conn. 571, 580, 114 A. 682; *Murphree* v. *Senn,* 107 Ala. 424, 18 So. 264; *Aldrich* v. *Aldrich,* 215 Mass. 164, 102 N. E. 487.

[16] *Cf.* Dr. Wilder's admission, note 9, *supra.*

they are here, and when the seer first denies, then admits, then denies again, that what took place in this time would make "a great deal" of difference in what he saw. Expert medical inference rightly can do much. But we think the feat attempted here too large for its accomplishment.

The Circuit Court of Appeals thought petitioner's enlistments and service in the Navy and Army in 1920–1922 were in themselves "such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy." 130 F. 2d 471; cf. *Atkins* v. *United States,* 63 App. D. C. 164, 70 F. 2d 768, 771; *United States* v. *Le Duc,* 48 F. 2d 789, 793 (C. C. A.). The opinion also summarizes and apparently takes account of the evidence presented on behalf of the Government. 130 F. 2d 469, 470. In view of the ground upon which we have placed the decision, we need not consider these matters.

III.

What has been said disposes of the case as the parties have made it. For that reason perhaps nothing more need be said. But objection has been advanced that, in some manner not wholly clear, the directed verdict practice offends the Seventh Amendment.

It may be noted, first, that the Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.[17] Whatever force the

[17] Neither the Amendment's terms nor its history suggest it was intended to extend to such claims. The Court of Claims has functioned for almost a century without affording jury trial in cases of this sort and without offending the requirements of the Amendment. *McElrath* v. *United States,* 102 U. S. 426; see Richardson, History, Jurisdic-

Amendment has therefore is derived because Congress, in the legislation cited,[18] has made it applicable. Even so, the objection made on the score of its requirements is untenable.

If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.[19] More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry* v. *United States,* 312 U. S. 450. The objection therefore comes too late.

Furthermore, the argument from history is not convincing. It is not that "the rules of the common law" in 1791 deprived trial courts of power to withdraw cases from the

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tion and Practice of the Court of Claims (2d ed. 1885). *Cf.* also note 18, *infra.*

[18] 43 Stat. 1302, 38 U. S. C. § 445; see H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2; *Pence* v. *United States,* 316 U. S. 332, 334; *Whitney* v. *United States,* 8 F. 2d 476 (C. C. A.); *Hacker* v. *United States,* 16 F. 2d 702 (C. C. A.).

Although Congress, in first permitting suits on War Risk Insurance policies, did not explicitly make them triable by jury, 40 Stat. 398, 410, the statute was construed to import "the usual procedure . . . in actions at law for money compensation." *Law* v. *United States,* 266 U. S. 494, 496. In amending that Act, Congress provided that, except for differences not relevant here, the "procedure in such suits shall . . . be the same as that provided for suits" under the Tucker Act, 43 Stat. 607, 613. Suits under the Tucker Act were tried without a jury (24 Stat. 505). However, within a year (in 1925) Congress amended that Act (43 Stat. 1302) with the intention to "give the claimant the right to a jury trial." H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2.

[19] See *e. g., Parks* v. *Ross,* 11 How. 362; *Improvement Co.* v. *Munson,* 14 Wall. 442; *Pleasants* v. *Fant,* 22 Wall. 116; *Commissioners of Marion County* v. *Clark,* 94 U. S. 278; *Ewing* v. *Goode,* 78 F. 442 (C. C.); *cf. Southern Ry. Co.* v. *Walters,* 284 U. S. 190; *Gunning* v. *Cooley,* 281 U. S. 90.

jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons.[20] The argument concedes they weighed the evidence, not only piecemeal but *in toto* for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial. The objection is not therefore to the basic thing,[21] which is the power of the court to withhold cases from the jury or set aside the verdict for insufficiency of the evidence. It is rather to incidental or collateral effects, namely, that the directed verdict as now administered differs from both those procedures because, on the one hand, allegedly higher standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation. Apart from the standards of proof, the argument appears to urge that in 1791, a litigant could challenge his opponent's evidence, either by the demurrer, which when determined ended the litigation, or by motion for a new trial which, if successful, gave the adversary another chance to prove his case; and therefore the Amendment excluded any challenge to which one or the other of these consequences does not attach.

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.[22] Nor were "the rules of the

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[20] Compare, *e. g.*, 3 Gilbert, The Law of Evidence (1792) 1181–5; *Rex* v. *Paine*, 5 Mod. 163; *Folkes* v. *Chadd*, 3 Doug. 157.

[21] *Cf. Thoe* v. *Chicago, M. & St. P. Ry. Co.*, 181 Wis. 456, 195 N. W. 407.

[22] *Ex parte Peterson*, 253 U. S. 300; *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U. S. 593; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *cf.* Stone, J., dissenting in *Dimick* v. *Schiedt*, 293 U. S. 474.

common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.[23] In 1791 this process already had

490. The rules governing the admissibility of evidence, for example, have a real impact on the jury's function as a trier of facts and the judge's power to impinge on that function. Yet it would hardly be maintained that the broader rules of admissibility now prevalent offend the Seventh Amendment because at the time of its adoption evidence now admitted would have been excluded. *Cf. e. g., Funk* v. *United States,* 290 U. S. 371.

[23] *E. g.,* during the eighteenth and nineteenth centuries, the nonsuit was being transformed in practice from a device by which a plaintiff voluntarily discontinued his action in order to try again another day into a procedure by which a defendant could put in issue the sufficiency of the plaintiff's evidence to go to the jury, differing from the directed verdict in that respect only in form. Compare Blackstone's Commentaries, Book III (Cooley's ed., 1899) 376; Johnson, J., dissenting in *Elmore* v. *Grymes,* 1 Pet. 469 (1828); *Oscanyan* v. *Winchester Arms Co.,* 103 U. S. 261, 264; *Coughran* v. *Bigelow,* 164 U. S. 301; see the historical survey in the comprehensive opinion of McAllister, J., in *Hopkins* v. *Railroad,* 96 Tenn. 409, 34 S. W. 1029. See generally 2 Tidd's Practice (4th Amer. ed., 1856) 861, 866–8. The nonsuit, of course, differed in consequence from the directed verdict, for it left the plaintiff free to try again. *Oscanyan* v. *Winchester Arms Co., supra;* Tidd's Practice, *supra.*

Similarly the demurrer to the evidence practice was not static during this period, as a comparison of *Cocksedge* v. *Fanshaw,* 1 Doug. 118 (1779), with *Gibson* v. *Hunter,* 2 H. Bl. 187 (1793), and the American practice on the demurrer to the evidence reveals (see, *e. g., Stephens* v. *White,* 2 Wash. 203 (Va. 1796); *Patrick* v. *Hallett,* 1 Johns. 241 (N. Y. 1806); *Whittington* v. *Christian,* 2 Randolph 353 (Va. 1824). See, generally, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thayer, Preliminary Treatise on Evidence (1898) 234–9). Nor was the conception of directing a verdict entirely unknown to the eighteenth century common law . See, *e. g., Wilkinson* v. *Kitchin,* 1 Ld. Raymond 89 (K. B.); *Syderbottom* v. *Smith,* 1 Strange 649. While there is no reason to believe that the notion at that time

resulted in widely divergent common-law rules on procedural matters among the states, and between them and England.[24] And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form.[25] In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.[26]

This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.[27]

Apart from the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy, the consequences flowing from the view asserted are sufficient to refute it. It may be doubted that the Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered. On the other hand, there is equal room for disbelieving it

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even approximated in character the present directed verdict, the cases serve further to show the plastic and developing character of these procedural devices during the eighteenth and nineteenth centuries.

[24] See, *e. g.*, Quincy's Mass. Reports, 553–72.

[25] See note 23, *supra*.

[26] See, *e. g.*, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465.

[27] *Cf.* notes 22 and 23, *supra*.

compels endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials. The essential inconsistency of these alternatives would seem sufficient to refute that either or both, to the exclusion of all others, received constitutional sanctity by the Amendment's force. The first alternative, drawn from the demurrer to the evidence, attributes to the Amendment the effect of forcing one admission because another and an entirely different one is made,[28] and thereby compels conclusion of the litigation once and for all. The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended. The admitted validity of the practice on the motion for a new trial goes far to demonstrate this.[29] It negatives any idea

[28] By conceding the full scope of an opponent's evidence and asserting its insufficiency in law, which is one thing, the challenger must be taken, perforce the Amendment, also to admit he has no case, if the other's evidence is found legally sufficient, which is quite another thing. In effect, one must stake his case, not upon its own merit on the facts, but on the chance he may be right in regarding his opponent as wanting in probative content. If he takes the gamble and loses, he pays with his own case, regardless of its merit and without opportunity for the jury to consider it. To force this choice and yet deny that afforded by the directed verdict would be to imbed in the Constitution the hypertechnicality of common-law pleading and procedure in their heyday. *Cf.* note 22, *supra.*

[29] Under that practice the moving party receives the benefit of jury evaluation of his own case and of challenge to his opponent's for insufficiency. If he loses on the challenge, the litigation is ended. But

that the challenge must be made at such a risk as the demurrer imposed. As for the other alternative, it is not urged that the Amendment guarantees another trial whenever challenge to the sufficiency of evidence is sustained. Cf. *Berry* v. *United States, supra.* That argument, in turn, is precluded by the practice on demurrer to the evidence.

Each of the classical modes of challenge, therefore, disproves the notion that the characteristic feature of the other, for effect upon continuing the litigation, became a part of the Seventh Amendment's guaranty to the exclusion of all others. That guaranty did not incorporate conflicting constitutional policies, that challenge to an opposing case must be made with the effect of terminating the litigation finally and, at the same time, with the opposite effect of requiring another trial. Alternatives so contradictory give room, not for the inference that one or the other is required, but rather for the view that neither is essential.[30]

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this is not because, in making it, he is forced to admit his own is insufficient. It is rather for the reasons that the court finds the opposite party's evidence is legally sufficient and the jury has found it outweighs his own. There is thus no forced surrender of one right from assertion of another.

On the other hand, if the challenger wins, there is another trial. But this is because he has sought it, not because the Amendment guarantees it.

[30] We have not given special consideration to the latest decisions touching the Amendment's effects in the different situations where a verdict has been taken, on the one hand, without reservation of the question of the sufficiency of the evidence, *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and, on the other hand, with such a reservation, *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654. Cf. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389. Whatever may be the exact effect of the latter and, more recently, of Rule 50 of the Federal Rules of Civil Procedure upon the former decision, it suffices to say that, notwithstanding the sharp division engendered in the Slocum case, there was no disagreement in it or in the Redman case concerning the validity

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises.[31] Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence[32] or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed.[33] If there is abuse in this respect, the obvious remedy is by correction on appellate review.

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of the practice of directing a verdict. On the contrary, the opinions make it plain that this was unquestioned and in fact conceded by all.

[31] *Cf.* 9 Wigmore, Evidence (1940) 296–299.

[32] *Cf. e. g. Fowle* v. *Alexandria,* 11 Wheat. 320, 323 (1826), a demurrer to the evidence admits "whatever the jury may reasonably infer from the evidence." *Pawling* v. *United States,* 4 Cranch 219, 221–222 (1808). A demurrant to the evidence admits "the truth of the testimony to which he demurs and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken jecture, or licentious speculation, could induce the jury to pronounce fiably draw, the court ought to draw." *Cocksedge* v. *Fanshaw, supra; Patrick* v. *Hallett, supra; Stephens* v. *White, supra.*

[33] *Cf.* Hughes, J., dissenting in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 408, and cases cited *supra,* note 22.

Judged by this requirement, or by any standard other than sheer speculation, we are unable to conclude that one whose burden, by the nature of his claim, is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available, and, further, throws no light upon three additional years, except for one vaguely described and dated visit to his former home. Nothing in the Seventh Amendment requires it should be allowed to join forces with the jury system to bring about such a result. That guaranty requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. It permits expert opinion to have the force of fact when based on facts which sustain it. But it does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but elects to keep it so. The words "total and permanent" are the statute's, not our own. They mean something more than incipient or occasional disability. We hardly need add that we give full credence to all of the testimony. But that cannot cure its inherent vagueness or supply essential elements omitted or withheld.

Accordingly, the judgment is

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur, dissenting:

The Seventh Amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall

be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty.[1] For this reason, among others, they adopted Article III, § 2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.

I.

Alexander Hamilton in The Federalist emphasized his loyalty to the jury system in civil cases and declared that jury verdicts should be re-examined, if at all, only "by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court." He divided the citizens of his time between those who thought that

[1] "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson (Washington ed.) 71.

The operation of the jury trial system in civil cases has been subject to careful analysis; Clark and Shulman, Jury Trial in Civil Cases, 43 Yale L. Jour. 867; Harris, Is the Jury Vanishing, 7 N. Y. U. L. Q. 657. Its utility has been sharply criticized; Pound, Jury—England and United States, 8 Encyclopedia of the Social Sciences 492; Mr. Justice Miller, The System of Trial by Jury, 21 American L. Rev. 859 (1887). On the other hand, this Court has on occasion warmly praised this mode of trial: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *New York*, 315 U. S. 752.

jury trial was a "valuable safeguard to liberty" and those who thought it was "the very palladium of free government." However, he felt it unnecessary to include in the Constitution a specific provision placing jury trial in civil cases in the same high position as jury trial in criminal cases.[2]

Hamilton's view, that constitutional protection of jury trial in civil cases was undesirable, did not prevail. On the contrary, in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment.[3] The first Congress expected the Seventh Amendment to meet the objections of men like Patrick Henry to the Constitution itself. Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom. . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed.*"[4] The first Congress, therefore,

[2] For Hamilton's views on the place of the jury in the Constitution, see The Federalist, Nos. 81 and 83.

[3] "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford*, 3 Pet. 433, 446. Of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases. Documents Illustrative of the Formation of the Constitution, House Doc. No. 398, 69th Cong., 1st Sess., pp. 1019 (Massachusetts), 1026 (New Hampshire), 1029 (Virginia), 1036 (New York), 1046 (North Carolina), 1054 (Rhode Island).

[4] 3 Elliott's Debates, 324, 544. Emphasis added.

provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself. 1 Stat. 73, 81.

In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal [5] and civil cases the arbiters not only of fact but of law. Less than three years after the ratification of the Seventh Amendment, this Court called a jury in a civil case brought under our original jurisdiction. There was no disagreement as to the facts of the case. Chief Justice Jay, charging the jury for a unanimous Court, three of whose members had sat in the Constitutional Convention, said: "For as, on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable that the court are the best judges of law. But still, both objects are lawfully within your power of decision." *Georgia* v. *Brailsford,* 3 Dall. 1, 4. Similar views were held by state courts in Connecticut, Massachusetts, Illinois, Louisiana and presumably elsewhere.[6]

The principal method by which judges prevented cases from going to the jury in the Seventeenth and Eighteenth Centuries was by the demurrer to the evidence, under

[5] The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in *Sparf* v. *United States,* 156 U. S. 51, when the subject was exhaustively discussed. See also Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582. This jury privilege was once considered of high value; in fact, a principal count in the impeachment proceedings against Justice Chase in 1805 was that he had denied to a jury the right to determine both the law and the fact in a criminal case—a charge which Justice Chase denied. Report of Trial of Hon. Samuel Chase (1805), appendix p. 17. This privilege is still at least nominally retained for the jury in some states. Howe, 614. For a late 19th Century statement of this view see *Kane* v. *Commonwealth,* 89 Pa. St. 522 (1879).

[6] See Howe, *supra,* pp. 597, 601, 605, 610; *Coffin* v. *Coffin,* 4 Mass. 1, 25; Thayer on Evidence (1898 ed.) 254. And see Lectures given by Justice Wilson as Professor of Law at the College of Philadelphia in 1790 and 1792, Thayer, 254, and *Sparf* v. *United States, supra,* at 158.

which the defendant at the end of the trial admitted all facts shown by the plaintiff as well as all inferences which might be drawn from the facts, and asked for a ruling of the Court on the "law of the case." [7] See for example *Wright* v. *Pindar,* (1647) Aleyn 18 and *Pawling* v. *United States,* 4 Cranch 219. This practice fell into disuse in England in 1793, *Gibson* v. *Hunter,* 2 H. Bl. 187, and in the United States federal courts in 1826, *Fowle* v. *Alexandria,* 11 Wheat. 320. The power of federal judges to comment to the jury on the evidence gave them additional influence. *M'Lanahan* v. *Universal Insurance Co.,* 1 Pet. 170 (1828). The right of involuntary non-suit of a plaintiff, which might have been used to expand judicial power at jury expense was at first denied federal courts. *Elmore* v. *Grymes,* 1 Pet. 469; *DeWolf* v. *Rabaud,* 1 Pet. 476; but cf. *Coughran* v. *Bigelow,* 164 U. S. 301 (1896).

As Hamilton had declared in The Federalist, the basic judicial control of the jury function was in the court's power to order a new trial.[8] In 1830, this Court said: "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo,* by an appellate court, for some error of law which intervened in the proceedings." *Parsons* v. *Bedford, supra, at* 448.[9] That retrial by a new jury rather than fac-

[7] I assume for the purpose of this discussion without deciding the point that the adoption of the Seventh Amendment was meant to have no limiting effect on the contemporary demurrer to evidence practice.

[8] A method used in early England of reversal of a jury verdict by the process of attaint which required a review of the facts by a new jury of twenty-four and resulted in punishment of the first jury for its error, had disappeared. Plucknett, A Concise History of the Common Law (2d ed.), 121.

[9] It is difficult to describe by any general proposition the circumstances under which a new trial would be allowed under early practice, since each case was so dependent on its peculiar facts. The early Pennsylvania rule was put as follows: "New trials are frequently neces-

tual reëvaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364.[10]

A long step toward the determination of fact by judges instead of by juries was the invention of the directed verdict.[11] In 1850, what seems to have been the first directed

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sary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted without solid and substantial reasons; otherwise the province of jurymen might be often transferred to the judges, and *they* instead of the jury, would become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But, whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages; the Court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties." *Cowperthwaite* v. *Jones*, 2 Dall. 55 (Phila. Ct. Cmn. Pleas 1790). For expressions in substantial accord, see *Maryland Insurance Co.* v. *Ruden's Administrator*, 6 Cranch 338, 340; *M'Lanahan* v. *Universal Insurance Co.*, 1 Pet. 170, 183. For similar State practice, see *Utica Insurance Co.* v. *Badger*, 3 Wend. 102 (1829); *New York Firemen Insurance Co.* v. *Walden*, 12 Johns. 513 (1815). The motion for new trial was addressed to the discretion of the trial judge and was not reviewable in criminal or civil cases. *United States* v. *Daniel*, 6 Wheat. 542, 548; *Brown* v. *Clarke*, 4 How. 4, 15. The number of new trials permitted in a given case were usually limited to two or three; see e. g. *Louisville & Nashville R. Co.* v. *Woodson*, 134 U. S. 614. The power of the judge was thus limited to his authority to return the case to a new jury for a new decision.

[10] Cf. *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654; *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389. See Rule 50 (b) of the Rules of Civil Procedure; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243; *Berry* v. *United States*, 312 U. S. 450.

[11] I do not mean to minimize other forms of judicial control. In a summary of important techniques of judicial domination of the jury, Thayer lists the following: control by the requirement of a "reasonable judgment"—i. e., one satisfactory to the judge; control of the rules

verdict case considered by this Court, *Parks* v. *Ross*, 11 How. 362, was presented for decision. The Court held that the directed verdict serves the same purpose as the demurrer to the evidence, and that since there was "no evidence whatever" [12] on the critical issue in the case, the directed verdict was approved.[13] The decision was an innovation, a departure from the traditional rule restated only fifteen years before in *Greenleaf* v. *Birth*, 9 Pet. 292, 299 (1835), in which this Court had said: "Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

This new device contained potentialities for judicial control of the jury which had not existed in the demurrer to the evidence. In the first place, demurring to the evi-

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of "presumption," cf. the dissenting opinion in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 172; the control of the "definition of language"; the control of rules of practice, and forms of pleading ("It is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions. Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts. . . . Considerations of policy have called louder for leaving to the jury a freer hand." 218); the control of "mixed questions of law and fact"; the control of factual decisions by appellate courts. Thayer on Evidence (1898 ed.) p. 208 *et seq.*

[12] Counsel seeking the directed verdict said: "This prerogative of the court is never exercised, but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild, irrational conjecture, or licentious speculation, could induce the jury to pronounce the verdict which is sought at their hands." *Parks* v. *Ross*, *supra*, at 372.

[13] See also, *Pleasants* v. *Fant*, 22 Wall. 116 (1874); *Oscanyan* v. *Arms Co.*, 103 U. S. 261 (1880); and *Baylis* v. *Travellers' Insurance Co.*, 113 U. S. 316 (1884). For an excellent discussion of the history of the directed verdict, see Hackett, Has a Trial Judge of a United States Court the Right to Direct a Verdict?, 24 Yale L. Jour. 127.

dence was risky business, for in so doing the party not only admitted the truth of all the testimony against him but also all reasonable inferences which might be drawn from it; and upon joinder in demurrer the case was withdrawn from the jury while the court proceeded to give final judgment either for or against the demurrant. *Hopkins* v. *Railroad,* 96 Tenn. 409, 34 S. W. 1029; *Suydam* v. *Williamson,* 20 How. 427, 436; *Bass* v. *Rublee,* 76 Vt. 395, 400, 57 A. 965. Imposition of this risk was no mere technicality; for by making withdrawal of a case from the jury dangerous to the moving litigant's cause, the early law went far to assure that facts would never be examined except by a jury. Under the directed verdict practice, the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury. The litigant not only takes no risk by a motion for a directed verdict, but in making such a motion gives himself two opportunities to avoid the jury's decision; for under the federal variant of judgment notwithstanding the verdict, the judge may reserve opinion on the motion for a directed verdict and then give judgment for the moving party after the jury has formally found against him.[14] In the second place, under the directed verdict practice the courts soon abandoned the "admission of all facts and reasonable inferences" standard referred to, and created the so-called "substantial evidence" rule which permitted directed verdicts even though there was far more evidence in the case than a plaintiff would have needed to withstand a demurrer.

The substantial evidence rule did not spring into existence immediately upon the adoption of the directed verdict device. For a few more years[15] federal judges

[14] Rule 50 (b) of the Rules of Civil Procedure and note 10, *supra.*

[15] In the period of the Civil War, the formula changed slightly but its effect was the same—if the evidence so much as "tended to prove

held to the traditional rule that juries might pass finally on facts if there was "any evidence" to support a party's contention. The rule that a case must go to the jury unless there was "no evidence" was completely repudiated in *Improvement Co.* v. *Munson,* 14 Wall. 442, 447 (1871), upon which the Court today relies in part. There the Court declared that "some" evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks "a jury can properly proceed." The traditional rule was given an ugly name, "the scintilla rule," to hasten its demise. For a time, traces of the old formula remained, as in *Randall* v. *B. & O. R. Co.,* 109 U. S. 478, but the new spirit prevailed. See for example *Pleasants* v. *Fant, supra,* and *Commissioners* v. *Clark,* 94 U. S. 278. The same transition from jury supremacy to jury subordination through judicial decisions took place in state courts.[16]

Later cases permitted the development of added judicial control.[17] New and totally unwarranted formulas, which should surely be eradicated from the law at the first opportunity, were added as recently as 1929 in *Gunning* v. *Cooley,* 281 U. S. 90, which, by sheerest dictum, made new encroachments on the jury's constitutional functions. There it was announced that a judge might weigh the evidence to determine whether he, and not the jury,

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the position" of the party, the case was for the jury. *Drakely* v. *Gregg,* 8 Wall. 242, 268; *Hickman* v. *Jones,* 9 Wall. 197, 201; *Barney* v. *Schmeider,* 9 Wall. 248, 253. Cf. *United States* v. *Breitling,* 20 How. 252; *Goodman* v. *Simonds,* 20 How. 343, 359.

[16] For examples of early respect for juries, see *Morton* v. *Fairbanks,* 11 Pick. 368 (1831); *Way* v. *Illinois Central R. Co.,* 35 Iowa 585 (1873). For the development in Illinois, see 8 Ill. L. Rev. 287, 481–486. For the Pennsylvania development, compare *Fitzwater* v. *Stout,* 16 Pa. St. 22, and *Thomas* v. *Thomas,* 21 Pa. St. 315, with *Hyatt* v. *Johnston,* 91 Pa. St. 196, 200.

[17] One additional device was the remittitur practice which gives the court a method of controlling jury findings as to damages. *Arkansas Valley Co.* v. *Mann,* 130 U. S. 69.

thought it was "overwhelming" for either party, and then direct a verdict. Cf. *Pence* v. *United States,* 316 U. S. 332, 340. *Gunning* v. *Cooley,* at 94, also suggests, quite unnecessarily for its decision, that "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." This dictum, which assumes that a judge can weigh conflicting evidence with mathematical precision and which wholly deprives the jury of the right to resolve that conflict, was applied in *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333. With it, and other tools, jury verdicts on disputed facts have been set aside or directed verdicts authorized so regularly as to make the practice commonplace, while the motion for directed verdict itself has become routine. See for example *Southern Railway Co.* v. *Walters,* 284 U. S. 190; *Atlantic Coast Line* v. *Temple,* 285 U. S. 143; *Lumbra* v. *United States,* 290 U. S. 551; *Pence* v. *United States, supra;* and *De Zon* v. *United States,* 318 U. S. 660.

Even *Gunning* v. *Cooley,* at 94, acknowledged that "issues that depend on the credibility of witnesses . . . are to be decided by the jury." [18] Today the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it.

The story thus briefly told depicts the constriction of a constitutional civil right and should not be continued.

[18] In *Ewing* v. *Burnet,* 11 Pet. 41, 51, this Court said: "It was also their [the jury's] province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked, must depend upon the opinion of the court, on a finding by the jury in favour of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff."

Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: "Such a reversal of opinion [as that of a particular state court concerning the jury function], if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration for democratic government,[19] and the judiciary's desire for the orderly supervision of public affairs by judges." [20]

The language of the Seventh Amendment cannot easily be improved by formulas.[21] The statement of a district judge in *Tarter* v. *United States*, 17 F. Supp. 691, 692–693, represents, in my opinion, the minimum meaning of the Seventh Amendment:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial

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[19] Another phase of this same conflict arises in the use of judicial power to punish for contempt of court without allowance of jury trial. Nelles and King, Contempt by Publication, 28 Col. L. Rev. 400, 524, and, for a sharp indictment of the free use of contempt jurisdiction as basically undemocratic, 553; *Nye* v. *United States*, 313 U. S. 33; *Bridges* v. *California*, 314 U. S. 252.

[20] Howe, *supra*, 615, 616. Howe continues: "What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result."

[21] This Court has said of one type of case in *Richmond & Danville R. Co.* v. *Powers*, 149 U. S. 43, 45 (1893): "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials."

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right." So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeals are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances.

II.

The factual issue for determination here is whether the petitioner incurred a total and permanent disability not later than May 31, 1919. It is undisputed that the petitioner's health was sound in 1918, and it is evidently conceded that he was disabled at least since 1930. When, in the intervening period, did the disability take place?

A doctor who testified diagnosed the petitioner's case as a schizophrenic form of dementia praecox. He declared it to be sound medical theory that while a normal man can retain his sanity in the face of severe mental or physical shock, some persons are born with an inherent instability so that they are mentally unable to stand sudden and severe strain. The medical testimony was that this petitioner belongs to the latter class and that the shock of actual conflict on the battle front brought on the incurable affliction from which he now suffers. The medical witness testified that the dominant symptoms of the condition are extreme introversion and preoccupation with personal interests, a persecution complex, and an emotional instability which may be manifested by extreme exhilaration alternating with unusual depression or irrational outbursts. Persons suffering from this disease are therefore unable to engage in continuous employment.

The petitioner relies on the testimony of wartime and postwar companions and superiors to show that his present mental condition existed on the crucial date. There is substantial testimony from which reasonable men might conclude that the petitioner was insane from the date claimed.

Two witnesses testify as to the petitioner's mental irresponsibility while he was in France. The most striking incident in this testimony is the account of his complete breakdown while on guard duty as a result of which he falsely alarmed his military unit by screaming that the

Germans were coming when they were not and was silenced only by being forceably bound and gagged. There was also other evidence that Galloway became nervous, irritable, quarrelsome and turbulent after he got to France. The Court disposes of this testimony, which obviously indicates some degree of mental unbalance, by saying no more than that it "does not prove he was insane." No reason is given, nor can I imagine any, why a jury should not be entitled to consider this evidence and draw its own conclusions.

The testimony of another witness, O'Neill, was offered to show that the witness had known the petitioner both before and after the war, and that after the war the witness found the petitioner a changed man; that the petitioner imagined that he was being persecuted; and that the petitioner suffered from fits of melancholia, depression and weeping. If O'Neill's testimony is to be believed, the petitioner suffered the typical symptoms of a schizophreniac for some years after his return to this country; therefore if O'Neill's testimony is believed, there can be no reasonable doubt about the right of a jury to pass on this case. The Court analyzes O'Neill's testimony for internal consistency, criticizes his failure to remember the details of his association with the petitioner fifteen years before his appearance in this case, and concludes that O'Neill's evidence shows no more than that "petitioner was subject to alternating periods of gaiety and depression for some indefinite period." This extreme emotional instability is an accepted symptom of the disease from which the petitioner suffers. If he exhibited the same symptoms in 1922, it is, at the minimum, probable that the condition has been continuous since an origin during the war. O'Neill's testimony coupled with the petitioner's present condition presents precisely the type of question which a jury should resolve.

The petitioner was in the Navy for six months in 1920, until he was discharged for bad conduct; and later was in the Army during 1921 and a part of 1922, until he deserted. The testimony of his Commanding Officer while he was in the Army, Col. Matthews, is that the petitioner had "periods of gaiety and exhilaration" and was then "depressed as if he had had a hangover"; that petitioner tried to create disturbances and dissatisfy the men; that he suffered from a belief that he was being treated unfairly; and that generally his actions "were not those of a normal man." The Colonel was not a doctor and might well not have recognized insanity had he seen it; as it was, he concluded that the petitioner was an alcoholic and a narcotic addict. However, the officer was unable, upon repeated investigations, to discover any actual use of narcotics. A jury fitting this information into the general pattern of the testimony might well have been driven to the conclusion that the petitioner was insane at the time the Colonel had him under observation.

All of this evidence, if believed, showed a man, healthy and normal before he went to the war, suffering for several years after he came back from a disease which had the symptoms attributed to schizophrenia and who was insane from 1930 until his trial. Under these circumstances, I think that the physician's testimony of total and permanent disability by reason of continuous insanity from 1918 to 1938 was reasonable. The fact that there was no direct testimony for a period of five years, while it might be the basis of fair argument to the jury by the Government, does not, as the Court seems to believe, create a presumption against the petitioner so strong that his case must be excluded from the jury entirely. Even if during these five years the petitioner was spasmodically employed, we could not conclude that he was not totally and permanently disabled. *Berry* v. *United States,* 312 U. S. 450, 455. It is not doubted that

schizophrenia is permanent even though there may be a momentary appearance of recovery.

The court below concluded that the petitioner's admission into the military service between 1920 and 1923 showed conclusively that he was not totally and permanently disabled. Any inference which may be created by the petitioner's admission into the Army and the Navy is more than met by his record of court-martial, dishonorable discharge, and desertion, as well as by the explicit testimony of his Commanding Officer, Colonel Matthews.

This case graphically illustrates the injustice resulting from permitting judges to direct verdicts instead of requiring them to await a jury decision and then, if necessary, allow a new trial. The chief reason given for approving a directed verdict against this petitioner is that no evidence except expert medical testimony was offered for a five to eight year period. Perhaps, now that the petitioner knows he has insufficient evidence to satisfy a judge even though he may have enough to satisfy a jury, he would be able to fill this time gap to meet any judge's demand. If a court would point out on a motion for new trial that the evidence as to this particular period was too weak, the petitioner would be given an opportunity to buttress the physician's evidence. If, as the Court believes, insufficient evidence has been offered to sustain a jury verdict for the petitioner, we should at least authorize a new trial. Cf. *Garrison* v. *United States,* 62 F. 2d 41, 42.

I believe that there is a reasonable difference of opinion as to whether the petitioner was totally and permanently disabled by reason of insanity on May 31, 1919, and that his case therefore should have been allowed to go to the jury. The testimony of fellow soldiers, friends, supervisors, and of a medical expert whose integrity and ability is not challenged cannot be rejected by any process available to me as a judge.

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MATTON STEAMBOAT CO., INC. ET AL. *v.* MURPHY, ACTING INDUSTRIAL COMMISSIONER, ET AL.*

APPEAL FROM THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

No. 783. Argued May 5, 1943.—Decided June 1, 1943.

Section 350 of 28 U. S. C. provides that "no appeal . . . intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree." Rule 36 of the Rules of this Court provides that an appeal to this Court from a state court of last resort may be allowed "by the chief justice or presiding judge of the state court, or by a justice of this court." *Held:*

1. An appeal for which a timely application was made to the Chief Judge of the Court of Appeals of New York could have been allowed by him either before or after the expiration of the three months period. P. 414.

2. Within the three months period, application for appeal may be made to the state judge and a justice of this Court at the same time, when necessary to preserve the right of appeal. P. 414.

3. Where an application for appeal has been made to the state judge within the three months period and has been denied, a subsequent application to a justice of this Court, filed after the three months period has expired, is too late. P. 414.

Appeals dismissed.

APPEALS from a judgment, 289 N. Y. 119, 44 N. E. 2d 391 (entered in the Supreme Court, Appellate Division, on remittitur) sustaining the validity of the New York Unemployment Insurance Law. See also 263 App. Div. 756, 774; 30 N. Y. S. 2d 930, 32 N. Y. S. 2d 373.

Mr. Frank C. Mason, with whom *Messrs. H. Maurice Fridlund* and *Edward L. P. O'Connor* were on the brief, for appellants in No. 783. *Mr. Francis S. Bensel,* with

*Together with No. 813, *Lake Tankers Corp.* v. *Murphy, Acting Industrial Commissioner, et al.*, also on appeal from the Supreme Court of New York, Appellate Division, Third Department.

whom *Messrs. Hersey Egginton* and *Nicholas Kelley* were on the brief, for appellant in No. 813.

Mr. Orrin G. Judd, Solicitor General of New York, with whom *Messrs. Nathaniel L. Goldstein,* Attorney General, *William Gerard Ryan* and *Francis R. Curran,* Assistant Attorneys General, were on the brief, for appellees.

PER CURIAM.

In these cases appellants have sought to appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), from judgments of the New York courts sustaining the validity of the New York Unemployment Insurance Law (N. Y. Labor Law, § 500 *et seq.*). The applicable section, 28 U. S. C. § 350, provides that "no appeal . . . intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree."

The question for our decision is whether the appeals to this Court in these cases were timely. In each, within three months after the judgment of the Court of Appeals (see *Department of Banking* v. *Pink,* 317 U. S. 264), the appellant made timely application for allowance of the appeal to the Chief Judge of the New York Court of Appeals who, being in doubt as to the finality of the judgments, denied the applications shortly before the expiration of the three months period. On application to an Associate Justice of this Court, made shortly after the three months had expired, the appeals were allowed by him with the Court's approval, in order that we might resolve an unsettled question of our practice (see Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 717–18). When we set the cases for argument together with two companion cases, *Standard Dredging Corp.* v. *Murphy, ante,* p. 306, and *Interna-*

tional Elevating Co. v. *Murphy, ante,* p. 306, we requested counsel to discuss the question whether the appeals were "applied for within the time provided by law."

By Rule 36 of our Rules, an appeal to this Court from a state court of last resort may be allowed "by the chief justice or presiding judge of the state court, or by a justice of this court." But such an appeal may not be allowed when no application is made to the judge or justice authorized to allow it within the period prescribed by the statute. Here appellants' applications to the Chief Judge of the Court of Appeals were timely, and could have been allowed by him either before or after the expiration of the three months period. *Cardona* v. *Quiñones,* 240 U. S. 83; *Latham* v. *United States,* 131 U. S. Appendix, xcvii; *United States* v. *Vigil,* 10 Wall. 423, 427. The appeals could also have been allowed, on such timely applications, by a justice of this Court. And there is nothing in the statute or Rules to preclude application within the three months to both the state judge and a justice of this Court at the same time, where shortness of time makes that necessary to preserve the right of appeal. Cf. *Spies* v. *Illinois,* 123 U. S. 131, 142.

But when the Chief Judge of the Court of Appeals denied appellants' applications and disallowed the appeals, the applications were no longer pending before him and, at least in the absence of any reconsideration by him, appeals could be allowed only on a new application either to him or to a justice of this Court. The time within which such applications could be made is that prescribed by the statute. Its language is peremptory—"no appeal . . . shall be allowed or entertained unless application therefor be duly made within three months." The purport of the words is that the appeal allowed must be one that is applied for within the three months period. An application which has been made within that period and denied does not satisfy that requirement, nor does a later

application filed after the time limit has expired even though it be allowed.

The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period, by making application to one judge within the three months and upon its denial by applying successively to other judges even after the prescribed time for appeal had ended. Moreover, in such cases extension of the period for appeal could be limited only by recourse to the doctrine of laches applied in the particular circumstances of each case.

We conclude that appellants' applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly

Dismissed.

KELLEY ET AL. *v.* EVERGLADES DRAINAGE DISTRICT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 935. Decided June 1, 1943.

1. The record in this case lacks the findings of fact which § 83 (e) of the Bankruptcy Act and No. 37 of the General Orders in Bankruptcy require and which are necessary to enable this Court to determine whether the plan under Chapter IX of the Bankruptcy Act for composition of the debts of a Florida drainage district discriminates unfairly in favor of a particular class of creditors. P. 417.

2. That only a very small minority of creditors have objected to the plan does not relieve the courts of the duty of appraising its fairness, and of making the findings necessary to support such an appraisal. P. 418.
3. The nature and degree of exactness of the findings required in proceedings under Ch. IX depends on the circumstances of the particular case. P. 419.
4. Where future tax revenues of a drainage district are the only source to which creditors can look for payment of their claims, considered estimates of those revenues constitute the only available basis for appraising the respective interests of different classes of creditors. P. 419.
5. In order that a court may determine the fairness of the total amount of cash or securities offered to creditors by the plan, the court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors. P. 420.
6. Where different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. P. 420.

   To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated.
7. In a Ch. IX proceeding it is not the function of this Court to analyze the evidence in order to supply findings which the trial court failed to make; there must be findings, stated either in the trial court's opinion or separately, which are sufficient to indicate the factual basis for its ultimate conclusion. P. 421.

132 F. 2d 742, vacated.

PETITION for writ of certiorari to review the affirmance of a decree confirming a plan under Chapter IX of the Bankruptcy Act for the composition of indebtedness of the drainage district. The writ was granted and the judgment below was vacated.

Mr. Miller Walton was on the brief for petitioners.

Messrs. M. Lewis Hall, Alfred E. Sapp and *John D. McCall* were on the brief for respondent.

PER CURIAM.

In this case we are asked to review a plan for composition of the debts of respondent, a drainage district organized under the laws of Florida. The courts below have confirmed the plan under § 83 (e) of the Bankruptcy Act, 50 Stat. 653, 658, 11 U. S. C. § 403 (e), as amended, upon the finding of the District Court, prerequisite to the adoption of the plan, that it is "fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors." 132 F. 2d 742.

Petitioners are holders of interest coupons, detached from bonds issued by respondent, on which they have recovered judgments. According to recitals in the plan of composition, the debtor's bonds and the interest coupons, designated by the plan as Class I indebtedness, "constitute a first charge against taxes levied . . . against lands in the District, and have preference over Class II Indebtedness"; the Class II indebtedness, consisting of various miscellaneous claims against the District, "is payable from an ad valorem tax of one mill . . ., does not constitute a first charge against any fixed revenues of the District, and is not secured by any lien or pledge." Under the plan the bondholders are to receive 56.918 cents in cash for each dollar of principal amount; holders of detached interest coupons, including coupons on which judgments have been recovered, are to receive 36.77 cents, and holders of Class II indebtedness 26.14 cents. The plan is to be financed by a loan from the Reconstruction Finance Corporation, evidenced and secured by the issuance to it of new 4% bonds of the District.

Petitioners contend here, as they did in both courts below, that the plan discriminates unfairly in favor of the Class II creditors. But we are unable to reach that

question since we agree with petitioners that the record lacks the findings of fact which the statute and the General Orders in Bankruptcy require, and which are necessary to the determination of that question.

Section 83 (e) of the Act requires that "At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon." And Rule 52 (a) of the Rules of Civil Procedure, made applicable to bankruptcy cases by General Order in Bankruptcy No. 37, requires the court to "find the facts specially." In *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, 520–525, this Court held that in the absence of findings as to the value of the assets subject to the payment of the respective claims of each class of bondholders, the courts were in no position to exercise the "informed, independent judgment" necessary to the discharge of their statutory duty to determine the fairness of a plan of corporate reorganization under the old § 77B of the Bankruptcy Act. In *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448, and in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523, we held the requirement of adequate findings applicable to railroad reorganizations under § 77 of the Bankruptcy Act.

It applies with no less force to cases of municipal bankruptcy. And, as stated in the *Consolidated Rock Products* case, *supra,* the fact that only a very small minority of creditors have objected to the plan does not relieve the courts of the duty of appraising its fairness, and of making the findings necessary to support such an appraisal. As we said in the *Chicago, Milwaukee, St. Paul & Pacific* case, p. 571, minorities under the various reorganization sections of the Bankruptcy Act "cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence or approval by the other members of the class." The applicability of that rule to proceedings under Ch. IX is plain. We stated in *American Ins. Co.* v. *Avon Park,* 311

U. S. 138, 148, "the fact that the vast majority of security holders may have approved a plan is not the test of whether that plan satisfies the statutory standard. The former is not a substitute for the latter. They are independent."

The nature and degree of exactness of the findings required depends on the circumstances of the particular case. In the *Western Pacific* and *Chicago, Milwaukee, St. Paul & Pacific* cases, we pointed out that in cases of railroad reorganization, the duty of making basic evidentiary findings does not require a determination in terms of dollars and cents of the value of the assets subject to the respective liens. We held that it was sufficient if the Commission's report set forth its conclusion as to the prospective earning power of the reorganized road, with findings supporting its apportionment of future earnings among creditors and stockholders so as to preserve their relative priorities, together with reasons for its conclusions and essential supporting data. Once the priority of liens has been determined, considered estimates of future earning power afford a substantial basis for appraising the interests of the respective lienors. As such estimates involve an element of prophecy, the reorganization of properties which cannot readily be liquidated requires resort to "practical adjustments, rather than a rigid formula," *Consolidated Rock Products Co.* v. *DuBois, supra,* 529. Hence we concluded that findings of the future earnings of the reorganized railroad distributable to each class of security holders and creditors were an adequate substitute for findings of asset value in terms of dollars and cents, which we held could be dispensed with as affording no more than a delusive appearance of a certainty which the subject matter did not warrant.

Delusive exactness of findings is likewise not demanded in cases of municipal bankruptcy. But where future

tax revenues are the only source to which creditors can look for payment of their claims, considered estimates of those revenues constitute the only available basis for appraising the respective interests of different classes of creditors. In order that a court may determine the fairness of the total amount of cash or securities offered to creditors by the plan, the court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors.

And where, as here, different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated.

The findings in the present case fall short of that requirement.[1] Appropriate facts which might have been

[1] The master, whose findings were adopted pro forma by the District Court, approved the classification of debts proposed in the plan, and made findings as to the amount of indebtedness of each class. He substantially paraphrased the recitals of the plan as to the sources to which each class of creditors could look for payment, and found that the acreage tax, out of which Class I debts were payable, was "the main source of revenue of the District." He stated:

"Some of the objecting creditors have taken the position that the Plan of Composition, as amended, provides for the use of acreage tax funds for purposes other than the payment of bonds and interest coupons, and one might get that impression from simply reading isolated parts of the Plan, but, taking it as a whole, it does not so provide."

And, in answer to the contention that the plan violated the so-called "rule of absolute priority" (see *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106), he said:

considered, but which are nowhere referred to in the opinions or findings below, are the revenues which have in the past been received from each source of taxation, the present assessed value of property subject to each tax, the tax rates currently prescribed, the probable effect on future revenues of a revision in the tax structure adopted in 1941, the extent of past tax delinquencies, and any general economic conditions of the District which may reasonably be expected to affect the percentage of future delinquencies. It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this Court to search the record and analyze the evidence in order to supply

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"A superficial reading of the Plan might so indicate, but a careful analysis of the entire Plan, the provisions of the loan, the conditions of payment of two classes of debts, and a practical application of the Plan to the District debts, resolves that question against such theory." These were the only two findings made by the master relative to the rights of the two classes of creditors *inter se* or to the amount of revenues likely to be available for service of the debt. Without further findings on these vital matters the master concluded that: "The Proposed Plan of Composition, as amended, is fair, equitable and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors."

The Circuit Court of Appeals clarified the master's findings as to the respective rights of each class of creditors by expressly stating that the Class II indebtedness was a first charge on the receipts from the ad valorem tax. It pointed out that in order that the District might exercise its maximum borrowing power it must extinguish all existing claims against the acreage and ad valorem taxes, and that in 1941 the tax structure had been revised so as to make all possible taxing resources available for payment of the new bonds issued to the Reconstruction Finance Corporation. From this it concluded without further discussion that "Provision for payment of 26.14¢ on the dollar to discharge Class II debts was fully authorized by the facts, and was not inequitable, unfair, or discriminatory."

Beyond this none of the findings or opinions below present any discussion of facts relating to the fairness of the respective treatment accorded the two classes of creditors by the plan.

findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.

Since the state of the record is such that a proper determination of the questions of law raised by petitioners' contentions as to the treatment of Class II creditors cannot be made in the absence of suitable findings, the petition for writ of certiorari is granted, the judgment is vacated, and the cause remanded to the District Court for appropriate action in conformity with this opinion.

So ordered.

MR. JUSTICE BLACK, dissenting:

I cannot agree that this case should be summarily remanded. In June, 1941, the District filed an application for composition of its debts. The petitioners here filed a motion to dismiss, which was overruled. They appealed to the Circuit Court of Appeals, making contentions which that court found to be "technical in the extreme." *Kelley* v. *Everglades Drainage District*, 127 F. 2d 808, 809. When the case came back before the Circuit Court of Appeals in the instant proceedings, that court found from the entire record that these petitioners had by "unfounded and extremely technical contentions . . . sought to obstruct the plan." 132 F. 2d 742, 744, 745.

Reversal for more findings means still further delay in bringing about what is undoubtedly a much needed financial reorganization. While I am certain that the

courts below could couch their findings in different and more words, I am by no means sure they could set out with greater clarity their conclusion that the evidence shows both groups of bondholders to have been accorded fair and equitable treatment. The decision of the Circuit Court of Appeals was made with full appreciation and after full consideration of the issues, the evidence, and the District Court's findings. Under these circumstances, I should prefer to deny certiorari, but since the Court has determined to grant review, I think we should not dispose of the case without first giving the parties an opportunity to argue the issues. On the record as I now see it, the findings were abundantly adequate, and the conclusion of the Circuit Court of Appeals was correct.

STEPHAN *v.* UNITED STATES.

ON APPLICATION FOR ALLOWANCE OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. —. Decided June 1, 1943.

1. A conviction in a capital case in the District Court is not appealable directly to this Court. Judicial Code (1911), 36 Stat. 1087. P. 426.
2. Where the United States Code and the Statutes at Large are inconsistent, the latter prevail. P. 426.

Application denied.

APPLICATION for allowance of a direct appeal from a conviction in the District Court in a capital case. See 49 F. Supp. 897.

Messrs. Nicholas Salowich and *James E. McCabe* were on the brief for the applicant.

Solicitor General Fahy was on the brief for the United States.

PER CURIAM.

This case is before us on an application for the allowance of a direct appeal as of right from a judgment of the district court sentencing applicant to death, it being contended that such an appeal may be taken pursuant to the section appearing in the United States Code (1940 edition) as § 681 of Title 18. The application was presented to MR. JUSTICE REED, and by him referred to the full Court. Cf. *Budlong* v. *Budlong*, 296 U. S. 550; *Brown* v. *Lane*, 232 U. S. 598, 600; *Spies* v. *Illinois*, 123 U. S. 131, 143; *Bess* v. *West Virginia*, 308 U. S. 509. A similar application has been denied by the trial judge on the ground, among others, that the section relied on to establish the jurisdiction of this Court has been repealed. 49 F. Supp. 897.

Stephan was convicted of treason upon a jury trial and sentenced to death. 18 U. S. C. § 2. The Circuit Court of Appeals for the Sixth Circuit, sitting en banc, affirmed the conviction, 133 F. 2d 87, and after careful consideration of the case we denied certiorari. 318 U. S. 781, rehearing denied, 319 U. S. 783. He now contends that, in addition to the appellate review which he has already obtained, he is entitled to an appeal as of right from the district court directly to this Court, in view of the provisions of 18 U. S. C. § 681, which in terms authorizes such an appeal "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States."

This section of the Code has its origin in § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, which granted a writ of error as of right from this Court to any federal trial court "in all cases of conviction of crime the punishment of which provided by law is death." This provision preceded the creation of circuit courts of appeals by the Act of March 3, 1891, 26 Stat. 826. See *United States* v. *Rider*, 163 U. S. 132, 138. Section 5 of the

latter Act provided that appeals be taken from district courts (or the existing circuit courts) directly to this Court in six specified classes of cases, one of which was "In cases of conviction of a capital or otherwise infamous crime"; and by § 6 it was provided that the circuit courts of appeals should exercise appellate jurisdiction "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

The Act of January 20, 1897, 29 Stat. 492, withdrew from this Court and transferred to the circuit courts of appeals appellate jurisdiction in criminal cases not capital. This was accomplished by deleting, from the clause of § 5 of the Act of March 3, 1891, just quoted, the phrase "or otherwise infamous," so that the direct appeal to this Court was preserved only "in cases of conviction of a capital crime."

Section 5 remained in that form until the enactment of the Judicial Code. Act of March 3, 1911, 36 Stat. 1087. Section 238 of the Judicial Code (36 Stat. 1157), which in connection with § 236 (36 Stat. 1156) defined the jurisdiction of this Court on direct appeals from district courts, set forth the substance of § 5 of the Act of March 3, 1891, except that it omitted the clause providing for appeals from the trial court to this Court "in cases of conviction of a capital crime." This omission was not accidental, but deliberate, and its purpose was to withdraw the jurisdiction of this Court to entertain a direct appeal from a district court in a capital case. This may be seen from the notes of the Revisers, which state:

"The only change made in the section is in striking out the words 'in cases of conviction of a capital crime.' The effect of this is to take from the Supreme Court jurisdiction in capital cases and to transfer the jurisdiction it now possesses to the circuit courts of appeals." S. Rep. No. 388, Part 1, 61st Cong., 2d Sess., p. 77; and also H. R. Doc. No. 783, Part 1, 61st Cong., 2d Sess., p. 81.

Consistently with this purpose, § 128 of the Judicial Code provided (36 Stat. 1133) that "The circuit courts of appeals shall exercise appellate jurisdiction . . . in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law." And § 297 directed (36 Stat. 1169) that "all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed."

Such a plain purpose, established both by language of the Judicial Code and its legislative history, cannot be ignored. Our appellate jurisdiction is defined by statute (*Ex parte McCardle*, 7 Wall. 506, 512; *The Francis Wright*, 105 U. S. 381, 386; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 292) and it is evident that since 1911 the statutes have not authorized a direct appeal to this Court in capital cases. The fact that the words of 18 U. S. C. § 681 have lingered on in the successive editions of the United States Code is immaterial. By 1 U. S. C. § 54 (a), the Code establishes "prima facie" the laws of the United States. But the very meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent. Cf. *Warner* v. *Goltra*, 293 U. S. 155, 161; *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, 164, n. 16.

Accordingly the application for leave to appeal is denied, and the stay heretofore granted is vacated.

So ordered.

Counsel for Parties.

BUCHALTER *v.* NEW YORK.*

CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, NEW YORK.

No. 606. Argued May 7, 10, 1943.—Decided June 1, 1943.

1. The due process clause of the Fourteenth Amendment requires that state action be consistent with fundamental principles of liberty and justice, but does not draw to itself the provisions of state constitutions or state laws. P. 429.
2. Upon review here of judgments of conviction in a criminal case in a state court, challenged by the defendants as denying their constitutional rights under the Fourteenth Amendment, *held:*
   (1) The record fails to establish actual bias on the part of the jury. P. 430.
   (2) The contention that the statute governing the selection of jurors and the court's rulings on challenges worked injustice in the impanelling of the jury raises no reviewable question of due process. P. 430.
   (3) The challenged rulings upon evidence and instructions to the jury did not deprive the defendants of a trial according to the accepted course of legal proceedings. P. 430.
   (4) The contention that the prosecuting attorney unfairly suppressed evidence is without merit. P. 431.
   (5) The remarks of the prosecuting attorney to the jury, here complained of, do not raise a due process question. P. 431.
3. Essential unfairness in a criminal trial must be shown convincingly and not left to speculation. P. 431.

289 N. Y. 181, 45 N. E. 2d 225, affirmed.

CERTIORARI, 318 U. S. 797, to review the affirmance of judgments of conviction of murder.

Messrs. Arthur Garfield Hays, Sydney Rosenthal, I. Maurice Wormser, John Schulman, and *J. Bertram Wegman,* with whom *Messrs. Gerald Weatherly* and *Benj. J. Jacobson* were on the brief, for petitioners.

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* Together with No. 610, *Weiss* v. *New York,* on writ of certiorari, 318 U. S. 797, to the Court of Appeals of New York, and No. 619, *Capone* v. *New York,* on writ of certiorari, 318 U. S. 797, to the County Court of Kings County, New York.

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Mr. Solomon A. Klein, with whom *Messrs. Thomas Cradock Hughes, Henry J. Walsh*, and *Edward H. Levine* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioners were convicted of first degree murder in the County Court of Kings County, New York, after a trial lasting over nine weeks. The printed record consists of over twelve thousand pages. The judgments were affirmed by the Court of Appeals of the State.[1] Numerous errors were there assigned. Four opinions were written, two of which dissented from the judgments of affirmance, as to which the court divided four to three. In his concurring opinion the Chief Judge said that he agreed with one of the dissenting opinions that errors and defects occurred in the trial which could not be "disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights." His conclusion was, however, that the errors did not affect the verdict. Two dissenting judges were of opinion that such substantial error was committed as to require a reversal. One judge was of opinion that the conduct of the trial was so grossly unfair as to leave the defendants without a remote chance of free consideration of their defenses by the jury; so unfair as to deprive them of the presumption of innocence and the requirement of proof beyond a reasonable doubt.

The remittiturs of the Court of Appeals recited that the appellants in brief and argument raised the point that they had been denied their constitutional rights under the Fourteenth Amendment to the Constitution of the

[1] 289 N. Y. 181, 45 N. E. 2d 225, 248; rehearing denied 289 N. Y. 244, 45 N. E. 2d 425.

United States and that this point was considered and necessarily decided. The same contention was the basis of the petitions for certiorari.

The petitioners rely not on any one circumstance but insist that they were not afforded a fair and impartial jury free from influences extraneous to the proofs adduced at the trial; that they were deprived of an impartial and unbiased judge to preside at the trial and that the prosecutor resorted to unfair methods to influence the jury.

This court granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument. As the opinions rendered in the court below state the facts and discuss the alleged trial errors in detail we need not restate them.

The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land." [2] Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee.[3] But the Amendment does not draw to itself the provisions of state constitutions [4] or state laws.[5] It leaves the states

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[2] *Hebert* v. *Louisiana,* 272 U. S. 312, 316. See also: *In re Kemmler,* 136 U. S. 436, 448; *Caldwell* v. *Texas,* 137 U. S. 692, 697; *Lisenba* v. *California,* 314 U. S. 219, 236.

[3] *Moore* v. *Dempsey,* 261 U. S. 86; *Powell* v. *Alabama,* 287 U. S. 45; *Brown* v. *Mississippi,* 297 U. S. 278; *Avery* v. *Alabama,* 308 U. S. 444; *Chambers* v. *Florida,* 309 U. S. 227; *White* v. *Texas,* 310 U. S. 530; *Smith* v. *O'Grady,* 312 U. S. 329; *Ward* v. *Texas,* 316 U. S. 547.

[4] *Rawlins* v. *Georgia,* 201 U. S. 638; *Patterson* v. *Colorado,* 205 U. S. 454, 459; *Hebert* v. *Louisiana, supra,* 316.

[5] *Leeper* v. *Texas,* 139 U. S. 462; *Rawlins* v. *Georgia, supra.*

free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.[6]

The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, such assertion raises no due process question requiring review by this court.[7]

The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such

[6] *Avery* v. *Alabama, supra,* 446–447; *Leeper* v. *Texas, supra; Howard* v. *North Carolina,* 191 U. S. 126, 136, 137; *Burt* v. *Smith,* 203 U. S. 129, 135; *Barrington* v. *Missouri,* 205 U. S. 483, 488; *Ughbanks* v. *Armstrong,* 208 U. S. 481, 487; *Caldwell* v. *Texas, supra,* 697; *Hebert* v. *Louisiana, supra,* 316.

[7] *Hayes* v. *Missouri,* 120 U. S. 68, 71; *Spies* v. *Illinois,* 123 U. S. 131, 168; *Rawlins* v. *Georgia, supra; Franklin* v. *South Carolina,* 218 U. S. 161, 168.

under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings.

Finally, the petitioners assert that the prosecuting officer, by suppression of evidence, and by statements in his addresses to the jury, was so unfair as to deprive the trial of the essential quality of an impartial inquiry into their guilt. The point as to the alleged suppression of evidence is without merit. Certain documentary evidence was in court. The judge ruled that the prosecuting officer need not submit it to defense counsel for examination. If there was error in the ruling, it was error of the court. Upon motion for rehearing the Court of Appeals examined the papers and found that they were not of significance in respect of any issue in the case. No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the state,[8] was shown.

The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

As we have recently said, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.[9]

The judgments are

Affirmed.

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[8] *Mooney* v. *Holohan*, 294 U. S. 103.

[9] *Adams* v. *McCann*, 317 U. S. 269, 281.

MR. JUSTICE BLACK, substantially agreeing with these views, is of opinion that the petitions should be dismissed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

KOREMATSU *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 912. Argued May 11, 1943.—Decided June 1, 1943.

An order of the District Court placing a convicted defendant on probation without imposing sentence of imprisonment or fine is a final decision reviewable by the Circuit Court of Appeals under Jud. Code § 239. Pp. 433, 436.

RESPONSE to a question certified by the Circuit Court of Appeals in a criminal case.

Mr. A. L. Wirin argued the cause, and *Mr. Jackson H. Ralston* was on the brief, for Korematsu.

Mr. John L. Burling, with whom *Solicitor General Fahy* and *Messrs. Edward J. Ennis* and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

Korematsu was found guilty by the District Court for the Northern District of California of remaining in the City of San Leandro, California, in violation of 18 U. S. C. § 97 (A) and the orders issued thereunder.[1] The District Court's order was that he "be placed on probation for the period of five (5) years, the terms and conditions

[1] The relevant orders are Executive Order 9066, Feb. 19, 1942, 7 Fed. Reg. 1407, and General DeWitt's Public Proclamation No. 1, March 2, 1942, and Civilian Exclusion Order No. 34, May 3, 1942, issued under authority of the Executive Order.

of the probation to be stated to said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended."

The defendant appealed to the Circuit Court of Appeals for the Ninth Circuit, which under 28 U. S. C. § 225 has "jurisdiction to review by appeal final decisions." The Circuit Court of Appeals, doubting whether it had jurisdiction to hear an appeal from an order placing the defendant on probation without first formally sentencing him, has certified to us the following question under § 239 of the Judicial Code:

"After a finding of guilt in such a criminal proceeding as the instant case, in which neither imprisonment in a jail or penitentiary nor a fine is imposed, is an order by the district court, that the convicted man 'be placed on probation for the period of five (5) years' a final decision reviewable on appeal by this circuit court of appeals?"

The federal probation law authorizes a district judge "after conviction or after a plea of guilty or nolo contendere . . . to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms" as seem wise. 18 U. S. C. § 724. In *Berman* v. *United States,* 302 U. S. 211, we held that when a court had imposed a sentence and then suspended its execution, the judgment was final and would support an appeal. The question here is whether the judgment is equally final when the imposition of sentence itself is suspended and the defendant subjected to probation.[2] The government concedes that this question should be answered in the affirmative.

[2] For the background of the probation legislation, see *Ex parte United States,* 242 U. S. 27; *United States* v. *Murray,* 275 U. S. 347. Cases on the instant problem are collected at 126 A. L. R. 1207.

It has often been said that there can be no "final judgment" in a criminal case prior to actual sentence, *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464, and this proposition was restated in *Berman* v. *United States,* 302 U. S. 211, 212.[3] In applying this general principle to a situation like that of the instant case, the Second and Fourth Circuit Courts of Appeals have concluded that they lacked jurisdiction to hear an appeal from an order placing a defendant on probation without first imposing sentence. *United States* v. *Lecato,* 29 F. 2d 694, 695; *Birnbaum* v. *United States,* 107 F. 2d 885. The Fifth Circuit appears to take the opposite view. *Nix* v. *United States,* 131 F. 2d 857.

The "sentence is judgment" phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control. Thus in *Miller* v. *Aderhold, supra,* imposition of sentence was suspended and the defendant was put under no obligaton at all. Hence the Court held that there was no jurisdiction to hear the appeal. But certainly when discipline has been imposed, the defendant is entitled to review.

In the *Berman* case, *supra,* we held that the appeal was proper where the sentence was imposed and suspended, and the defendant was placed on probation. The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the order follows a finding of guilt or a plea of nolo conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may, during the probationary period, be required to pay a fine, or make repara-

[3] "Final judgment in a criminal case means sentence. The sentence is the judgment."

tion to aggrieved parties, or provide for the support of persons for whom he is legally responsible. 18 U. S. C. § 724. He is under the "supervision" of the probation officer whose duty it is to make reports to the court concerning his activities, 18 U. S. C. § 727, and at "any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest." 18 U. S. C. § 725. These and other incidents of probation emphasize that a probation order is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline." *Cooper* v. *United States,* 91 F. 2d 195, 199.

The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. Probation, like parole, "is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency," *Zerbst* v. *Kidwell,* 304 U. S. 359, 363, and this end is served in the same fashion whether or not probation is preceded by imposition of sentence. In either case, the liberty of an individual judicially determined to have committed an offense is abridged in the public interest. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.' " *Berman* v. *United States, supra,* 212, 213. Here litigation "on the merits" of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public.

These considerations lead us to conclude that the order is final and appealable. Our answer to the question is Yes.

MOLINE PROPERTIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 660. Argued April 16, 19, 1943.—Decided June 1, 1943.

1. Upon the facts of this case, *held* that, for the purpose of the federal income tax, gains from sales (in 1935 and 1936) by a corporation of its property, although the corporation was owned wholly by an individual stockholder, could not be treated as income taxable to the individual rather than to the corporation. P. 440.
2. The corporation in this case was not a mere agent of the stockholder. P. 440.

131 F. 2d 388, affirmed.

CERTIORARI, 318 U. S. 751, to review the reversal of a decision of the Board of Tax Appeals, 45 B. T. A. 647, that there were no deficiencies in the corporate taxpayer's income and excess-profits taxes.

Mr. Nelson Trottman, with whom *Messrs. Bart A. Riley* and *Thomas H. Anderson* were on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner seeks to have the gain on sales of its real property treated as the gain of its sole stockholder and its corporate existence ignored as merely fictitious. Certiorari was granted because of the volume of similar litigation in the lower courts and because of alleged con-

flict of the decision below with other circuit court decisions.[1]

Petitioner was organized by Uly O. Thompson in 1928 to be used as a security device in connection with certain Florida realty owned by him. The mortgagee of the property suggested the arrangement, under which Mr. Thompson conveyed the property to petitioner, which assumed the outstanding mortgages on the property, receiving in return all but the qualifying shares of stock, which he in turn transferred to a voting trustee appointed by the creditor. The stock was to be held as security for an additional loan to Mr. Thompson to be used to pay back taxes on the property. Thompson owned other real property, title to which he held individually. In 1933 the loan which occasioned the creation of petitioner was repaid and the mortgages were refinanced with a different mortgagee; control of petitioner reverted to Mr. Thompson. The new mortgage debt was paid in 1936 by means of a sale of a portion of the property held by petitioner. The remaining holdings of the petitioner were sold in three parcels, one each in 1934, 1935 and 1936, the proceeds being received by Mr. Thompson and deposited in his bank account.

Until 1933 the business done by the corporation consisted of the assumption of a certain obligation of Thompson to the original creditor, the defense of certain condemnation proceedings and the institution of a suit to remove restrictions imposed on the property by a prior deed.

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[1] *112 West 59th Street Corp.* v. *Helvering,* 62 App. D. C. 350, 68 F. 2d 397; *United States* v. *Brager Building & Land Corp.,* 124 F. 2d 349; *North Jersey Title Ins. Co.* v. *Commissioner,* 84 F. 2d 898; *Inland Development Co.* v. *Commissioner,* 120 F. 2d 986; see Carling Holding Co. *v.* Commissioner, 41 B. T. A. 493; Mayer *v.* Commissioner, 36 B. T. A. 117; Abrams Sons' Realty Corp. *v.* Commissioner, 40 B. T. A. 653; Thrift Realty Co. *v.* Commissioner, 29 B. T. A. 545; Moro Realty Holding Corp. *v.* Commissioner, 25 B. T. A. 1135, affirmed 65 F. 2d 1013; Forshay *v.* Commissioner, 20 B. T. A. 537.

The expenses of this suit were paid by Thompson. In 1934 a portion of the property was leased for use as a parking lot for a rental of $1,000. Petitioner has transacted no business since the sale of its last holdings in 1936 but has not been dissolved. It kept no books and maintained no bank account during its existence and owned no other assets than as described. The sales made in 1934 and 1935 were reported in petitioner's income tax returns, a small loss being reported for the earlier year and a gain of over $5,000 being reported for 1935. Subsequently, on advice of his auditor, Thompson filed a claim for refund on petitioner's behalf for 1935 and sought to report the 1935 gain as his individual return. He reported the gain on the 1936 sale.

The question is whether the gain realized on the 1935 and 1936 sales shall be treated as income taxable to petitioner, as the Government urges, or as Thompson's income. The Board of Tax Appeals held for petitioner on the ground that because of its limited purpose, the corporation "was a mere figmentary agent which should be disregarded in the assessment of taxes." Moline Properties *v.* Commissioner, 45 B. T. A. 647. The Circuit Court of Appeals reversed on the ground that the corporate entity, chosen by Thompson for reasons sufficient to him, must now be recognized in the taxation of the income of the corporation. *Commissioner* v. *Moline Properties,* 131 F. 2d 388.

The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation [2] or to avoid [3] or to comply with [4] the demands of creditors or to

[2] *Texas-Empire Pipe Line Co.* v. *Commissioner,* 127 F. 2d 220. Cf. *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 453–4, 456.

[3] *Sheldon Bldg. Corp.* v. *Commissioner,* 118 F. 2d 835.

[4] *Palcar Real Estate Co.* v. *Commissioner,* 131 F. 2d 210.

serve the creator's personal or undisclosed convenience,[5] so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 442; *Deputy* v. *du Pont,* 308 U. S. 488, 494. In *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415, this Court appraised the relation between a corporation and its sole stockholder and held taxable to the corporation a profit on a sale to its stockholder. This was because the taxpayer had adopted the corporate form for purposes of his own. The choice of the advantages of incorporation to do business, it was held, required the acceptance of the tax disadvantages.

To this rule there are recognized exceptions. *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, and *Gulf Oil Corp.* v. *Lewellyn,* 248 U. S. 71, have been recognized as such exceptions but held to lay down no rule for tax purposes. *New Colonial Co.* v. *Helvering, supra,* 442, n. 5; *Burnet* v. *Commonwealth Improvement Co., supra,* 419, 420. A particular legislative purpose, such as the development of the merchant marine, whatever the corporate device for ownership, may call for the disregarding of the separate entity, *Munson S. S. Line* v. *Commissioner,* 77 F. 2d 849, as may the necessity of striking down frauds on the tax statute, *Continental Oil Co.* v. *Jones,* 113 F. 2d 557. In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction. *Higgins* v. *Smith,* 308 U. S. 473, 477–78; *Gregory* v. *Helvering,* 293 U. S. 465.

The petitioner corporation was created by Thompson for his advantage and had a special function from its in-

[5] *Watson* v. *Commissioner,* 124 F. 2d 437; *Salmon* v. *Commissioner,* 126 F. 2d 203.

ception. At that time it was clearly not Thompson's *alter ego* and his exercise of control over it was negligible. It was then as much a separate entity as if its stock had been transferred outright to third persons. The argument is made by petitioner that the force of the rule requiring its separate treatment is avoided by the fact that Thompson was coerced into creating petitioner and was completely subservient to the creditors. But this merely serves to emphasize petitioner's separate existence. *New Colonial Co.* v. *Helvering, supra,* 441. Business necessity, i. e., pressure from creditors, made petitioner's creation advantageous to Thompson.

When petitioner discharged its mortgages held by the initial creditor and Thompson came in control in 1933, it was not dissolved, but continued its existence, ready again to serve his business interests. It again mortgaged its property, discharged that new mortgage, sold portions of its property in 1934 and 1935 and filed income tax returns showing these transactions. In 1934 petitioner engaged in an unambiguous business venture of its own—it leased a part of its property as a parking lot, receiving a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity distinct from its stockholder.

Petitioner advances what we think is basically the same argument of identity in a different form. It urges that it is a mere agent for its sole stockholder and "therefore the same tax consequences follow as in the case of any corporate agent or fiduciary." There was no actual contract of agency, nor the usual incidents of an agency relationship. Surely the mere fact of the existence of a corporation with one or several stockholders, regardless of the corporation's business activities, does not make the corporation the agent of its stockholders. Therefore the question of agency or not depends upon the same legal

issues as does the question of identity previously discussed. *Burnet* v. *Commonwealth Improvement Co., supra,* 418, 419–20.

Affirmed.

MAYO ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 726. Argued April 16, 1943.—Decided June 1, 1943.

1. The United States owned the fertilizer which it shipped into Florida for distribution pursuant to the Soil Conservation and Domestic Allotment Act, and in respect of such distribution was acting in a governmental capacity. P. 444.
2. A State is without Constitutional power to exact an inspection fee—although the design of the inspection service was to protect consumers from fraud—in respect of fertilizer which the United States owns and is distributing within the State pursuant to provisions of the Soil Conservation and Domestic Allotment Act. Const., Art. VI. P. 447.
3. The instrumentalities and property of the United States used by it in governmental activities are immune from state taxation or regulation, unless Congress affirmatively provides otherwise. P. 448.

47 F. Supp. 552, affirmed.

APPEAL from a decree of a District Court of three judges enjoining state officers from enforcing against the United States the provisions of the Florida Commercial Fertilizer Law.

Messrs. Wm. C. Pierce and *James H. Millican, Jr.,* Assistant Attorney General of Florida, with whom *Messrs. J. Tom Watson,* Attorney General of Florida, and *H. E. Carter* were on the brief, for appellants.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Sidney J. Kaplan, Martin Norr* and *Richard S. Salant* were on the brief, for the United States.

Messrs. William N. McQueen, Acting Attorney General of Alabama, *Eugene Stanley,* Attorney General of Louisiana, *Harry McMullan,* Attorney General of North Carolina, and *Thomas J. Herbert,* Attorney General of Ohio, on behalf of their respective States, as *amici curiae,* adopted the brief of appellants.

MR. JUSTICE REED delivered the opinion of the Court.

This record presents for review the action of a specially constituted district court in enjoining, on final hearing, the Commissioner of Agriculture of the State of Florida and his agents from enforcing against the United States the provisions of the Florida Commercial Fertilizer Law. Judicial Code, §§ 266 and 238.

By this Florida act the sale or distribution of commercial fertilizer is comprehensively regulated. There is included a requirement of a label or stamp on each bag evidencing the payment of an inspection fee. Unless so identified, the bags may be seized and sold by the sheriff of the county. The purpose of the legislation is to assure the consumers that they will obtain the quality of fertilizer for which they pay and that substances deleterious to the land will be excluded from the material sold. Florida Statutes, 1941, c. 576.

The United States, under the direction of the Secretary of Agriculture, acting under the provisions of the Soil Conservation and Domestic Allotment Act,[1] purchased commercial fertilizer outside of Florida and undertook its distribution to consumers within that state during the fiscal year ending June 30, 1943, without state inspection and without paying for or affixing to the bags the inspection stamps required by the Florida act. This distribution was a part of the national soil conservation program.[2] Through

[1] 49 Stat. 163, 1148; 50 Stat. 329; 55 Stat. 257, 860; 56 Stat. 664.

[2] §§ 7 and 8 of the Soil Conservation and Domestic Allotment Act, as amended.

the use of fertilizers with a high content of superphosphate on winter legumes the plan sought, by plowing under the legumes, to obtain scarce nitrogen for the commercial crops which were to follow. To secure a heavy growth of the legumes before plowing time, the fertilizer should be applied and the legumes planted prior to October 15th. Farmers who desire to participate in the conservation program follow the required practices under the supervision of county committees or associations which are federal instrumentalities for carrying out the plans. § 8 (b).

The soil-building and soil-conserving practices, when carried out by a participating farmer, entitle him to a grant or benefit payment. § 8. In order that the farmer may earn this grant, phosphate fertilizers are furnished to him in advance by the Government through the county committee. The cost is deducted from the grant. For the purpose of carrying out the program, the United States caused fertilizers purchased by its agents to be shipped into Florida to the local agricultural associations for such distribution. As the sacks were without stamps, the Florida Commissioner of Agriculture on September 10, 1942, gave a "stop sale" notice to the county agricultural association to cease distribution.

The Attorney General of the United States directed the filing of a complaint against the Florida officials who are charged with the enforcement of the Florida law. The complaint set out the "stop sale" notice, the refusal of numerous persons utilized by the United States in its work to proceed with the distribution of the fertilizer without the protection of an injunction, the frustration of the conservation program of the Secretary of Agriculture, the imminency of irreparable damage because of the necessity of prompt distribution of the fertilizer and the lack of any efficient remedy other than a temporary and permanent injunction. Florida objected to the complaint for failure to state a cause of action and set up numerous defenses

which have now been reduced by the specification of errors and the brief to the fundamental one that the United States as to fertilizer to be used upon Florida soil is not exempt by Constitution or statute from compliance with reasonable state regulation or the payment of reasonable inspection fees. At any rate, it is urged, inspection fees may be collected under the facts heretofore stated as the Government is merely a conduit or service agent for the fertilizer manufacturer or the Florida farmer.

The District Court disposed, we think, of the conduit or service agent argument by its finding that the Government "became the owner" of the fertilizer at the manufacturing plants which are outside the state and was engaged in distributing it in Florida as a part of the national soil conservation program. In promoting soil conservation by precept and demonstration through the Department of Agriculture, the United States, as in its other authorized activities, acts in a governmental capacity.[3] Prior to the Soil Conservation Act, Congress had, as a matter of custom, put money and responsibility in the hands of the executive to promote agriculture in the most general sense. It is commonplace for appropriations to be made for loans to farmers.[4] The distribution of fertilizer owned by the United States as a charge against grants to aid soil conservation is of the same character. § 8 (b). Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 68. No inference of fact or conclusion of law, we think, can be properly drawn from the circumstances of this fertilizer

[3] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102.

[4] Establishment of the Department of Agriculture, 12 Stat. 387; of colleges of agriculture, 26 Stat. 417; Federal Farm Loan Act, 39 Stat. 360, 40 Stat. 431; Federal Intermediate Credit Banks, 42 Stat. 1454; Federal Farm Board, 46 Stat. 11; boll weevil grant, 45 Stat. 539, 565.

distribution other than that the United States was the owner of the fertilizer in Florida awaiting distribution.

The other findings are substantially in accord with the allegations of the complaint and are not contested. The District Court, one judge dissenting, enjoined the application of Florida law to the above described acts of the United States on the ground of federal immunity from state regulation.

Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.[5] No other adjustment of competing enactments or legal principles is possible.

Appellants' argument in support of the inspection fee is that neither the Constitution nor any federal statute exempts the United States from paying reasonable state inspection fees to support permissible regulation of commercial fertilizer. Such inspections are allowable where the United States is not the owner. *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 392. Appellants urge that since they are allowable to protect the farmers against the imposition of fertilizers of quality possibly inferior to the manufacturers' representations, the inspection fee should

[5] *McCulloch* v. *Maryland,* 4 Wheat. 316, 427; *Ohio* v. *Thomas,* 173 U. S. 276, 283; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 667; *Johnson* v. *Maryland,* 254 U. S. 51; *Arizona* v. *California,* 283 U. S. 423, 451.

be paid on fertilizers distributed by the United States, where the federal law is silent as to any exemption on the ground of sovereignty. Reliance is placed upon *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities.[6] No such permission is granted here. Compare 56 Stat. 664. Congress may protect its agencies from the burdens of local taxation.[7] There are matters of local concern within the scope of federal power which in the silence of Congress may be regulated in such manner as does not impair national uniformity.[8] There are federal activities which in the absence of specific Congressional consent may be affected by state regulation.[9] *Graves* v. *New York ex rel. O'Keefe, supra,* upon which appellants rely so strongly, is in this latter group. In that case, an employee of the Home Owners' Loan Corporation, a Federal agency which was assumed to have the same immunity from state taxation as the United States itself, sought exemption from New York's income tax on the ground that a tax upon the employee's salary imposed an unconstitutional burden upon the Federal Government. This position was not without precedent.[10] Upon full reëxamination of the authorities and the reasoning upon which the earlier cases had allowed the em-

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[6] *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 667; *Baltimore National Bank* v. *Tax Comm'n,* 297 U. S. 209; *Pacific Coast Dairy* v. *Dept. of Agriculture,* 318 U. S. 285, 296.

[7] *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, and cases cited.

[8] *Standard Dredging Corp.* v. *Murphy, ante,* p. 306; *California* v. *Thompson,* 313 U. S. 109.

[9] *Alabama* v. *King & Boozer,* 314 U. S. 1, 9, and cases cited.

[10] *Dobbins* v. *Commissioners,* 16 Pet. 435; *Collector* v. *Day,* 11 Wall. 113; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; *Brush* v. *Commissioner,* 300 U. S. 352.

ployees of one sovereignty freedom from the exactions of the other, this Court declared that in the absence of a federal declaration of immunity from state taxation, no such "tangible or certain economic burden is imposed on the [United States] as would justify a court's declaring that the [employee] is clothed with the implied constitutional tax immunity of the government by which he is employed." Page 486.

These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing as in *Graves* v. *New York ex rel. O'Keefe, supra,* with a tax upon the salary of an employee, or as in *Alabama* v. *King & Boozer,* 314 U. S. 1, with a tax upon the purchases of a supplier, or as in *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free.[11] This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the appli-

[11] Similar conclusions have been reached in adjacent fields. The state is powerless to punish its citizens for acts done in exclusively federal territory. *Pacific Coast Dairy* v. *Dept. of Agriculture,* 318 U. S. 285. A state cannot tax land of the United States situated within the state even though the state has not ceded sovereignty to the United States. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 177.

cable legislation and the particular exaction. *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Affirmed.

MR. JUSTICE BLACK concurs in the result.

FREEMAN *v.* BEE MACHINE CO., INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 707. Argued May 4, 5, 1943.—Decided June 1, 1943.

1. A federal court having jurisdiction of a cause removed from a state court may allow such an amendment of the complaint as could have been made had the suit originated in the federal court, even though the amendment could not have been made had the suit remained in the state court. P. 451.
2. After removal to the federal District Court of an action for breach of contract, begun in a state court against a nonresident defendant upon whom process was personally served within the State, the defendant entered a general appearance, defended on the merits, and filed a counterclaim. *Held* that the defendant was "found" within the district so as to give the District Court power to allow the complaint to be amended by adding a cause of action under § 4 of the Clayton Act. P. 453.
3. The Rules of Civil Procedure, which permit joinder of claims, Rule 18, and provide for amendment of pleadings, Rule 15, are applicable to removed cases and "govern all procedure after removal," Rule 81 (c). P. 454.
4. Rule 5 of the Rules of Civil Procedure permits service of an amended complaint to be made upon the attorney for the defendant. P. 455.

131 F. 2d 190, affirmed.

CERTIORARI, 318 U. S. 752, to review a judgment vacating a judgment of the District Court which granted a mo-

tion for a summary judgment for the defendant (petitioner here), 41 F. Supp. 461, and denied a motion of the plaintiff (respondent here) to amend the complaint, 42 F. Supp. 938, in a suit which had been removed from a state court.

Mr. Marston Allen, with whom *Mr. Nathan Heard* was on the brief (*Mr. Chas. E. Riordan* entered an appearance), for petitioner.

Mr. Cedric W. Porter, with whom *Mr. George P. Dike* was on the brief, for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

It was held in *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U. S. 377, 382, that where a state court lacks jurisdiction of the subject matter or of the parties, the federal District Court acquires none on a removal of the case. And see *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 260 U. S. 261, 288; *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127, 131; *Minnesota* v. *United States,* 305 U. S. 382, 389. That is true even where the federal court would have jurisdiction if the suit were brought there. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co., supra.* As stated by Mr. Justice Brandeis in that case, "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." 258 U. S. p. 382. The question in this case is whether the rule of those decisions is applicable to a situation involving the following facts:

Petitioner is a resident of Ohio; respondent is a Massachusetts corporation. Respondent brought an action at law against petitioner in the Superior Court of Massachusetts for breach of a contract. Petitioner was personally served when he happened to be in Boston.

Petitioner appeared specially and caused the action to be removed to the federal District Court in Massachusetts, petitioner being a non-resident of Massachusetts and there being diversity of citizenship and the requisite jurisdictional amount. Judicial Code § 28, 28 U. S. C. § 71. Petitioner thereupon entered a general appearance [1]—he answered, interposing several defenses including *res judicata;* he also filed a counterclaim. He then moved for a summary judgment. Shortly before that motion came on to be heard respondent moved to amend its declaration by adding a complaint for treble damages under § 4 of the Clayton Act.[2] 38 Stat. 731, 15 U. S. C. § 15. The District Court granted petitioner's motion for summary judgment. 41 F. Supp. 461. But it denied respondent's motion to amend, being of the view that it had no jurisdiction to allow the amendment. 42 F. Supp. 938. In reaching that result the District Court expressed doubts that the venue requirements of § 4 of the Clayton Act were satisfied. But it expressly declined to rest on that basis and placed its decision solely on the *Lambert Co.* line of cases. On appeal the Circuit Court of Appeals sustained the ruling of the District Court on the motion for summary judgment but disagreed with its view on the motion to amend. 131 F. 2d 190. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and

[1] See *Western Loan & S. Co.* v. *Butte & B. Mining Co.,* 210 U. S. 368, 372; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 165.

[2] That section provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." That section derived from § 7 of the Sherman Act. See *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 371–374.

the contrariety of views which had developed concerning it.[3]

The *Lambert Co.* case and those which preceded[4] and followed it merely held that defects in the jurisdiction of the state court either as respects the subject matter or the parties[5] were not cured by removal but could thereafter be challenged in the federal court. We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court.[6] If the federal court has jurisdiction of the removed cause and if the amendment to the complaint could have been made had the suit originated in the federal court, the fact that the federal court acquired jurisdiction by removal does not deprive it of power to allow the amendment. Though this suit as instituted involved only questions of local law, it could have been brought in the federal court by reason of diversity of citizenship.[7] The rule of *Erie R. Co.* v. *Tompkins*,

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[3] See *Noma Electric Corp.* v. *Polaroid Corp.*, 2 F. R. D. 454; *Carroll* v. *Warner Bros. Pictures*, 20 F. Supp. 405; *Howe* v. *Atwood*, 47 F. Supp. 979, 984. Cf. *Newberry* v. *Central of Georgia Ry. Co.*, 276 F. 337, 338.

[4] See *Goldey* v. *Morning News*, 156 U. S. 518; *De Lima* v. *Bidwell*, 182 U. S. 1, 174; *Courtney* v. *Pradt*, 196 U. S. 89, 92; *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 258.

[5] *Wabash Western Ry.* v. *Brow*, 164 U. S. 271; *Hassler, Inc.* v. *Shaw*, 271 U. S. 195; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374.

[6] It is clear that the Massachusetts state court did not have jurisdiction over the cause of action under the Anti-Trust laws. See 15 U. S. C. § 15, *supra*, note 2; *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 440.

[7] Suits based on diversity of citizenship may be brought "only in the district of the residence of either the plaintiff or the defendant." Judicial Code § 51, 28 U. S. C. § 112. Congress has not made the same requirement on removal. Thus an action between citizens of different states begun in a court of a state of which neither is a citizen may be removed to the federal court of the district in which the suit is pending. *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653. See *Neirbo Co.* v.

304 U. S. 64, is, of course, applicable to diversity causes removed to the federal courts as well as to such actions originating there. But if the federal court has jurisdiction of the removed cause (*Mexican National R. Co.* v. *Davidson,* 157 U. S. 201), the action is not more closely contained than the one which originates in the federal court. The jurisdiction exercised on removal is original not appellate. *Virginia* v. *Rives,* 100 U. S. 313, 320. The forms and modes of proceeding are governed by federal law. *Thompson* v. *Railroad Companies,* 6 Wall. 134; *Hurt* v. *Hollingsworth,* 100 U. S. 100; *West* v. *Smith,* 101 U. S. 263; *King* v. *Worthington,* 104 U. S. 44; *Ex parte Fisk,* 113 U. S. 713; *Northern Pacific R. Co.* v. *Paine,* 119 U. S. 561; *Twist* v. *Prairie Oil & Gas Co.,* 274 U. S. 684; *Rorick* v. *Devon Syndicate,* 307 U. S. 299. Congress has indeed provided that in a suit which has been removed the District Court shall "proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal." Judicial Code § 38, 28 U. S. C. § 81. While that section does not cure jurisdictional defects present in the state court action, it preserves to the federal District Courts the full arsenal of authority with which they have been endowed. Included in that authority is the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules. *West* v. *Smith, supra; Twist* v. *Prairie Oil & Gas Co., supra,* p. 687.

It is said, however, that the amendment in question may not be made since the cause of action authorized by § 4 of the Clayton Act may be brought only in a District

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Bethlehem Shipbuilding Corp., 308 U. S. 165, 168. Indeed, the defendant must be a non-resident of the state in which suit is brought before he can remove to the federal court on the ground of diversity of citizenship. *Patch* v. *Wabash R. Co.,* 207 U. S. 277.

Court in the district "in which the defendant resides or is found or has an agent." 15 U. S. C. § 15. That requirement relates to venue. But venue involves no more and no less than a personal privilege which "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165, 168. On the face of the present record it would seem that any objection to venue has been waived. There is no indication in the record before us that any such objection was "seasonably asserted." *Commercial Ins. Co.* v. *Consolidated Stone Co.,* 278 U. S. 177, 179; *Interior Construction Co.* v. *Gibney,* 160 U. S. 217. As we have noted, the District Court did not place its ruling on the grounds of venue. Nor is there any indication in the record that petitioner raised the venue point in the District Court. But even if we assume that he did, it is not clear that the objection has been preserved here.[8]

But we need not rest on that narrow ground. Petitioner was personally served in the state court action. After the removal of the cause he entered a general appearance and defended on the merits. He also filed a counterclaim in the action. He thus invoked the jurisdiction of the federal court and submitted to it. *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S. 286. He was accordingly "found" in the district so as to give the District Court power to allow the complaint in that suit to be amended by adding a cause of action under § 4 of the Clayton Act. This venue provision was designed, as stated by Judge

[8] The "only question" presented by the petition for writ of certiorari was "whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which would be outside the state court's jurisdiction." That obviously is not a presentation of a question of venue of a federal district court under § 4 of the Clayton Act; and it can hardly be expanded into one by an incidental discussion of venue in the brief.

Learned Hand in *Thorburn* v. *Gates,* 225 F. 613, 615, "to remove the existing limitations upon the venue of actions between diverse citizens [9] and to permit the plaintiff to sue the defendant wherever he could catch him." But "found" in the venue sense does not necessarily mean physical presence. We noted in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., supra,* pp. 170–171, that a corporation may be "found" in a particular district for venue purposes merely because it had consented to be sued there. The fact that it was present "only in a metaphorical sense" (308 U. S. p. 170) was not deemed significant. In the present case it is not important that at the time of this amendment petitioner had returned to Ohio and was not physically present in Massachusetts. He was conducting litigation in Massachusetts. He was there for all purposes of that litigation. Having invoked the jurisdiction of the federal court and submitted to it, he may not claim that he was present only for the limited objectives of his answer and counterclaim. He was present, so to speak, for all phases of the suit. That presence satisfies the venue provision of § 4 of the Clayton Act for the purpose of this amendment. The Rules of Civil Procedure are applicable to removed cases and "govern all procedure after removal." Rule 81 (c). They permit joinder of claims (Rule 18) and contain the procedure for amendment of pleadings. Rule 15. And, as we have noted, Congress has directed the District Court after a case has been removed to "proceed therein as if the suit had been originally commenced in said district court." Judicial Code § 38, 28 U. S. C. § 81. There can be no doubt but that the court had the power under that statute and under the Rules to permit the joinder of the cause of action under the Clayton Act. If petitioner was subject to the jurisdiction of the court for purposes of the law suit, including an amend-

[9] See note 7, *supra.*

ment of the complaint, he certainly was "found" there for the purpose of adding a cause of action under § 4 of the Clayton Act. Process is of course a different matter. But under the Rules of Civil Procedure service of an amended complaint may be made upon the attorney [10] (Rule 5)—the procedure which apparently was followed here.

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

Congress has power, of course, to authorize a suit arising under federal law to be brought in any of the federal district courts. *Robertson* v. *Labor Board,* 268 U. S. 619, 622. But from the beginning of the federal judicial system, Congress has provided that civil suits can be brought only in the district where the defendant is an inhabitant, except that where federal jurisdiction is based solely upon diversity of the parties' citizenship, suit may be brought in the district of the residence of either the plaintiff or the defendant. Section 51 of the Judicial Code, 28 U. S. C. § 112, derived from § 11 of the Judiciary Act of 1789, 1 Stat. 73, 79. Only in a very few classes of cases has Congress given a strictly limited right to sue elsewhere. *Robertson* v. *Labor Board, supra.* In § 4 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. § 15, the legislation immediately before us, suits are authorized to be brought "in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . ." Similar provisions, permitting suit where the defendant is "found," appear in the Act of March 3, 1911, § 43, 36 Stat. 1087, 1100, 28 U. S. C. § 104 (suits for penalties and forfeitures), the Act of March 4, 1909, § 35, 35 Stat. 1075, 1084, 17 U. S. C. § 35 (suits for copyright infringement), the Act of February 5, 1917, § 25, 39 Stat. 874, 893, 8 U. S. C. § 164 (suits under the

[10] See *Adam* v. *Saenger,* 303 U. S. 59, 67–68.

immigration laws), the Act of May 27, 1933, tit. I, § 22, 48 Stat. 74, 86, 15 U. S. C. § 77v (suits under the Securities Act of 1933), and the Act of June 6, 1934, § 27, 48 Stat. 881, 902, 15 U. S. C. § 78aa, (suits under the Securities Exchange Act of 1934). In holding that the petitioner was "found" in the district of Massachusetts merely because he had exercised his statutory right to remove a suit to the federal district court in Massachusetts, the Court, I cannot but conclude, is disregarding the venue requirements of the Clayton Act.

The respondent, a Massachusetts corporation, brought an action for breach of contract in the Superior Court of Essex County, Massachusetts, against the petitioner, a resident of Ohio, by serving him personally while at a hotel in Boston. Since there was the requisite diversity of citizenship and jurisdictional amount, the petitioner appeared specially in the state court, removed the cause to the federal district court in Massachusetts, filed an answer and a counterclaim for damages, and moved for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure. Thereafter, on the day before the hearing on this motion, the respondent moved to amend its complaint by adding a cause of action for treble damages under § 4 of the Clayton Act. At that time the petitioner was no longer present in Massachusetts. The district court granted the petitioner's motion for summary judgment, and denied the respondent leave to amend its complaint. The reasons for the court's action appear in its opinion:

"This court has jurisdiction under the anti-trust laws over a nonresident only if he is found in the district or has an agent therein. 15 U. S. C. § 15. The defendant while in the Commonwealth was served with process in a common law action of contract. The plaintiff [respondent] obviously seeks to take advantage of this fact in order to obtain jurisdiction over the person in a suit involving

a new and entirely different subject-matter, namely, the enforcement of rights arising under federal statutes. . . . It follows from the foregoing that if the plaintiff is allowed to add the cause of action alleged in its motion, the amended complaint would be subject to successful attack on jurisdictional grounds. . . . The motion is, therefore, denied without prejudice to plaintiff's right to seek redress by suit brought originally in the Federal court." 42 F. Supp. 938, 939.

As in *Camp* v. *Gress,* 250 U. S. 308, 311, therefore, the petitioner objected "not to the jurisdiction of a federal court, but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue." Such a use of the term "jurisdiction" in the sense of venue is by no means uncommon. See, *e. g., Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208, 211–12. Although the record contains no specific objection by the petitioner to the amendment of the complaint by adding the cause of action under the anti-trust laws, the opinion of the district court recites that the parties "have now been heard upon this [respondent's] motion" to amend the complaint, and that the "question presented is whether this amendment should be allowed." 42 F. Supp. at 939. The petitioner's resistance to the entertainment by the district court of the proposed claim under the Clayton Act must mean that he objected to being sued in the federal district court in Massachusetts because he was not amenable to the process of that court; in other words, because that court was without venue.

In vacating the judgment of the district court, the Circuit Court of Appeals stated: "The fact that in all probability the plaintiff in the case at bar could not bring a separate action under the anti-trust laws against the defendant in the district court sitting in Massachusetts because the defendant could avoid the service of process upon him by remaining outside of the district cannot

affect the jurisdiction of the court to allow the amendment. This is only a fact to be considered by the district court in exercising its discretionary power to allow or disallow the amendment. Since the court below did not exercise its discretionary power but ruled that it lacked jurisdiction to allow the amendment we must remand to that court for further proceedings." 131 F. 2d 190, 194–95. The Circuit Court of Appeals plainly did not regard the petitioner as having waived his objection to the "jurisdiction" or venue of the district court in Massachusetts. It placed its reversal of the district court on another ground, the correctness of which I shall consider later.

Nor can the petition for certiorari, read in its entirety, be construed as an abandonment of the petitioner's objection to the venue of the Massachusetts district court. True enough, the "only question presented" is stated to be "whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which would be outside the state court's jurisdiction." But the text of the petition makes it clear that the petitioner's "jurisdictional" objections included the claim that venue was not properly laid in the Massachusetts district court. On pages 16 and 17, for example, he states:

"The question of venue or jurisdiction of the person is not a matter lightly to be disregarded. It depends upon substantive law. The right of a person to be sued only in the district of which he is an inhabitant is carefully guarded by the general venue statute, Judicial Code, section 51. . . . Now, being 'found' is a sporadic, temporary thing, very different from being 'an inhabitant.' The petitioner Freeman was 'found' at one particular time and subjected to suit on a cause of action in contract. . . . The original cause of action was removed to the District Court, but this did not make Freeman 'an inhabitant' so that he could be served at any time. The only way in

which jurisdiction can be obtained of Freeman in this district for a cause of action under the Antitrust Laws is by having him 'found' here. This result cannot be secured by 'amending' an existing complaint, because it would not only violate the whole theory of venue, but it would be in direct violation of Rule 82 [of the Federal Rules of Civil Procedure], which is superior to Rule 15."

I quite agree with the Court that venue is a privilege that may be waived, that it "may be lost by failure to assert it seasonably." *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168. But the waiver must be actual, not fictitious. There must be a surrender, not resistance. No doubt a party who, having a valid objection to the venue of a suit, pleads to the merits instead of making objection waives his objection. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 212. Here the petitioner answered the state suit before and not after the respondent sought to amend its complaint to add an exclusively federal cause of action under the anti-trust laws. His defense to the contract claim could not possibly waive any venue objections with respect to a claim subsequently made under the anti-trust laws. One cannot waive an objection which he cannot assert.

The Court relies upon Rules 15 and 18 of the Federal Rules of Civil Procedure, which establish liberal rules for the joinder of causes of action. But these Rules do not dispense with the requirements of venue. Rule 82 explicitly provides that "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." Because causes of action could be joined, if properly brought, does not prove that they are properly brought. A liberal rule regarding joinder of actions does not eliminate the problems of suability created by the various venue provisions. The removal statute itself does not

impliedly repeal the multitudinous venue restrictions imposed by Congress. And certainly Rules 15 and 18 did not do so, especially since Rule 82 contains a specific disavowal of such implications.

The provision of the removal statute that once a suit is removed, the district court shall "proceed therein as if the suit had been originally commenced in said district court," § 38 of the Judicial Code, 28 U. S. C. § 81, in no wise extends the jurisdiction or venue of the district court after removal. The provision means only that when a suit is removed to the federal courts, it shall be disposed of in the manner in which business is conducted there. The requirement of federal law that there be a unanimous verdict of the jury, for example, applies even to suits removed from a state court where a majority of eight can render a verdict. See *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211. Of course, therefore, the Federal Rules of Civil Procedure are equally applicable to suits removed to the federal courts. Rule 81 (c). But the venue restrictions imposed by federal legislation and left undisturbed by the Rules are not eliminated merely because the suit is one which has been removed. The venue of the federal court is the same, whether the suit be originally instituted in or removed to the federal court. It certainly is not enlarged by the fact of removal.

Joinder is permissible only if the causes of action are properly in court, that is, if the requirements of venue as well as jurisdiction are satisfied. If these requirements are not met, an order of court directing joinder cannot dispense with them. The respondent here sought to add a cause of action for treble damages under § 4 of the Clayton Act—a cause of action over which the district court in Massachusetts could have venue only if the petitioner resided in Massachusetts, or was found there either in person or through an accredited agent. But at the time of the proposed amendment to the complaint seek-

ing to add this claim, the petitioner was not a resident of Massachusetts nor can he be said to have been "found" there in any legitimate sense of the word. His only contact with Massachusetts was the fact that he was a defendant in an action for breach of contract brought in a Massachusetts state court and properly removed to the federal district court there. If the respondent had instituted a separate suit in Massachusetts against the petitioner under the anti-trust laws, neither the state court, *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 440, nor the federal court in Massachusetts could entertain the suit on the ground that the petitioner was "found" there merely because he was a defendant to the contract suit.

I know of no case which has construed the requirement of "found," as applied to a natural person, to mean anything less than actual physical presence. The *Neirbo* case is obviously without relevance here. The problem there was that of fitting a fictive personality into legal categories designed for natural persons. A corporation is never "found" anywhere except metaphorically. In recognition of this fact the *Neirbo* case held that when a corporation assents to the conditions governing the doing of business within a state, it is as much "found" there for purposes of federal law as for those of state law. But in the case of a natural person, he can be "found" not metaphorically but physically. And when a person is not actually physically present in a place, he is not, "so to speak," "found" there except in the world of Alice in Wonderland.

The case therefore reduces itself to this: if the petitioner had not removed the action for breach of contract to the federal court, he could not possibly be compelled to defend a suit under the anti-trust laws brought against him in Massachusetts. His mere exercise of the right of removal given him by Congress has resulted in his being

made subject to suit in a place other than that specified by Congress in § 4 of the Clayton Act. This is to add to the removal privilege a condition of hardship which Congress itself has not imposed for the simple reason that it runs counter both to the underlying assumption of diversity jurisdiction and to the historic rule that the "jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant or in which he can be found." *Robertson* v. *Labor Board,* 268 U.S. 619, 627. The Court invokes no policy of judicial administration which could warrant disregard of this long established legislative policy.

The derivative nature of removal jurisdiction, see *Minnesota* v. *United States,* 305 U. S. 382, 389, is not based upon technical rules of law. Congress deemed it fair and just that a nonresident who is being sued outside his state should be able to transfer the suit to a neutral federal court without losing or gaining any privileges by such transfer. The decision in this case turns an opportunity given by Congress to assure fairness and impartiality into a Hobson's choice. By removing a suit to the federal court a defendant is subjected to a liability—namely, to be sued in a district where he is neither a resident nor found, under a statute providing that he can be sued only where he is either a resident or found—from which he would be free if he remained in the state court. In other words, the right of removal is curtailed by depriving a defendant of territorial immunities from suit given by Congress in the enforcement of federal statutes, presumably because it deemed place for suit important in a country having the dimensions of a continent.

MR. JUSTICE ROBERTS, MR. JUSTICE REED and MR. JUSTICE JACKSON join in this dissent.

TOT *v.* UNITED STATES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 569. Argued April 5, 1943.—Decided June 7, 1943.

1. Sec. 2 (f) of the Federal Firearms Act, where it provides that it shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition "which has been shipped or transported in interstate or foreign commerce," is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. P. 466.
2. Congress was without power to create the presumptions sought to be created by § 2 (f) of the Federal Firearms Act, to wit: That, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred after July 30, 1938, the effective date of the statute. P. 466.
3. A statutory presumption can not be sustained if there be no rational connection in common experience between the fact proved and the ultimate fact presumed. P. 467.

131 F. 2d 261, reversed.

131 F. 2d 614, affirmed.

CERTIORARI, 317 U. S. 623 (No. 569), to review the affirmance of a conviction under the Federal Firearms Act, and certiorari, 318 U. S. 748 (No. 636), to review a judgment reversing a like conviction.

Mr. George R. Sommer, with whom *Mr. Frederic M. P. Pearse* was on the brief, for petitioner in No. 569. *Messrs. Jack N. Tucker* and *Morton A. Eden* for respondent in No. 636.

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*Together with No. 636, *United States* v. *Delia,* on writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit,—argued April 5, 6, 1943.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Messrs. Irwin L. Langbein* and *Valentine Brookes* were on the briefs, for the United States.

Mr. Harold H. Armstrong filed a brief, in No. 636, on behalf of William Minski, as *amicus curiae,* urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases involve the construction and validity of § 2 (f) of the Federal Firearms Act,[1] which is:

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

In No. 569, Tot, the petitioner, was convicted[2] upon an indictment which charged that he, having been previously convicted of two crimes of violence, a burglary and an assault and battery, with intent to beat, wound, and ill-treat,[3] on or about September 20, 1938, at Newark, New Jersey, knowingly, unlawfully, and feloniously received a described firearm which "had been shipped and transported in interstate commerce to the said City of Newark." The Circuit Court of Appeals affirmed the judgment.[4]

The Government's evidence was that Tot had been convicted of assault and battery in 1925, and had pleaded *non vult* to a charge of burglary in 1932 in state courts, and that, on September 22, 1938, he was found in possession of a loaded automatic pistol.

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[1] c. 850, 52 Stat. 1250, 1251; 15 U.S.C. § 902 (f).

[2] See 42 F. Supp. 252.

[3] These are crimes of violence according to the definition contained in § 1 (6) of the Act, 15 U.S.C. § 901 (6).

[4] 131 F. 2d 261.

After denial of a motion for a directed verdict, Tot took the stand and testified that he purchased the pistol in 1933 or 1934. He admitted the criminal record charged in the indictment and other convictions. His sister and his wife testified in corroboration of his evidence, but their testimony was shaken on cross-examination. In rebuttal the Government produced a representative of the manufacturer who testified that the pistol had been made in Connecticut in 1919 and shipped by the maker to Chicago, Illinois. At the close of the case petitioner renewed his motion for a directed verdict, which was denied.

In No. 636, Delia, the respondent, was convicted upon two counts. The first alleged that, on September 25, 1941, he was a person previously convicted of a crime of violence—robbery while armed [5]—and that he received and possessed a firearm, described in the indictment, "which firearm had theretofore been shipped and transported in interstate commerce." The second repeated the allegation of previous conviction and charged that, on September 25, 1941, he received and possessed certain cartridges which "had been theretofore shipped and transported in interstate commerce." The Government's proof was that Delia had been convicted of armed robbery and, on September 25, 1941, had in his possession a loaded revolver which had been manufactured in Massachusetts prior to 1920; that some of the cartridges in the pistol had been manufactured in Ohio and some in Germany, the former after 1934 and the latter at an unknown date. The respondent testified that he had, at about the time of his arrest, picked up the revolver when it was dropped by a person who attacked him, but there was testimony which tended to contradict

[5] Armed robbery is a crime of violence as defined in § 1 (6) of the Act.

this defense. The Circuit Court of Appeals reversed the conviction on each count.[6]

Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct. There remains for decision the question of the power of Congress to create the presumption which § 2 (f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute.

The Government argues that the presumption created by the statute meets the tests of due process heretofore laid down by this court. The defendants assert that it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant.

An indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense. Proof of some sort on the part of the prosecutor is requisite to a finding of guilt; it may consist of testimony of those who witnessed the defendant's conduct. Although the Government may be unable to produce testimony of eye

[6] 131 F. 2d 614.

witnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes a basis for inference of the existence of the second.[7]

The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States.[8] The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.

The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection

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[7] *Wilson* v. *United States*, 162 U. S. 613, 619.

[8] *Ex parte Fisk*, 113 U. S. 713, 721; *Adams* v. *New York*, 192 U. S. 585, 599; *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 42; *Bailey* v. *Alabama*, 219 U. S. 219, 238; *Luria* v. *United States*, 231 U. S. 9; *Hawes* v. *Georgia*, 258 U. S. 1, 4.

between the two in common experience.[9] This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case.[10] But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.

The Government seeks to support the presumption by a showing that, in most states, laws forbid the acquisition of firearms without a record of the transaction or require registration of ownership. From these circumstances it is argued that mere possession tends strongly to indicate that acquisition must have been in an interstate transaction. But we think the conclusion does not rationally follow. Aside from the fact that a number of states have no such laws, there is no presumption that a firearm must have been lawfully acquired or that it was not transferred interstate prior to the adoption of state regulation. Even less basis exists for the inference from mere possession that acquisition occurred subsequent to the effective date of the statute,—July 30, 1938. And, as no state laws or regulations are cited with respect to the acquisition of ammunition, there seems no reasonable ground for a presumption that its purchase or procurement was in interstate rather than in intrastate commerce.[11] It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

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[9] *Mobile, J. & K. C. R. Co.* v. *Turnipseed, supra,* p. 43; *Bailey* v. *Alabama, supra,* 239; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Luria* v. *United States, supra,* 25; *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79, 86; *Manley* v. *Georgia,* 279 U. S. 1; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642; *Morrison* v. *California,* 291 U. S. 82, 90.

[10] *Bailey* v. *Alabama, supra,* 235.

[11] Delia was convicted upon an indictment which charged, *inter alia,* receipt of ammunition.

Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.[12]

Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.

Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness

[12] *McFarland* v. *American Sugar Rfg. Co., supra,* 86.

or hardship.[13] Even if the presumption in question were in itself reasonable, we think that the nature of the offense, and the elements which go to constitute it, render it impossible to sustain the statute, for the reason that one element of the offense is the prior conviction of a crime of violence. If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given.

Although the Government recognizes that the authorities cited in Note 9 announce the rule by which the validity of the Act is to be tested, it relies on certain other decisions as supporting the legislation. We think that what was decided in those cases was not a departure from the rule and that they are distinguishable from the instant cases.

In *Adams* v. *New York,* 192 U. S. 585, a state statute made it an offense "knowingly" to possess policy slips and provided that possession should be presumptive evidence "of possession thereof knowingly." The statutory presumption was sustained. Accidental and innocent possession of such a paper would be extraordinary and unusual and the statutory presumption was hardly needed to justify a jury in inferring knowledge of the character of the policy slip by one found in possession of it.

In *Hawes* v. *Georgia,* 258 U. S. 1, the statutory offense was that of knowingly permitting a still upon the defendant's premises. The statute provided that when distilling apparatus was found on the premises this should be

[13] *Morrison* v. *California, supra,* 94, 96.

prima facie evidence that the person in actual possession had knowledge of its existence. The defendant's premises were a farm on which a still was found. This court sustained the presumption. The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof.

In *Fong Yue Ting* v. *United States,* 149 U. S. 698, an Act of Congress was involved which required every Chinese alien within one year to procure from the Collector of Internal Revenue a certificate of residence and made it the duty of such alien to produce the certificate on request. Any officer was authorized to arrest a Chinese alien failing to produce the certificate on request and to hold him for deportation. The Act placed on the alien the burden of proving at the deportation hearing his residence and of excusing his failure to procure a certificate. Failure to have in his possession the certificate the law required him to have gave rise to a natural inference of intentional failure to procure it or unlawful residence in the country which precluded his procuring it. In such a situation the shifting to the alien of the burden of explanation imposed no unreasonable hardship upon him.

In *Yee Hem* v. *United States,* 268 U. S. 178, it appeared that an Act of Congress prohibited importation of opium except under Treasury regulations and the latter forbade importation of smoking opium. The statute made it an offense knowingly to conceal opium illegally imported and threw upon a defendant found in possession of smoking opium the burden of showing that he had not acquired it through illegal importation. This court sustained the presumption on the ground that no lawful purchase of smoking opium could occur in this country and that, therefore, possession gave rise to sinister implications. It concluded it was not unreasonable to create a presumption of unlawful importation as the source of the commodity the possession of which the defendant concealed.

In *Casey* v. *United States*, 276 U. S. 413, the offenses created by Act of Congress were the purchase or sale of morphine from packages not stamped with an Internal Revenue tax stamp. The defendant was charged with a purchase from such a package. The evidence showed that he dispensed the drug in clandestine fashion and not from a stamped package. In these circumstances, this court held that the presumption created by the statute that a sale of morphine from an unstamped package should be *prima facie* evidence of a similar purchase was not unreasonable or beyond the realm of common experience.

The Government seeks to sustain the statute on an alternative ground. It urges that Congress, in view of the interstate commerce in firearms, might, in order to regulate it, have prohibited the possession of all firearms by persons heretofore convicted of crimes of violence; that, as the power of Congress extends so far, the presumption that acquisition was in interstate commerce is the lesser exertion of legislative power and may be upheld.[14] Two considerations render the argument inadmissible. First, it will not serve to sustain the presumption of acquisition after the effective date of the Act, and secondly, it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce. The judgment in No. 569 is reversed and that in No. 636 is affirmed.

No. 569, reversed.
No. 636, affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.

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[14] See *Ferry* v. *Ramsey*, 277 U. S. 88.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, concurring:

I agree that the mere possession of a pistol coupled with conviction of a prior crime is no evidence at all that the possessor of the pistol has acquired it in interstate commerce or obtained it since the effective date of the Act under consideration. The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers* v. *Florida*, 309 U. S. 227, 237, stand as a constitutional barrier against thus obtaining a conviction, *ibid.*, 235–238. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.

It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment.

COUNTY OF MAHNOMEN *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 684. Argued May 4, 1943.—Decided June 7, 1943.

1. In an action by the United States on behalf of an emancipated Indian against a county to recover money paid as taxes on the Indian's non-taxable allotment, where the issue is whether the payment was voluntary, the burden of proving it involuntary is on the Government. P. 477.
2. An Indian allotment was taxed by a county for a succession of years, in part before and in part after the expiration of the twenty-five year period during which the land was declared immune to taxation. The Indian then, being emancipated, voluntarily made a compromise with the county whereby the land was relieved of all the taxes and of tax sales based thereon, upon payment by the Indian of an amount less than the part of the taxes which had been laid after the twenty-five year period had expired. *Held* that the payment was not recoverable by the Government in a suit on behalf of the Indian. P. 477.

131 F. 2d 936, reversed.

CERTIORARI, 318 U. S. 752, to review a judgment affirming and expanding a judgment of the District Court in a suit by the United States to recover from the County, money paid the County by an Indian as taxes on the Indian's allotment of land.

Messrs. L. A. Wilson and *Geo. B. Sjoselius,* Assistant Attorney General of Minnesota, with whom *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, was on the brief, for petitioner.

Mr. Vernon L. Wilkinson, with whom *Solicitor General Fahy* and *Assistant Attorney General Littell* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

This action was brought by the government in a federal district court to recover real estate taxes alleged to have been illegally collected by Mahnomen County, Minnesota, from Isabelle Garden, an Indian allottee.[1] The suit, brought in 1940, seeks a refund of taxes for the years 1911 to 1927 inclusive. It is conceded that any limitation on the County's power to tax expired in 1928 with the termination of the twenty-five year trust described below. The District Court rendered judgment against the County for the years 1911 to 1921, inclusive, giving a total judgment of $405.97. On appeal by both the government and the County, the Circuit Court of Appeals affirmed but gave an added judgment for the years 1922 through 1925. 131 F. 2d 936.

In its petition for certiorari, the County claimed that Garden was an emancipated Indian who had paid the taxes voluntarily, and that hence the judgment granting a refund conflicts with *Ward* v. *Love County,* 253 U. S. 17. The County also contended that it was wholly within an Indian reservation; that it had long been dependent on taxation of allotted lands; that after the passage of the first Clapp Amendment in 1906, 34 Stat. 325, 353, which emancipated the Mahnomen County Indians, and lifted "all restrictions as to the sale, incumbrance, or taxation for allotments," the County had assumed that the Indians could voluntarily contribute to the support of county institutions; and that while the instant judgment is small, the aggregate amount of such judgments which might be obtained in similar actions would adversely affect the solvency of the County and imperil the continuance of

[1] The government's original complaint included additional claims against Mahnomen and other counties, but these other claims are not involved in the case as it reaches us.

county institutions. On these representations of the public importance of the case, we granted certiorari.

In 1902, the Secretary of the Interior, acting under Congressional authority, issued a patent to this Indian allottee, agreeing to hold a tract of land in trust for twenty-five years "for the sole use and benefit of the Indian" and then to convey the land to her "discharged of said trust and free of all charge or incumbrance whatsoever." [2] Indian land so held by the government has been said to be exempt from all state taxation. *United States* v. *Rickert,* 188 U. S. 432, 436–438. The first and second Clapp Amendments, passed in 1906 and 1907,[3] lifted restrictions previously imposed upon the sale, encumbrance and taxation of the allotments of adult mixed-blood Indians, and in addition declared that "the trust deeds heretofore or hereafter executed by the Department for such allotments, are hereby declared to pass the title in fee simple." Garden is an adult mixed-blood Indian and has been an adult since 1911, when the first controverted tax payment was made. These amendments evidence "a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands." *United States* v. *Waller,* 243 U. S. 452, 462; *Baker* v. *McCarthy,* 145 Minn. 167, 170, 176 N. W. 643.

Notwithstanding these acts the County concedes, and we assume arguendo, that it was without power to impose a tax upon these allotted lands prior to 1928 against the consent of the Indians. *Choate* v. *Trapp,* 224 U. S. 665.[4] The

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[2] 24 Stat. 388, 389; 25 Stat. 642.

[3] 34 Stat. 325, 353; 34 Stat. 1034.

[4] We do not consider whether *Choate* v. *Trapp* is controlling here. In that case the government had patented land with a provision that "the land should be non-taxable" and the agreement with the Indians was held to be a contract which, "having been accepted by the State

Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert, supra;* but under *Choate* v. *Trapp* the Indian, who has gained a "vested right" not to be taxed, must also consent. Acceptance of *Choate* v. *Trapp* does not mean that an Indian, legislatively declared to be competent to handle his own affairs, cannot voluntarily decide to pay taxes for his own advantage and welfare. If, as the petitioner argued, and as the government does not deny, the capacity of the County to provide schools, roads, and other necessary services would have been seriously jeopardized, if not destroyed, by the failure of the Indians to contribute to a tax fund, their newly granted emancipation would have been of little value. In addition, the market value of their lands would have been greatly reduced by the complete inability of the County to secure funds essential to the establishment of means of travel and communication and the maintenance of an orderly society. Nothing that was said in *Choate* v. *Trapp,* or in any other decision of this Court, deprived an emancipated Indian of freedom voluntarily to pay taxes in his own interest. *Ward* v. *Love County,* 253 U. S. 17, 22, assumed that the test of the right to recover a tax illegally collected from an Indian is whether the tax was paid voluntarily, and that the burden is upon one seeking recovery of the tax to establish that the payment was made involuntarily. The issue before us, therefore, is whether the government has sustained that burden.

There is no allegation, stipulation, or finding by either court that these taxes were involuntarily paid. Both courts below erroneously assumed that the government's original obligation to hold the land in trust and deliver it free of encumbrances permits the government to main-

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of Oklahoma in its Constitution upon admission to statehood, was a limitation upon the taxing power of the State." *Carpenter* v. *Shaw,* 280 U. S. 363, 366.

tain this suit even though the Indian has willingly paid taxes. 1911–1921 taxes were evidently paid without protest, and there is nothing in the record to permit a deduction that the payments were involuntary.[5]

The 1922–25 taxes were discharged in somewhat different fashion. The allottee became delinquent in the payment and the lands were sold to the State. Subsequently, in 1936, she made a compromise arrangement with the State, for a period including not only the years 1922–27, for which tax exemption is claimed, but also for the years 1928–34, for which there is no conceivable claim of exemption. This compromise, made in the form of purchase of two tax certificates for the allottee, resulted in payment by Garden for the entire 1922–34 period of *less* than the amount of the 1928–34 taxes. The compromise, made at a time when the Indian was fully as free as any other citizen, was, in the words of the District Court, a "voluntary action and election of the allottee to proceed in a manner which she deemed wise and prudent." It resulted in a net saving to the allottee of $66.42 for the taxable years 1928–1934.[6] The voluntary nature and the

[5] In 1923 Garden sued in a state court for recovery of her 1911–1921 taxes. A demurrer was sustained in the trial court and no appeal was taken. The record does not show that she had made the tax payments under protest, which would probably have entitled her to recovery under state law according to the doctrine of *Warren* v. *Mahnomen County*, 192 Minn. 464, 257 N. W. 77. This action, brought after the tax benefits had been enjoyed, is no indication that she did not originally pay the taxes willingly in order to enjoy the benefits of county government. We need not consider the contention of the County that the 1923 action is res adjudicata. Cf. *Bryan County* v. *United States*, 123 F. 2d 782.

[6] The parties have entered the following stipulation as to the payment of these taxes: "That said taxes for the years 1922 to 1927, both inclusive, were paid and discharged by the said allottee by the purchase by her of State Assignment Certificate No. 76 in the amount of $33.22 covering the taxes for the years 1922 to 1925, both inclusive, and State Assignment Certificate No. 232 in the amount of $145.93 covering taxes for the years 1926 to 1934, both inclusive, all pursuant

fairness of the 1936 settlement are further indicated by the fact that the County, in its answer to the complaint, has declared its willingness to refund the sum paid in settlement in order that it may relevy the taxes for the years 1928 and 1934 and thus collect the taxes which Garden admittedly owed.

The allottee paid the 1911–21 taxes voluntarily and settled the balance of her taxes to her advantage in 1936. Neither Minnesota law [7] nor federal law [8] requires that

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to Chapter 387 Laws of Minnesota for 1935, that the aggregate for said State Assignment Certificates is the sum of $179.15 and that the valid taxes for the years 1928 to 1934, both inclusive, thereby discharged amounted to $245.57 without penalty or interest and that therefore said allottee effected a saving of $66.42 plus penalty and interest by the purchase of said State Tax Assignment Certificates."

The government in effect concedes the merit of the argument that the 1936 settlement was a fair and voluntary compromise but seeks to avoid its force by an assumption that the two tax certificates are to be treated in different fashion. As the stipulation makes clear, Certificate No. 76 formally covers the years 1922–25, and No. 232 covers the years 1926–34. In view of the substantial benefit received by the allottee from the compromise, the government has waived its claim for any refund for the years 1926–27, but it apparently assumed that Certificate No. 76 was unrelated to this compromise. However, both certificates were purchased at the same time, both covered the same lands, and each would be worthless without the other since the Minnesota law under which the arrangement was made is aimed at the settlement of all delinquent taxes. C. 387, Minn. Laws, 1935; Minn. Stat. (Henderson, 1941), § 280.11–13; cf. *Security Trust Co.* v. *Heyderstaedt*, 64 Minn. 409, 67 N. W. 219. The reason for the use of two certificates, one for the years prior to 1925 and the other for the years thereafter, may have resulted from the fact that the Minnesota statute applies different standards of value to compromises of taxes delinquent prior to 1925 and those delinquent thereafter. As is indicated by the stipulation, the transaction for the two certificates was considered as a unit and is in fact one compromise, termed by the trial judge a settlement for a "lump sum."

[7] *Falvey* v. *Board of County Comm'rs*, 76 Minn. 257, 79 N. W. 302; *Warren* v. *Mahnomen County*, *supra*.

[8] *Ward* v. *Love County*, *supra*; *Carpenter* v. *Shaw*, 280 U. S. 363.

a county refund taxes which an emancipated Indian has voluntarily paid. The County is entitled to judgment in its favor.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE concur in the result.

MR. JUSTICE MURPHY, dissenting:

I dissent because the Court today takes too narrow a view of our obligations to our Indian citizens—obligations engendered by a history marked at times with trespass, depredation and corruption, and by the concomitant necessity of aiding and protecting a people once dependent and unlearned in our ways during their difficult period of transition from that situation to the assumption of civic responsibilities and assimilation into the mass of our citizenry.

The assumptions which the opinion of the Court makes regarding the tax status of Isabelle Garden's allotted land but state the applicable law. The land which she received in 1902 under a trust patent, issued pursuant to the Nelson Act (25 Stat. 642) and the General Allotment Act (24 Stat. 388), was exempt from state and local taxation for a period of 25 years, or until 1928. *United States* v. *Rickert*, 188 U. S. 432; *Board of Commissioners* v. *Seber*, 318 U. S. 705. Since the tribe to which she belonged gave up its extensive holdings after assurances that the forthcoming allotments would be non-taxable for 25 years,[1] this tax exemption was a vested right of which she could not be deprived without her consent. *Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363. Consequently, although Isabelle Garden upon reaching her majority in 1911 became eman-

[1] House Ex. Doc. 247, 51st Cong., 1st Sess. (Ser. No. 2747), pp. 93, 103, 104, 138 (1890). See also *Morrow* v. *United States*, 243 F. 854.

cipated by virtue of the Clapp Amendments of 1906 and 1907 (34 Stat. 353, 1034), that legislation did not disturb her vested tax exemption.

The Court's reliance upon *Ward* v. *Love County,* 253 U. S. 17, as the basis for its decision with regard to the 1911–21 taxes paid by Isabelle Garden is unwarranted. In that case it was assumed that an emancipated Indian possessing a vested tax exemption could not recover back taxes illegally assessed but voluntarily paid. 253 U. S. at 22. But that case did not hold, as the Court now asserts that it did, that the burden was on the Indian claimant to establish the involuntary character of the payment. Still less, since the United States was not a party, did it consider what the rights of the United States would be should it bring suit on behalf of the Indian. That is the instant question, and while it is ordinarily true that the burden of demonstrating the illegality of a collected tax and compliance with the statutory requirements for refund are upon the taxpayer seeking recovery, strong reasons of policy suggest an opposite rule should prevail in this case. While "emancipated" upon attaining twenty-one, Isabelle Garden was an Indian "just emerging from a state of dependency and wardship," *Ward* v. *Love County, supra,* at p. 23, and the United States had the right, if not the duty, to enforce for her benefit its guarantee of tax immunity even though she was a citizen, the restrictions on her property were removed, and she was otherwise emancipated from a wardship status. Cf. *Cramer* v. *United States,* 261 U. S. 219, 232; *Heckman* v. *United States,* 224 U. S. 413, 437; *United States* v. *Minnesota,* 270 U. S. 181, 194. To hold that the United States is foreclosed by action which Isabelle Garden may have taken or failed to take in ignorance of her legal rights is to hinder the United States in the performance of its considered policy of protection and to deprive her indirectly of that of which she could not directly be deprived—her vested tax

exemption. Without legal right the County placed her tax-exempt property upon its tax rolls immediately upon her reaching adulthood, assessed it, and she paid the taxes under circumstances not fully disclosed. In this situation it is only fair to put the burden on the County, whose unauthorized action brought it about, of establishing that she paid the taxes of her own free will with full knowledge of her legal rights. A contrary rule fails to take into account the long and not altogether creditable history of our relations with the Indians and the obligations we owe to those people to protect them in their rights.

Apart from the question of burden of proof, however, I cannot agree with the opinion of the Court. The crucial issue with regard to the 1911–21 taxes is assumed to be the voluntary or involuntary character of those payments. The trial court admittedly made no findings on this issue, and, in the absence of such findings, the proper procedure would be to remand the case to the trial court. Cf. *Seminole Nation* v. *United States,* 316 U. S. 286, 300. But if we are to decide the case here by indulging in presumptions, I think the only tenable assumption is that the payments were made under compulsion. Isabelle Garden's land was assessed immediately after she became twenty-one, and she ran the risk of losing it unless she paid the taxes. The record shows that some of the Indians, originally included in this action, who failed to pay their taxes did lose their allotments. On the record it cannot be said with certainty that Isabelle Garden paid the taxes for any other purpose than to prevent her allotment from being sold for unpaid taxes. This is borne out by the fact that she herself brought suit in 1923 to recover the 1911–21 taxes.[2] Suggested

[2] This unsuccessful suit is no bar to the present action by the United States. The interest of the United States in having its obligations and policies respected cannot be defeated by judgments in actions to which it is not a party. *United States* v. *Candelaria,* 271 U. S. 432, 443–44;

reasons for finding that the payments were voluntary are without substance. Isabelle Garden did not have to pay those taxes for the privilege of managing her allotment as she wished. That right was hers under the Clapp Amendments which were competent to remove the restrictions upon her land, but not the vested tax immunity. Cf. *Choate* v. *Trapp, supra,* p. 673. And there is nothing in the record, apart from argument contained in the County's unsuccessful motion for a new trial, to support the assumption that she voluntarily paid the taxes to enjoy the benefits of county government. Payments made under circumstances such as this, where an exempt Indian runs the risk of losing her allotment unless the taxes are paid, should not be considered voluntary payments. Cf. *Ward* v. *Love County, supra,* p. 23; *Carpenter* v. *Shaw,* 280 U. S. 363, 369.

Finally, I cannot assent to the proposition that since Isabelle Garden settled her taxes for 1922 through 1934 for less than the amount she owed for taxes validly assessed for the period beginning in 1928 when her land became taxable, the United States cannot recover for her the amounts she paid to discharge the 1922–25 taxes. Those taxes were discharged in 1936 by the purchase of State Assignment Certificate No. 76. At the same time, the taxes for 1926–34 were discharged by the purchase of another assignment certificate. The fact, unexplained by the stipulation, that two certificates were used to discharge the taxes suggests that there was no relation between the discharge of the 1922–25 taxes and the settlement of the admittedly due taxes for 1928–34. But even if a relation is assumed, the United States should still be allowed to recover the amount paid for Assignment

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Sunderland v. *United States,* 266 U. S. 226, 232; *Privett* v. *United States,* 256 U. S. 201, 204; *Bryan County* v. *United States.* 123 F. 2d 782.

Certificate No. 76. Isabelle Garden probably would have been able to compromise her 1928–34 taxes even more advantageously if the County had not asserted its unwarranted claims for the years 1922–25 during which period the property was still tax exempt. That is sufficient to warrant recovery of the amount paid for Assignment Certificate No. 76 in discharge of the 1922–25 taxes.[3]

BARTCHY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 762. Argued May 12, 1943.—Decided June 7, 1943.

1. Sec. 11 of the Selective Training and Service Act and § 641.3 of the rules made pursuant thereto, declaring it the duty of each registrant to keep his local board advised of the address where mail will reach him, do not require a registrant who is expecting a notice of induction to remain at any one place or to notify the local board of his every move or of his every temporary address. P. 488.
2. The requirement of the rule is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance. P. 489.
3. The evidence in this case does not justify the inference that the petitioner had not shown diligence in keeping the local board advised of his whereabouts, or had endeavored to avoid delivery of the board's notice of induction. P. 489.

132 F. 2d 348, reversed.

CERTIORARI, 318 U.S. 754, to review a judgment affirming a conviction under § 11 of the Selective Training and Service Act.

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[3] This analysis also indicates that the portion of the assignment certificate covering the period 1926–34 which discharged the taxes levied for 1926 and 1927 should be returned. The Government, however, presses no claim for these amounts here.

Mr. Bernard A. Golding for petitioner.

Mr. Valentine Brookes, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *Richard S. Salant* were on the brief, for the United States.

Mr. Justice Reed delivered the opinion of the Court.

This case presents the question of the sufficiency of the evidence to support petitioner's conviction under § 11 of the Selective Training and Service Act and the regulations made thereunder,[1] for a knowing failure to keep his local board[2] advised of the address where mail would reach petitioner, a registrant under the Act. A second count, on which petitioner was acquitted and which need not concern us further, charged a knowing failure to comply with an order to report for induction into the armed forces. Certiorari was granted because the conviction involved an interpretation of an important regulation under the Selective Service Act.

With the approval of both parties and the court, petitioner was tried by the court without a jury and on conviction was sentenced to imprisonment for sixty days. The Circuit Court of Appeals affirmed, one judge dissenting. 132 F. 2d 348.

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[1] Sec. 11 punishes with a maximum of five years imprisonment and a fine of not more than $10,000 "any person . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, . . ." 54 Stat. 885, 894. The regulation involved provides: "Sec. 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not." 6 Fed. Reg. 6851–52.

[2] § 603, 6 Fed. Reg. 6827.

Petitioner was placed in class 1–A, available for general military service, by Local Board No. 9 in Houston, Texas. He had already been given a final physical examination by the Army. On February 4, 1942, petitioner was advised by his board that his induction would probably take place in twenty or thirty days. He immediately sought employment as a merchant seaman for a short coastwise trip. Employment as messman was secured through the National Maritime Union which had active offices in Houston and in New York. The latter city was the port of destination of the ship *Pan Rhode Island* upon which petitioner first shipped. Bartchy secured a union permit card prior to the voyage and later became a regular member of the union. The *Pan Rhode Island* sailed from Texas City February 11th and petitioner received his certificate of discharge from her employment in New York February 20th.

On February 10th Bartchy advised the board by letter that he was shipping as a seaman on the *S. S. Caliche.* He corrected the name on the same day to the *S. S. Pan Maine.* No notice was given the board as to the ship upon which he actually sailed. In the letter he suggested deferment from induction into military service on the ground of employment in the merchant marine and requested that in case deferment was granted it be addressed to 8045 Harrisburg Boulevard, Houston. This was the office of the National Maritime Union and was different from his address, 7543 Harrisburg Boulevard, previously given the board. Bartchy arranged with the Houston office of the union to forward his induction notice to the union's New York office.

On, or shortly after, February 20, 1942, a notice to report for induction on March 4 was mailed to petitioner. It arrived at the Houston office of the union promptly and was forwarded to its New York office pursuant to the instructions left by petitioner. The record does not show

the exact time the letter reached New York. The notice was returned March 12th to the board by the union in an envelope bearing the union's New York return address and postmarked Houston, Texas, the same day. It was not delivered to petitioner although, as will later appear, he was in New York harbor at the time.

On arrival in New York about February 20th, petitioner talked with Merrell, an executive at that office of the union, and inquired for mail from his local board. None was there. On February 25th through the union he obtained a job on the *S. S. American Packard,* berthed at Hoboken, and was on board until March 11th. Sometime between February 20th, when the notice was mailed at Houston, and March 12th, when it was received by the local board at Houston, the letter was in Merrell's hands in New York at the union office. Bartchy was not advised by Merrell of the receipt of the notice to report for induction. The Federal Bureau of Investigation first sought information from Merrell as to Bartchy's whereabouts on March 10th and 11th. Merrell thereupon informed Bartchy that he was sought after by the F. B. I. and he came into the union office on March 11th and was taken into custody.

Bartchy admitted that he knew that the *American Packard* was bound for a foreign port and that he was willing to make the trip unless the induction notice was received. The ship was not to sail immediately on February 25th and he was not required to sign articles for the trip; that would be requested of him just before sailing and after the examination of the seamen by the federal, particularly naval, representatives. He "had every reason to think" that before sailing date he would have word from the board. Asked what he would have done if he were requested to sign articles for the foreign voyage on March 10th, the day before the arrest, he said that he would have first communicated with the board. Pay

and lodging were earned by Bartchy through his service on the *American Packard.* During his stay on board the *American Packard,* Bartchy did not return to New York union headquarters to inquire for mail.

Merrell testified that in their first conversation petitioner said that he was expecting an induction letter, that he wished immediately to be informed of its arrival and that he asked for advice "on how we handled that type of cases, of men who went to sea." Petitioner also said that he would like to work in the meantime and asked whether he should ship. Merrell told him to continue shipping until the time came to go into the Army. The witness testified that his customary advice was for such men to stay aboard ship "until the induction comes in, and then when the induction comes in, we always arrange, we always get hold of them ourselves for the draft board." When the induction notice arrived in the New York office, it was routed to Merrell and he returned it to the board under the mistaken impression that the *American Packard* had left the harbor bound for a war zone.

As petitioner was acquitted of the charge of knowingly failing to report and submit to induction into the armed forces, we shall not deal of course with the situation of a registrant, so charged, who complied with the duty of keeping his local board advised of his address and failed nevertheless to receive his notice. This petitioner was convicted only of the charge that he knowingly failed and neglected "to keep his local board advised at all times of the address where mail will reach him."

We think the Government correctly interprets the Act, § 11, and the regulation, § 641.3, not to require a registrant who is expecting a notice of induction to remain at one place or to notify the local board of every move or every address, even if the address be temporary. The Government makes the point, however, that a registrant with

knowledge, as here, of the imminence of the posting of the notice "is plainly obligated to keep in close communication with the forwarding address." If this suggestion is meant as a rule of law that at his peril the registrant must at short intervals inquire at his last address given to the board, here 7543 Harrisburg Boulevard, Houston, or at his own forwarding address, here the Maritime Union in New York, we are of the view that the Government demands more than the regulation requires. The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance.

The District Court and the Court of Appeals concluded that the petitioner had not shown diligence in keeping the board advised of his whereabouts and had affirmatively endeavored to avoid delivery of the communication. We do not think either of these inferences is justified by this record.

The petitioner left with the board an address which in regular course of mail should and did bring the notice to the harbor where petitioner was located. The fact that Bartchy shipped on one ship rather than another to reach New York is immaterial. On arrival there he went to his forwarding address, inquired for mail, told the official in charge he was expecting an induction notice and arranged for notification to him by the union of its arrival. Bartchy failed to receive the notice because of the mistake of the official of the union when the latter concluded, without verification, that the *S. S. American Packard* had sailed. The union had information the registrant was working on that ship.

Petitioner might have been more diligent by telephoning or calling at the union at intervals between the

twenty-fifth of February and the tenth of March but we conclude that he was justified in relying upon the efficiency of this experienced organization to advise him of the arrival of the notice.

Reversed.

MR. CHIEF JUSTICE STONE:

The decision of the two courts below that petitioner knowingly failed "to keep his Local Board advised at all times of the address where mail would reach him" is amply supported by uncontradicted evidence.

The address which petitioner gave the Board was that of the Maritime Union in Houston, Texas. Mail would not reach him there because he was not in Houston. Assuming that a forwarding address to a place where mail would reach him, if forwarded, would satisfy the statutory requirement, mail would not reach him at his forwarding address in New York City, for he was not in New York City in the critical time from February 25 to March 11, during which he knew from the advice of the Board that his notice of induction would probably be mailed. He was then living in Hoboken, New Jersey on the *S. S. American Packard,* on which he had sought employment as a seaman for a voyage of many months to the Far East, and which, pending her sailing, was undergoing repairs in Hoboken.

During that time mail would not reach him in New York City, for he was at no time in New York City, and he at no time went or sent there for mail, or inquired whether mail had come for him. Mail would not reach him in Hoboken or on the *American Packard,* or "in New York Harbor," because he had not given either as a forwarding address or given instructions to any one that mail be sent or delivered to him at either place. The courts below were justified in concluding that during a period of some weeks, when he expected to receive the notice of the draft board, and when he was preparing to leave the country for a period of months,

he knowingly failed to keep the Board advised of any address where mail would reach him. The judgment should be affirmed.

MR. JUSTICE ROBERTS joins in this dissent.

McLEOD *v.* THRELKELD ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 787. Argued May 6, 7, 1943.—Decided June 7, 1943.

1. An employee whose work is to prepare meals and serve them to maintenance-of-way employees of an interstate railroad in pursuance of a contract between his employer and the railroad company is not "engaged in commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act. P. 493.
2. The test in determining whether an employee is "engaged in commerce" within the meaning of the Fair Labor Standards Act, §§ 6 and 7, is not whether his activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of commerce as to be a part of it. P. 497.

   The work of the employee decides this question; it is not important in this case whether his employer was engaged in interstate commerce.

131 F. 2d 880, affirmed.

CERTIORARI, 318 U. S. 754, to review the affirmance of a judgment of the District Court, 46 F. Supp. 208, in a suit brought by McLeod against his employer under §§ 6 and 7 of the Fair Labor Standards Act.

Mr. Leon C. Levy, with whom *Mr. Harry Dow* was on the brief, for petitioner.

Mr. John P. Bullington for respondents.

Solicitor General Fahy and *Messrs. Richard S. Salant* and *Irving J. Levy* and *Miss Bessie Margolin* filed a brief

on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari brings here for examination a judgment of the Circuit Court of Appeals for the Fifth Circuit, 131 F. 2d 880, which held that a cook, employed by respondents to prepare and serve meals to maintenance-of-way employees of the Texas & New Orleans Railroad Company, is not engaged in commerce under §§ 6 and 7 of the Fair Labor Standards Act and therefore not entitled to recover for an alleged violation of that act.[1]

The respondents are a partnership with a contract to furnish meals to maintenance-of-way employees of the railroad, an interstate carrier. The meals are served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. The car is set conveniently to the place of work of the boarders and in emergencies follows the gang to the scene of its activities. Employees pay the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due and pay it over to the contractor. The petitioner worked as cook at various points in Texas along the line of the road during the period in question.

As the extent of the coverage by reason of the phrase "engaged in commerce" is important in the administration of the Fair Labor Standards Act, we granted certiorari.

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[1] 52 Stat. 1062–63. "Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

. . . . . .

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . ."

In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" was rejected in favor of the language, now in the act, "each of his employees who is engaged in commerce or in the production of goods for commerce." [2] §§ 6 and 7. See the discussion and reference to legislative history in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564. The selection of the smaller group was deliberate and purposeful.

McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause.[3] Our question is whether he was "engaged in commerce." [4] We have held that this clause covered

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[2] The distinction in the coverage arising from this choice of language was well known to Congress. Cf. National Labor Relations Act, 49 Stat. 449, 450. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 31 *et seq.;* Bituminous Coal Act of 1937, § 4–A, 50 Stat. 72, 83; Agricultural Adjustment Act, 50 Stat. 246; Public Utility Holding Company Act of 1935, 49 Stat. 803, § 1 (c).

[3] 52 Stat. 1061. "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

[4] Cooks employed to feed workers engaged in the production of goods for commerce have been held to be similarly engaged. *Hanson* v. *Lagerstrom,* 133 F. 2d 120; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101.

every employee in the "channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not.[5] Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable waterways are "engaged in commerce." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, 742.

In the present instance, it is urged that the conception of "in commerce" be extended beyond the employees engaged in actual work upon the transportation facilities.[6] It is said that this Court decided an employee, engaged in similar work was "in commerce," under the Federal Employers' Liability Act[7] and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive.[8]

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[5] *Walling* v. *Jacksonville Paper Co., supra; Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

[6] The contention that the work of the employee is covered by the exemption of § 13 (a) (2)—"any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"— seems without significance. If the work is in interstate commerce, the exemption does not apply. Compare *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101, 106 *et seq.; Hanson* v. *Lagerstrom*, 133 F. 2d 120.

[7] *Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U. S. 101. This case construed the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, § 1; "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages . . ."

[8] *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524.

Judicial determination of the reach of the coverage of the Fair Labor Standards Act "in commerce" must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum Co.* v. *Walling, supra,* 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments "in commerce" under the Fair Labor Standards Act.[9]

The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment,[10] we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation.[11] But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i. e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.[12]

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[9] *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 558; *Chicago & North Western Ry. Co.* v. *Bolle,* 284 U. S. 74, 78; *Chicago & Eastern Illinois R. Co.* v. *Commission,* 284 U. S. 296; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415, 419.

[10] Act of August 11, 1939, 53 Stat. 1404; Hearings, Senate Committee on the Judiciary, Amending the Federal Employers' Liability Act, March 28 and 29, 1939, pp. 3–9, 26–30; S. Rep. No. 661, 76th Cong., 1st Sess.

[11] *Pedersen* v. *Delaware, L. & W. R. Co.,* 229 U. S. 146, 151; cf. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125.

[12] See the cases cited in note 9, *supra.*

The *Smith* [13] case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was "in commerce" this Court said:

"The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." 250 U. S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle, Industrial Commission* and *Bezue* cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads

[13] *Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U. S. 101.

carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.[14] Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, "production of goods for commerce." [15]

It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

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[14] Thus we said as to a rate clerk employed by a motor transportation company:

"It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act . . ." *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 575.

[15] 52 Stat. 1060–61.

Sec. 3. "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

. . . . . .

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act.

Affirmed.

MR. JUSTICE MURPHY, dissenting:

I think that petitioner is covered by the Fair Labor Standards Act.

In using the phrase "engaged in commerce" Congress meant to extend the benefits of the Act to employees "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567. We recently construed the phrase to include employees whose activities are so closely related to interstate commerce "as to be in practice and in legal contemplation a part of it." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 129, 130, 132. This practical test was derived from cases such as *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, 151, and *Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U. S. 101, construing similar language in the Federal Employers' Liability Act.[1] The activities of petitioner in cooking for a traveling maintenance crew of an interstate railroad are sufficient to satisfy this test. It was so held in the *Smith* case, 250 U. S. 101, the facts of which are virtually identical with the instant case except for the immaterial difference that petitioner here was employed by an independent contractor rather than by the railroad itself.[2] The reasoning of the *Smith* case is persuasive and should control this one.

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[1] Act of April 22, 1908, 35 Stat. 65, as it was before the amendment of 1939, 53 Stat. 1404. 45 U. S. C. § 51 *et seq.*

[2] The application of the Fair Labor Standards Act, of course, depends upon the character of the employees' activities, not the nature of the employer's business. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132, and cases cited.

The opinion of the Court, however, rejects the concept of coverage used in the *Smith* case for the narrower test of whether an employee is engaged "in interstate transportation or in work so closely related to it as to be practically a part of it," used in another line of cases under the Federal Employers' Liability Act.[3] I think this is wrong for several reasons.

The Fair Labor Standards Act extends to employees "engaged in commerce," not merely to those engaged in transportation.[4] As the *Bolle* case itself points out: "Commerce covers the whole field of which transportation is only a part." 284 U. S. at 78. Hence, whatever basis there may have been for restricting the coverage of the Federal Employers' Liability Act to employees actually engaged in transportation because of the fact that the Act applied only to those working for employers engaged in interstate transportation by rail,[5] can have no possible application or bearing on the interpretation of the Fair Labor Standards Act. The coverage of this Act is much more extensive. It is not limited to employees of interstate carriers but extends generally to employees engaged in all kinds of commerce, including transportation. Nothing in the Act suggests that it has a narrower application to employees whose work "in commerce" is transportation or work connected therewith, than it has to employees who are engaged in commerce but whose work has nothing to do with transportation. Such a construction is untenable because it would discriminate without reason between different types of employees, all

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[3] *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, 558; *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74; *Chicago & Eastern Illinois R. Co.* v. *Commission*, 284 U. S. 296; *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415.

[4] The Act defines "commerce" as: "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U. S. C. § 203.

[5] See *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74, 78.

of whom fall within the same general statutory classification of "engaged in commerce."

The necessary effect of rejecting the *Smith* case for the restrictive concept of "in commerce" which was used in the *Shanks*,[6] *Bolle*,[7] *Commission*,[8] and *Bezue*[9] cases is to introduce into the administration of the Fair Labor Standards Act that concededly undesirable confusion which characterized the application of the Federal Employers' Liability Act and prompted the 1939 amendment (53 Stat. 1404) which in effect repudiated the narrow test of the *Shanks* line of cases. The reality of this confusion is readily demonstrable. We have held that a rate clerk employed by an interstate motor carrier[10] and a seller of tickets on a toll bridge over which interstate traffic moves[11] are both "engaged in commerce" within the meaning of the Fair Labor Standards Act. Yet, in the view of the majority of the Court, when the employees' activities are in the field of transportation, the Act apparently will not cover[12] those who work in an interstate carrier's repair shop on facilities to supply power for machinery used in repairing instrumentalities of transportation,[13] or who heat cars and depots used by interstate passengers,[14] or who store fuel for the use of interstate vehicles,[15] or who work on such vehicles when with-

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[6] 239 U. S. 556.

[7] 284 U. S. 74.

[8] 284 U. S. 296.

[9] 284 U. S. 415.

[10] *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.

[11] *Overstreet* v. *North Shore Corp.*, 318 U. S. 125.

[12] This is discussed wholly apart from the question of the applicability of § 7 because of the exemption contained in § 13 (b) (1) of the Act. See *Southland Gasoline Co.* v. *Bayley*, *ante*, p. 44.

[13] Cf. *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556.

[14] Cf. *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74.

[15] Cf. *Chicago & Eastern Illinois R. Co.* v. *Commission*, 284 U. S. 296.

drawn for the moment from commerce for repairs.[16] The anomaly of this is clear—there is no sound reason for extending the benefits of the Act to a rate clerk employed in the office of an interstate motor carrier and denying them to the janitor who keeps the office clean and warm, or the employee who works in the carrier's shop on machinery used to repair interstate vehicles, or on the vehicles themselves.

If the applicable provision were "engaged in the production of goods for commerce" instead of "engaged in commerce," our decisions make it clear that employees such as the janitor and the shop tender and probably petitioner would be within the Act. Cf. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88.[17] The phrase "engaged in commerce" should be as broadly construed. In the words of one of the Act's sponsors, the phrase extends to "employees who are a necessary part of carrying on" a business operating in interstate commerce.[18] Petitioner's work was evidently considered necessary to the operation of the railroad, else it would have made no provision for boarding its maintenance crews. We have cast the relevant tests for determining the scope of the two phrases of coverage in substantially similar language. In *Kirschbaum Co.* v. *Walling,* work which "had such a close and immediate tie with the process of production for commerce" as to be "an essential part

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[16] Cf. *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415.

[17] Employees cooking for workers engaged in the production of goods for commerce have been held to be similarly engaged and covered by the Act. *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101; *Hanson* v. *Lagerstrom,* 133 F. 2d 120.

[18] Speaking for the Senate conferees on the Conference Report, Senator Borah said: ". . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec. 9170.

of it" was held to be "necessary to the production of goods for commerce." 316 U. S. at 525–26. Correspondingly, in *Overstreet* v. *North Shore Corp.*, we held that the phrase "engaged in commerce" includes work which "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.'" 318 U. S. at 130. The purpose of the "production of goods for commerce" phrase was obviously not to cut down the scope of "engaged in commerce," but to broaden the Act's application by reaching conditions in the production of goods for commerce which Congress considered injurious to interstate commerce. See *United States* v. *Darby*, 312 U. S. 100. The effect of the Court's decision today, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it, when the employee's activities are in transportation or connected therewith, to the narrow and legislatively repudiated view of the *Shanks, Bolle, Commission* and *Bezue* cases. Such an unbalanced application of the statute is contrary to its purpose of affording coverage broadly "throughout the farthest reaches of the channels of interstate commerce" to employees "engaged in commerce."

The judgment should be reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

UNITED STATES *v.* JOHNSON.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 4. Argued April 10, 13, 1942. Reargued October 12, 1942.—Decided June 7, 1943.

1. Under Jud. Code § 284, a grand jury can be authorized to sit beyond the term of court at which it was organized only to finish investigations begun during that term. P. 510.
2. Where a grand jury sat to the end of the term at which it was organized and, by authority of an order of court, through the term next following, a further order authorizing it to continue to sit during the term next succeeding "to finish investigations begun but not finished" by it during the original and intermediate terms is to be read, not as attempting to authorize the finishing of investigations begun contrary to Jud. Code § 284 in the intermediate term, but as authorizing only the finishing of investigations begun during the original term. P. 509.
3. A grand jury is invested with broad investigatorial powers into what may be found to be offenses against federal criminal law. Its work is not circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries. P. 510.
4. That for which a grand jury may be authorized to continue its sitting after the term during which it was organized is the general subject matter on which it originally began to investigate in that term. And where its sessions have been extended by order to a following term, it is not forbidden to inquire into new matters within the general scope of its original investigation. P. 511.
5. A grand jury, which began its investigation of systematic income tax evasions during a December 1939 Term in which it was organized, and which was allowed to continue its sitting during the next two terms (February and March) for the purpose of finishing the investigation, properly included in its indictment for an attempted evasion of taxes for the year 1939 the filing of a false return in March 1940 which was a part of the systematic, fraudulent practice investigated. P. 511.

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*Together with No. 5, *United States* v. *Sommers et al.*, also on writ of certiorari, 315 U. S. 790, to the Circuit Court of Appeals for the Seventh Circuit.

6. Where an indictment alleged that the grand jury's investigation of the matters charged was begun but not finished at the term of court at which the jury was organized, and that the jury, pursuant to orders of court, had continued to sit during the two following terms for the purpose of finishing such investigation; and pleas and motions were filed seeking to put these allegations in issue and to have the indictment quashed upon the ground that it resulted from an investigation begun after the original term, beyond the competency of the grand jury, *held* that the Government was not required to answer or to assume the burden of supporting with proof the allegations of the indictment; and that the motion to quash was properly stricken on a preliminary motion by the Government. P. 512.
7. Where one person was charged in several counts with attempts to defeat and evade the payment of his income taxes for each of several years (made a felony by § 145 (b) of the Internal Revenue Code), and with filing false returns on March 15th of each of the years in the process of such attempts and not merely with the offense of filing false returns, which is made a misdemeanor by § 145 (a) of that Code; and others were joined as aiders and abettors (who under § 332 of the Criminal Code are principals) charged with assisting him by their conduct during the years in question both before and after the returns were filed, but not as participating in the acts of filing, *held* that the counts, as against the aiders and abettors, were neither inconsistent nor duplicitous, nor objectionable as charging them in the same count as accessories both before and after the fact. P. 514.
8. The evidence concerning the connection of the defendant Johnson with a network of gambling houses, his winnings, and his private expenditures during the years in question was sufficient to warrant leaving the case to the jury. P. 515.
9. In a prosecution for attempts to avoid payment of income taxes, the fact that the defendant's private expenditures during the years in question exceeded his available declared resources *held* competent as evidence that he had some unreported income. P. 517.
10. One may aid and abet another in attempts to evade income taxes, without participating in the making of the other's false returns, by falsely pretending to be the proprietor of establishments from which the other's income was derived. P. 518.

    Evidence of the conduct, acts and admissions of persons charged as aiders and abettors amply warranted sending their cases to the jury. P. 518.

11. Admission of testimony of an expert witness regarding income and expenditures of one of the accused in this case, although consisting of computations based on substantially the entire evidence in the record, *held* not an invasion of the province of the jury, where, in the light of the judge's charge, all issues are left to the independent, unforeclosed determination of the jury. P. 519.

123 F. 2d 111, 142, reversed.

CERTIORARI, 315 U. S. 790, to review the reversal of sentences imposed by the District Court in a prosecution of Johnson and others for alleged violations of penal provisions of the Revenue Acts of 1936 and 1938 and for conspiracy.

Mr. Arnold Raum, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Ellis N. Slack, Earl C. Crouter, J. Louis Monarch,* and *Gordon B. Tweedy* were on the briefs, for the United States.

Mr. Floyd E. Thompson argued the cause on the original argument for respondents. *Mr. William J. Dempsey* was with him on the reargument, and *Mr. Conrad H. Poppenhusen* was with them on the briefs, for respondent in No. 4.

Messrs. Harold R. Schradzke and *Edward J. Hess* submitted on the reargument for respondents in No. 5. *Mr. John Elliott Byrne* was with *Mr. Hess* on the brief on the original argument.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an indictment in five counts. Four charge Johnson with attempts to defraud the income tax for each of the years from 1936 to 1939, inclusive, and charge a dozen others with aiding and abetting Johnson's efforts. The fifth count charges Johnson and the others with conspir-

acy to defraud the income tax during those years. The substantive counts charge violations of the penal provisions of the Revenue Acts of 1936 and 1938, now embodied in general form in § 145 (b) of the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. § 145 (b). The conspiracy count is based on the old § 5440 of the Revised Statutes, which later became § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88.

As to four of the defendants, the cause was dismissed upon motion of the United States Attorney; three others were acquitted by the jury. Of the six remaining defendants, the jury brought in a verdict of guilty on all five counts against Johnson, Sommers, Hartigan, Flanagan, and Kelly, and against Brown on counts three and four, the substantive counts for the years 1938 and 1939, and on the conspiracy count. The district court imposed on Johnson a sentence of five years on each of the first four counts and of two years on the conspiracy count, as well as a fine of $10,000 on each of the five counts. The terms of imprisonment were to run concurrently and the payment of $10,000 would discharge all fines. Lesser concurrent sentences and fines were imposed on the other defendants.

The Circuit Court of Appeals reversed the judgments. Its holding undermined the entire prosecution in that it found the indictment void because it was returned by an illegally constituted grand jury. But it went beyond that major ruling. It found the four substantive counts of the indictment, in so far as they charged defendants as aiders and abettors, fatally defective. Proceeding to the merits, the court held that the case properly went to the jury against Johnson on the last four counts and that the evidence sustained the verdict against all the defendants on the conspiracy count, but that a verdict should have been directed for Johnson on the first count and for the other defendants on all but the conspiracy count. Finally, it found that the testimony of an expert accountant for the

government invaded the jury's province and that its admission was prejudicial error. 123 F. 2d 111. Judge Evans dissented on all points. He found no infirmities in the indictment or in the rulings by the trial judge, and thought that the case was properly committed to the jury. *Id.*, 128. On rehearing, the Circuit Court of Appeals adhered to its views, but withdrew an erroneous part of its grounds for deeming admission of the expert accountant's testimony to be prejudicial. 123 F. 2d 142. We brought the case here because it concerns serious aspects of federal criminal justice. 315 U. S. 790.

Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance. Therefore, in deciding that the defendants were held to answer for an infamous crime on what was merely a scrap of paper and not "the indictment of the Grand Jury" as required by the Fifth Amendment, the lower court went beyond that which relates to the special circumstances of a particular case. Unlike most of the other rulings below, the court here dealt with a matter of deep concern to the administration of federal criminal law. At the root of the court's decision is its finding that an order extending the life of the grand jury was void, and that the indictment was therefore returned by a body not lawfully empowered to act. A brief history of the proceedings which led to the filing of this indictment in open court on March 29, 1940, is therefore essential.

Terms of court of the District Court for the Eastern Division of the Northern District of Illinois are, by statute, fixed for the first Monday in February, March, April, May, June, July, September, October, and November, and on the third Monday in December. 28 U. S. C. § 152. This grand jury was impaneled at the December

1939 term of the district court, and was therefore empowered to sit through January 1940. By an order, the validity of which is undisputed, its life was continued into the February term. And on February 28, 1940, the district court authorized a further continuance of this grand jury during the March 1940 term. This is the order which gives rise to the controversy, for upon its legality depends the validity of the indictment thereafter returned by the grand jury. The disputed order reads as follows:

"Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois, Eastern Division, by Dorothy W. Binder, Forewoman, and in open Court requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; and the Court being fully advised in the premises,

"It Is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations."

The court below construed this order as authorizing the grand jury to sit during March to enable it to finish investigations begun in February, while under the governing statute, § 284 of the Judicial Code, 28 U. S. C. § 421, it could be authorized only "to finish investigations begun but not finished by such grand jury" during its original term, *i. e.*, the December 1939 term. So to read the order, however, is to dissociate language from its appropriate function and to disregard the historic rôle of the grand

jury in our federal judicial system. Since the law permits a continuance of the grand jury "to finish investigations" begun during its original term, the most elementary requirement of attributing legality to judicial action should, unless violence is done to English speech, lead to a reading of the order of February 28 so as to restrict the grand jury to that which it legally could do instead of to an expansive reading making for illegality.

The foundation for the holding that the order extending the grand jury into the March term purported to give authority in defiance of the statute is the phrase in the order reciting the grand jury's request that it be authorized to continue its sitting during the March term "to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court." The Circuit Court of Appeals read this to mean that the grand jury requested a continuance into the March term to finish investigations begun in the February as well as in the original December term. But surely the recital "to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms," is, at the worst, dubious as to what was begun and what was finished. Judge Evans rightly resolved the ambiguity by reading the disputed language "during the said December 1939 and the said February 1940 Terms" as qualifying "finished" rather than "begun," and therefore meaning that the grand jury was unable to finish during the December and February terms that which it had begun when it first came into being in the December term. Such a rendering makes good English as well as good sense. To read it as the court below read it is to go out of one's way in finding that the judge who granted the order of extension either wilfully or irresponsibly did a legally forbidden act, namely, to allow

a grand jury to sit beyond the term and take up new instead of finishing old business. For the legal limitations governing extension of the life of a grand jury do not lie in a recondite field of law in which a federal district judge may easily slip. Certainly every district judge in a great metropolitan center like Chicago knows that in authorizing a grand jury to continue to sit "for the purpose of finishing" their "investigations," the "investigations" must have been begun during the grand jury's original term and that new domains of inquiry may not thereafter be entered by the grand jury.

The failure of the court below to recognize the essential function of the grand jury in our system of criminal justice is revealed by its subsidiary argument in regard to the fourth count. Since that charges an attempted evasion of Johnson's taxes for the year 1939, and since such an attempt could not have become manifest prior to the filing of his return on March 15, 1940, the court reasoned that the "investigation" into this charge necessarily could not have been begun prior to the March term and that it therefore constituted a "new" investigation. Such a view misconceives the duties and workings of a grand jury. It is invested with broad investigatorial powers into what may be found to be offenses against federal criminal law. Its work is not circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries. A grand jury that begins the investigation of what may be found to be obstructions to justice or passport frauds or tax evasions opens up all the ramifications of the particular field of inquiry. Its investigation in such cases may be into a course of conduct continuing during, and perhaps even after, its inquiry. And Congress certainly did not restrict a grand jury in dealing with all crimes disclosed by its investigation. The very purpose of the Act of February 25, 1931, 46 Stat. 1417, 28 U. S. C. § 421, allowing grand

juries to continue investigations beyond the arbitrary periods that constitute terms of court in the various federal districts, was to make the grand jury a more continuous and therefore more competent instrument of what have become increasingly more complicated inquiries into violations of the enlarged domain of federal criminal law. That Congress did not have a restrictive view of the "investigations" which a grand jury was authorized to pursue to completion beyond its original term is emphasized by the Act of April 17, 1940, 54 Stat. 110, amending the Act of 1931, *supra*. Under the original Act a grand jury was not permitted to sit "during more than three terms." But since the terms of court are of varying duration, a fact to which the attention of Congress was directed by the experience particularly in the Southern District of New York, Congress extended the potential life of a grand jury from "three terms," which in some districts might be only three months, to "eighteen months." The considerations which induced Congress to enlarge still further the already ample scope of grand jury investigations and the manner in which the House committee report spoke of a grand jury's work, see H. Rep. No. 1747, 76th Cong., 3d Sess., are but confirmation that that for which a grand jury may continue its sitting is the general subject-matter on which it originally began its labors. It is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter.

One can hardly conceive of a clearer case of a continuing investigation of an old subject-matter than that presented here. The grand jury in December 1939 began investigation into alleged tax evasions by Johnson. It was allowed to continue its sitting during the February term, and its authority was further extended to permit it to sit during March. The grand jury found a systematic practice of tax evasion over a course of years, and

yet, so we are urged, it could not continue to ferret out one more phase of this continuous course of fraudulent conduct because that did not ripen into a separate offense until the last term of the grand jury's sitting. So to hold is to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing. See *Hale* v. *Henkel,* 201 U. S. 43, 65; *Blair* v. *United States,* 250 U. S. 273, 282; *Cobbledick* v. *United States,* 309 U. S. 323, 327.

By way of reinsurance of its main basis for invalidating the indictment, the Circuit Court of Appeals relied on a wholly different line of argument from that which we have just rejected. It held that the preliminary motions, by which the defendants sought to quash the indictment because of the grand jury's illegality, raised issues of fact. It therefore found that the district court, instead of granting the government's motion to strike the pleas in abatement, should have put the government to answer. The indictment itself alleged that the grand jury "having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this Court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term. . . ." The court below was apparently of the view that a mere denial of such a solemn allegation by the grand jury puts its truth in issue, that the burden is upon the government "to support it with proof," and that failure to vindicate the authority of the grand jury is "fatal." Assuming that under any circumstances a grand jury's allegation that the indictment which it returns was the outcome of an investigation "begun" during its original term and was not a forbidden new investigation "begun" during an extended term, within the meaning of § 284 of the Judicial Code, 28 U. S. C. § 421, presented a traversable issue, the cir-

cumstances that could raise such an issue would indeed have to be extraordinary and the burden of establishing it would rest heavily on defendants. Compare *Roche* v. *Evaporated Milk Assn., ante,* p. 21.

Were the ruling of the court below allowed to stand, the mere challenge, in effect, of the regularity of a grand jury's proceedings would cast upon the government the affirmative duty of proving such regularity. Nothing could be more destructive of the workings of our grand jury system or more hostile to its historic status. That institution, unlike the situation in many states, is part of the federal constitutional system. To allow the intrusion, implied by the lower court's attitude, into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes. The district court was quite within its right in striking the preliminary motions which challenged the legality of the grand jury that returned the indictment. To construe these pleadings as the court below did would be to resuscitate seventeenth century notions of interpreting pleadings and to do so in an aggravated form by applying them to the administration of the criminal law in the twentieth century. Protections of substance which now safeguard the rights of the accused do not require the invention of such new refinements of criminal pleading.

Another ruling of general importance in the law of criminal pleading was made by the Circuit Court of Appeals. It will be recalled that the first four counts charge Johnson with attempts to defraud the revenue, and that the other defendants are in the same counts charged as aiders and abettors of Johnson. The court below ruled that a demurrer of the defendants other than Johnson to

those four counts should have been sustained. It found that these counts were, as to the co-defendants, both inconsistent and duplicitous. They were deemed inconsistent in that the offenses against Johnson were charged as of March 15th of each year, whereas the co-defendants "as aiders and abettors are charged with an offense which extended over a period of years." They were deemed duplicitous in that the co-defendants were in each count charged with conduct that aided and abetted Johnson both before and after March 15th of the relevant year, and were therefore, in the court's view, charged in the same count as accessories both before and after the fact.

We are constrained to say that the court was led into error by a misreading of the statutes which underlie these counts and the allegations which laid the offenses. The basis of each of the four counts, we have noted, is a penal sanction in successive revenue laws, now generalized by the provision in the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. § 145 (b), which makes it a felony for any person who, being subject to the income tax, "willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof." Section 332 of the Criminal Code (18 U. S. C. § 550) makes every person who "directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission" a "principal." The vice of the lower court's ruling is its misconception of the nature of the offense defined by § 145 (b) with which Johnson is charged, as well as that of the relation of aiders and abettors, made principals by § 332 of the Criminal Code to such an offense. In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 15th. That may only be a misdemeanor under § 145 (a) of the Internal Revenue Code, but that is not the offense with which Johnson was

charged. He was charged with a felony made so by § 145 (b), the much more comprehensive violation of attempting "in any manner to defeat and evade" the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion. And all who contributed consciously to furthering that illicit enterprise aided and abetted its commission and thereby, under § 332 of the Criminal Code, became principals in the common enterprise. Therefore, nonparticipation in merely one phase of Johnson's attempted evasion, namely, the filing of a false return on March 15th, is in itself irrelevant, and it is equally irrelevant that the aid which the co-defendants gave Johnson continued after March 15th as well as preceded it. The crime of each of the first four counts is the wilful attempt to evade the payment of what was due to the revenue. All who participated in that attempt were contributors to the illicit enterprise. There was only one offense in each count, and all who shared in its execution have equal responsibility before the law, whatever may have been the different rôles of leadership and subordination among themselves. There is neither inconsistency nor duplicity in these four counts and the demurrers to them were properly overruled.

There remain only questions pertinent to this case, and more particularly whether the evidence warranted leaving the case to the jury. This was a six weeks' trial of which the record, even in the abbreviated form used on appeal, runs over a thousand printed pages. We have painstakingly examined it all, but it would be unprofitable to give more than the barest outline of what went to the jury. The details sufficiently appear from the two opinions below.

Johnson was a gambler on a magnificent scale. The income which he himself reported from winnings for one of the years in question exceeded a quarter of a million

dollars. The lowest annual income so reported for the period is more than $100,000. His co-defendants were plainly smaller fry in Chicago's gambling world. Their reported annual gambling income during the same period ranged from $3,600 to $19,000. Concededly Johnson frequented some half-dozen gambling houses, ostensibly separately owned by the others found guilty, excepting only Brown who was the nominal owner of a so-called currency exchange which furnished private banking facilities for these gambling houses. Indisputably, also, Johnson had a continuous and close relation to these gambling houses. The decisive issue of fact was whether Johnson's relation to these resorts was that of a patron or of a proprietor. The testimony both for the government and for the defendants focussed on that question. During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he "never had any financial interest in any gambling Club operated by any of the defendants."

The jury decided this central issue against Johnson. And the argument that there was not enough evidence on which a jury was entitled to make such a finding does not call for extended discussion. In making this ultimate finding the jury must have found that the string of gambling houses with which Johnson was associated over a period of years, while ostensibly conducted as separate enterprises by his co-defendants in separate ownership, was in fact a single unified gambling enterprise. A voluminous body of lurid and tedious testimony, often through obviously unwilling witnesses, amply justified the jury in finding that these pretended separate houses were under a single domination. The testimony also amply justified the conclusion that Johnson owned a proprietary interest in this network of gambling houses and was not merely a patron or an occasional accommodating dealer when other

patrons desired to play for stakes beyond the conventional limit. Having been justified in finding that the individual defendants were screens behind which Johnson operated, the jury was also justified in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. Even such records as were kept in these houses were destroyed. But that these gambling transactions were on an enormous scale was overwhelmingly established. It is not to be expected that the actual financial transactions of such a vast illicit business would appear by direct proof. Compare *United States* v. *Wexler*, 79 F. 2d 526. The long duration of this gambling business, the substantial evidence of the operation of the law of probability in favor of the houses, such records as there were pertaining to the private banking facilities and currency exchanges which were at the service of these houses, made it not a matter of tenuous speculation but of solid proof that there were winnings of a substantial amount which Johnson did not report.

That he had large, unreported income was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938, and 1939, the private expenditures of Johnson exceeded his available declared resources. It is on this latter ground—namely, that presumably Johnson's expenditures justified the finding that he had some unreported income which was properly attributable to his earnings from the gambling houses—that the court below thought that the evidence on three of the substantive counts, those for 1937, 1938, and 1939, was sufficient to go to the jury. That is enough to sustain the judgment against Johnson, for the sentences on all the counts were imposed to run concurrently.

Of course the government did not have to prove the exact amounts of unreported income by Johnson. To require more or more meticulous proof than this record discloses that there were unreported profits from an elab-

orately concealed illegal business, would be tantamount to holding that skilful concealment is an invincible barrier to proof. ". . . the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents." *Delaney* v. *United States,* 263 U. S. 586, 589–90. And this consideration—the concurrence of both courts below in the sufficiency of the jury's verdict—renders unnecessary further discussion of the verdict against all the defendants, including Brown, on the conspiracy count. For while Brown was also convicted on two substantive counts, the conspiracy charge is sufficient to absorb his sentence.

Not many words are needed to dispose of the question of the sufficiency of the evidence to warrant submission to the jury of the substantive counts against the other aiders and abettors, Sommers, Hartigan, Flanagan, and Kelly. In holding that the motion for directed verdicts on the counts charging aiding and abetting should have been granted, the court below was largely misled by its erroneous conception, with which we have already dealt, of the crime of aiding and abetting in the circumstances of this case. In other words, as a matter of evidence as well as a matter of pleading, the court was dominated by the notion that the co-defendants did not aid and abet Johnson if they actually did not share in the making of his false return on each March 15th. The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of his interest in these gambling clubs of which they themselves pretended to be proprietors. Evidence of conduct, acts and admissions, amply warranted the trial court to send the substantive counts against the aiders and abettors to the jury.

A ruling on evidence, much pressed upon us, must finally be noticed. The court below held that the admission of the testimony of an expert witness regarding Johnson's income and expenditures during the disputed period invaded the jury's province. The witness gave computations based on substantially the entire evidence in the record as to Johnson's income. The Circuit Court of Appeals held that while undoubtedly "a proper hypothetical question could have been framed and propounded," in fact the witness was not giving answers on the basis of any assumption or hypothesis but as testimony on the "controverted issue" in the case. 123 F. 2d at 128. We do not so read the meaning of this testimony. No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the con-

duct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules.

The decision below must therefore be reversed and the cause remanded to the Circuit Court of Appeals for proper disposition in accordance with this opinion.[1]

Reversed.

MR. JUSTICE ROBERTS concurs in that portion of the opinion which deals with the validity of the indictment. He is of opinion that the judgment of the Circuit Court of Appeals should be affirmed because, in the case of Johnson, substantial trial errors in the admission of evidence operated to his prejudice, and, in the case of the other defendants, because there was no evidence whatever to prove that they aided or abetted Johnson in any effort to commit a fraud upon the revenue and none to prove that they were parties to a conspiracy with him having the same object.

MR. JUSTICE MURPHY, MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

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[1] After the case came here, the Government asked that the petition as to Flanagan, who had died, be dismissed. Accordingly, we dismiss the writ as to Flanagan and leave the disposition of the fine that was imposed on him to the Circuit Court of Appeals. See *United States* v. *Pomeroy*, 152 F. 279, reversed in 164 F. 324.

UNITED STATES *v.* BELT ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 919. Decided June 7, 1943.

Section 5 of the Act of April 27, 1912, allowing appeals directly to this Court from final decrees of the "Supreme Court of the District of Columbia," was repealed by § 238 of the Judicial Code, as amended by the Act of February 13, 1925. P. 522.

47 F. Supp. 239, vacated and remanded.

APPEAL from a judgment for the defendants in a suit brought by the United States to quiet title.

Solicitor General Fahy and *Mr. Alex. H. Bell, Jr.* were on the brief for the United States.

Messrs. Milton D. Campbell and *Walter M. Bastian* were on the brief for appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This suit in the District Court for the District of Columbia was brought by the United States under the Act of April 27, 1912, c. 96, 37 Stat. 93, to establish and make clear its title to certain parcels of land adjacent to the Anacostia River. The District Court entered judgment for the defendants, and the United States seeks a direct appeal to this Court under § 5 of that Act, which provides: "That from the final decree of the Supreme Court of the District of Columbia . . . an appeal shall be allowed to the United States, and to any other party in the cause complaining of such decree, to the Supreme Court of the United States. . . ."

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C.

§ 345, permits direct review by this Court of the judgments of the district courts in only five specified categories, "and not otherwise." The case at bar is within neither those categories nor that recognized by *Ex parte Kawato,* 317 U. S. 69, and *Ex parte Peru,* 318 U. S. 578, *viz.,* the use of auxiliary writs in exceptional cases in aid of this Court's appellate jurisdiction. The Government seeks to remove this case from the restrictions of the Act of 1925 on the ground that it was not intended to affect such special instances of direct review as that afforded by the Act of April 27, 1912. But we cannot read such an exception into the 1925 Act.

Nor is the contrary result required because the District Court for the District of Columbia was known as the "Supreme Court of the District of Columbia" when the Act of 1925 became law. At that time the Supreme Court of the District of Columbia possessed the jurisdiction of a district court of the United States, see Code of Law for the District of Columbia (1924) §§ 61, 62, 84, and it was treated as a "district court" for purposes of the Anti-Trust Acts, see *Federal Trade Comm'n* v. *Klesner,* 274 U. S. 145, 153–54, and *Swift & Co.* v. *United States,* 276 U. S. 311, 324–25. Considerations no less controlling exist for treating it as a "district court" within the scope of § 238. The dominating policy of the Act of 1925 was to restrict direct review to this Court as a matter of right, and more particularly to shut off such direct review of the judgments of federal *nisi prius* courts. It would be wholly inconsistent with that Act to exclude the District Court for the District of Columbia from the scope of its provisions merely because that court did not become a district court in name until the Act of June 25, 1936, c. 804, 49 Stat. 1921. Cf. H. R. Rep. No. 1075, 68th Cong., 2d Sess., pp. 6–7.

We hold, therefore, that the provisions for direct review to this Court contained in § 5 of the Act of April 27, 1912, were repealed by § 13 of the Judiciary Act of 1925, because

they were "inconsistent therewith." The judgment appealed from is vacated and the cause is remanded to the District Court so that it may enter a new judgment from which the United States may, if it wishes, perfect a timely appeal to the Court of Appeals for the District of Columbia. Cf. *Phillips* v. *United States,* 312 U. S. 246, 254.

So ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY dissent.

VIRGINIAN HOTEL CORPORATION *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 766. Argued May 12, 13, 1942.—Decided June 7, 1943.

Under the Revenue Act of 1938, which provides that the basis on which depreciation shall be "allowed" as a deduction in computing net income is the cost of the property with proper adjustments for depreciation to the extent "allowed (but not less than the amount allowable)" under that and prior income tax laws, excessive amounts claimed by the taxpayer for depreciation in his returns for earlier years were properly deducted from cost in readjusting the depreciation basis of the property in question, although in those years no tax benefit resulted to the taxpayer from the use of depreciation as a deduction. P. 526.

132 F. 2d 909, affirmed.

CERTIORARI, 318 U. S. 754, to review the reversal of a ruling of the Tax Court against a deficiency assessment of income tax.

Mr. W. A. Sutherland, with whom *Messrs. F. G. Davidson, Jr., Noah A. Stancliffe, Theodore L. Harrison,* and *J. Donald Rawlings* were on the brief, for petitioner.

Mr. Samuel H. Levy, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and

Messrs. Sewall Key, L. W. Post, and *Valentine Brookes* were on the brief, for respondent.

Messrs. I. Newton Brozan and *Aaron Holman* filed a brief on behalf of the Pittsburgh Brewing Company, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The facts of this case are stipulated. Petitioner operates an hotel. From 1927 through 1937 petitioner (or its predecessor) reported in its income tax returns depreciation on certain of its assets on a straight-line basis.[1] No objection was taken by the Commissioner or his agents to the amounts claimed and deducted. In 1938 petitioner claimed a deduction for depreciation at the same rates. The Commissioner determined that the useful life of the equipment was longer than petitioner claimed and that therefore lower depreciation rates should be used.[2] Accordingly a deficiency was computed. The depreciation theretofore claimed as deductions was subtracted from the cost of the property. The remainder was taken as the new basis for computing depreciation. A lesser deduction for depreciation accordingly was allowed.[3] There had been a net gain for some of the years in question. For the years 1931 to 1936 inclusive there was a net loss and, says the stipulation, "the entire amount of depreciation deducted on the income tax returns for those years did not serve to reduce the taxable income." Petitioner does

[1] 15% on carpets and 10% on all other equipment. At those rates the properties would have been fully depreciated in 6⅔ and 10 years respectively.

[2] 8% on carpets and 5% on the other equipment, the estimated life being 12½ years and 20 years respectively.

[3] $1,295.47 for 1938 as compared with $4,341.97 which was claimed. The difference between the depreciation claimed in the loss years and the depreciation properly allowable in such years is $31,400.25.

not challenge the new rates. It contends that the amount of depreciation claimed for the years 1931 to 1936 inclusive in excess of the amount properly allowable should not be subtracted from the depreciation basis, since it did not serve to reduce taxable income in those years. The Tax Court, in reliance on an earlier ruling,[4] held for the petitioner. The Circuit Court of Appeals reversed. 132 F. 2d 909. The case is here on a petition for a writ of certiorari which we granted because of a conflict between the decision below and *Pittsburgh Brewing Co.* v. *Commissioner,* 107 F. 2d 155, decided by the Circuit Court of Appeals for the Third Circuit.

A reasonable allowance for depreciation is one of several items which Congress has declared shall be "allowed" as a deduction in computing net income. Int. Rev. Code § 23 (1). The basis upon which depreciation is to be "allowed" is the cost of the property with proper adjustments for depreciation "to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws." [5] That provision makes plain that the depreciation basis is reduced by the amount "allowable" each year whether or not it is claimed. *Fidelity-Philadelphia Trust Co.* v. *Commissioner,* 47 F. 2d 36. Moreover the basis must be reduced by that amount even though no tax benefit results from the use of depreciation as a deduction. Wear and tear do not wait on net income. Nor can depreciation be accumulated and held for use in that year in which it will bring the taxpayer the most tax benefit.

[4] Kennedy Laundry Co. *v.* Commissioner, 46 B. T. A. 70, which followed *Pittsburgh Brewing Co.* v. *Commissioner,* 107 F. 2d 155. Prior to the Kennedy Laundry Co. case and prior to the time when Pittsburgh Brewing Co. *v.* Commissioner, 37 B. T. A. 439, was overruled, the Tax Court took a contrary view. Its decision in the Kennedy Laundry Co. case was reversed by the Circuit Court of Appeals. 133 F. 2d 660.

[5] Sec. 113 (b) (1) (B), which is made applicable by reason of § 23 (n), § 114, and § 113 (a).

Congress has elected to make the year the unit of taxation. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. Thus the amount "allowable" must be taken each year. *United States* v. *Ludey*, 274 U. S. 295, 304.

But it is said that "allowed," unlike "allowable," connotes the receipt of a tax benefit. The argument is that though depreciation in excess of an "allowable" amount is claimed by the taxpayer and not disallowed by the Commissioner, it is nevertheless not "allowed" if the deductions other than depreciation are sufficient to produce a loss for the year in question. "Allowed" in this setting plainly has the effect of requiring a reduction of the depreciation basis by an amount which is in excess of depreciation properly deductible. We do not agree, however, with the contention that such a reduction must be made only to the extent that the deduction for depreciation has resulted in a tax benefit. The requirement that the basis should be adjusted for depreciation "to the extent allowed (but not less than the amount allowable)" first appeared in the Revenue Act of 1932. 47 Stat. 169, 201. Prior to that time the adjustment required was for the amount of depreciation "allowable." [6] The purpose of the amendment in 1932 was to make sure that taxpayers who had made excessive deductions in one year could not reduce the depreciation basis by the lesser amount of depreciation which was "allowable." If they could, then the government might be barred from collecting additional taxes which would have been payable had the lower rate been used originally.[7] But we find no suggestion that "allowed," as

[6] For a summary of the legislative history, see 40 Col. L. Rev. 540.

[7] S. Rep. No. 665, 72d Cong., 1st Sess., p. 29: "The Treasury has frequently encountered cases where a taxpayer, who has taken and been allowed depreciation deductions at a certain rate consistently over a period of years, later finds it to his advantage to claim that the allowances so made to him were excessive and that the amounts which were in fact 'allowable' were much less. By this time the Government may

distinguished from "allowable," depreciation is confined to those deductions which result in tax benefits. "Allowed" connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are "allowed," since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are "allowed." And when all deductions are treated alike by the taxpayer and by the Commissioner, it is difficult to see why some items may be said to be "allowed" and others not "allowed." [8] It would take clear and compelling indications for us to conclude that "al-

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be barred from collecting the additional taxes which would be due for the prior years upon the strength of the taxpayer's present contentions. The Treasury is obliged to rely very largely upon the good faith and judgment of the taxpayer in the determination of the allowances for depreciation, since these are primarily matters of judgment and are governed by facts particularly within the knowledge of the taxpayer, and the Treasury should not be penalized for having approved the taxpayer's deductions. While the committee does not regard the existing law as countenancing any such inequitable results, it believes the new bill should specifically preclude any such possibility."

[8] As we have noted, the stipulation of facts states that "the entire amount of depreciation deducted on the income tax returns" for the years in question "did not serve to reduce the taxable income." That has been taken to mean that no part of the depreciation deduction resulted in tax benefits. We do not stop to inquire how that could be true when the depreciation deducted on each return from 1931 through 1936 was larger than the net loss for each of those years. If the stipulation were not accepted, one other problem would be presented. That is the theory that when there is a loss, depreciation may be singled out as not offsetting gross income, even though it is only one of several deductions which is claimed. See Kennedy Laundry Co. *v.* Commissioner, 46 B. T. A. 70, 75, Judge Disney dissenting. In view of the stipulation, we do not reach that question. Cf. *Butler Bros.* v. *McColgan,* 315 U. S. 501, 508–509.

lowed" as used in § 113 (b) (1) (B) means something different than it does in the general setting of the revenue acts. See *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. 2d 44.

Congress has provided for deductions of annual amounts of depreciation which, along with salvage value, will replace the original investment of the property at the time of its retirement. *United States* v. *Ludey, supra; Detroit Edison Co.* v. *Commissioner, ante,* p. 98. The rule which has been fashioned by the court below deprives the taxpayer of no portion of that deduction. Under that rule, taxpayers often will not recover their investment tax-free. But Congress has made no such guarantee. Nor has Congress indicated that a taxpayer who has obtained no tax advantage from a depreciation deduction should be allowed to take it a second time. The policy which does not permit the second deduction in case of "allowable" depreciation (*Beckridge Corp.* v. *Commissioner,* 129 F. 2d 318) is equally cogent as respects depreciation which is "allowed."

Affirmed.

MR. CHIEF JUSTICE STONE, dissenting:

It is true that the 1938 Revenue Act does not speak of a "tax benefit" to the taxpayer. Section 23 speaks only of deductions from gross income which "shall be allowed" in computing net income, among which it includes, § 23 (l), "a reasonable allowance for the exhaustion, wear and tear of property used in trade or business." And by § 113 (b) (1) (B) the basis for depreciation of property is its cost adjusted by depreciation "to the extent allowed (but not less than the amount allowable)." It is equally true and obvious, and of some importance to the correct interpretation of the statute, that any depreciation in excess of the reasonable allowance authorized can, under the statute, result in no tax advantage to the taxpayer

and in no tax prejudice to the Government, unless the excess has in fact been deducted from the taxpayer's gross income.

I can find no warrant in the purpose or the words of the statute, or in the principles of accounting, for our saying that the taxpayer is required to reduce his depreciation base by any amount in excess of the depreciation "allowable," which excess he never has in fact deducted from gross income. Whatever else the statutory reference to depreciation "allowed" may mean, it obviously cannot and ought not to be construed to mean that a deduction for depreciation which has never in fact been subtracted from gross income is a deduction "allowed."

And there is no reason why such should be deemed to be its meaning. The only function of depreciation in the income tax laws is the establishment of an amount, which may be deducted annually from gross income, sufficient in the aggregate to restore a wasting capital asset at the end of its estimated life. The scheme of the 1938 Revenue Act is to prescribe the permissible deductions for depreciation, and to preclude the taxpayer from gaining any unwarranted advantage by the amount and distribution of those deductions. The Act accomplishes the latter by compelling the taxpayer to reduce his depreciation base by the amount of the allowable annual depreciation, whether deducted from gross income or not, and by such further amount as he has in fact deducted from gross income. No reason is suggested why the taxpayer's tax for future years should be increased by reducing his depreciation base by any amount in excess of the depreciation "allowable," unless the excess has at some time and in some manner been deducted from gross income. So inequitable a result cannot rightly be achieved by saying that a "deduction" for depreciation which never has been deducted from gross income has nevertheless been "allowed."

What I have said does not imply that a taxpayer, who has deducted excessive depreciation from his gross income in any year, is not subject to a deficiency assessment as the statutes and regulations prescribe; or that excessive deductions for depreciation taken from gross income—or allowable depreciation, whether so deducted or not—may not properly be used to reduce the taxpayer's depreciation base. The statute so provides. But I do assert that, under the system of taxation which we have established, the overstatement of the taxpayer's depreciation base on which the Government insists is not to be justified because the taxpayer may in some other year have deducted from gross income excessive depreciation which has already been subtracted from his depreciation base. See *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 365. The statute neither compels nor permits so incongruous a result. The judgment should be reversed.

MR. JUSTICE ROBERTS, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON join in this dissent.

MR. JUSTICE JACKSON, dissenting:

The first and fundamental step in determining accrued depreciation is to estimate the probable useful life of the property to be depreciated. This depends upon judgment and is not capable of exact determination. When it is found, and after making allowance for probable salvage value at the time of retirement, it is a mere matter of mathematics to compute under the straight-line method the rate of annual accrual.

This rate when applied to the cost of the depreciable property fixes two things: (1) The amount of the depreciation accrual to deduct from gross, before determining net, income. For this purpose a high rate works in favor of the taxpayer for any given year. (2) It also determines the amount by which the cost base must be reduced

for application of depreciation rates the following year. In this aspect a high depreciation rate works in favor of the Government.

The Virginian Hotel Corporation misconceived, as the Commissioner thinks, the probable life of its depreciable property. Attributing to it a longer life span, he corrected that judgment. To apply that correction consistently would lower the rate and consequent deduction on account of depreciation and cause a smaller subtraction from the valuation base, leaving a larger base to which the smaller rate would be applied.

The Commissioner proposed to correct taxpayer's returns by considering only the year in question. He eliminated the error as far as it affected the rate and thus reduced the depreciation accrual and increased the tax. But he retained the base as reduced by the taxpayer's accumulated errors, refusing to readjust the base consistently with the corrected depreciation rates.

To the extent that the taxpayer had obtained advantage from the use of the higher depreciation rate, I would think it quite justifiable to refuse to make a correction. The Government, however, stipulates as to the years in question that "the entire amount of the depreciation deducted on the income tax returns for those years did not serve to reduce the taxable income." We should not disregard a deliberately made stipulation, even if, on our limited knowledge of its background, we are in doubt as to why it was made. The question comes simply to this: Whether the Commissioner, upon determining whether taxpayer has in good faith erred, may use a correction in so far as it helps the Government and adhere to the mistake in so far as it injures the taxpayer. I think that no straining should be done to find a construction of the statutes that will support the result.

I am the less inclined to lay down a rule that will permit the Government to make inconsistent corrections in the

matter of depreciation because consistency in the matter of depreciation is one of the few important principles of its application. There has been no more futile tax litigation than that over depreciation rates. In an era of rising taxes the faster a taxpayer depleted his base for depreciation the more the Government realized in revenue from him. If this present taxpayer had been permitted to continue its high depreciation rates, it would have come into the present era of exceedingly high taxes with its depreciation base correspondingly exhausted. What is important for the protection of the revenues is that accrual for depreciation be applied only to property that is properly depreciable, that it be stopped when the property is fully depreciated, and that the rate be consistently applied so that the taxpayer cannot choose to take only a little depreciation when he has a little income and a lot of depreciation when he has a large income. If these conditions are observed, litigation about the rate serves chiefly to vindicate theories rather than to protect the revenues.

If the Government desires to make revisions of theoretical rates, there is no reason why it should not observe the rule of consistency that is one of the cardinal rules to impose on the taxpayer. Hence, I join in the dissenting opinion of the CHIEF JUSTICE.

VIRGINIA ELECTRIC & POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 709. Argued May 6, 1943.—Decided June 7, 1943.

1. In requiring the disestablishment of a company union, the National Labor Relations Board was authorized, by § 10 (c) of the National Labor Relations Act, upon the facts it found in this case, supported by evidence, to order that the employer reimburse its employees in full for amounts which had been deducted from their wages and paid to that union as dues. P. 539.
2. The Board's determination that reimbursement in full of the checked-off dues is necessary to "effectuate the policies of the Act" should stand, in the absence of any showing that the order was a patent attempt to achieve ends other than can fairly be said to effectuate the policies of the Act. P. 540.
3. The order is not to be regarded as adjudicating a right to damages or as imposing a penalty. P. 543.

132 F. 2d 390, affirmed.

CERTIORARI, 318 U. S. 752, to review an order of the National Labor Relations Board. The case was here before and was remanded for a redetermination, 314 U. S. 469.

Messrs. George D. Gibson and *T. Justin Moore* for petitioner.

Mr. Robert B. Watts, with whom *Solicitor General Fahy* and *Messrs. Robert L. Stern, Ernest A. Gross,* and *Owsley Vose* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

After the remand of this case in 314 U. S. 469, the Board reconsidered it upon the original record, made new findings of fact, and concluded that the Company had violated

§ 8 (1), (2) and (3) of the Act. 29 U. S. C. § 158. A new order was entered requiring the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the Independent Organization of Employees. The order also directed the Company to withdraw recognition from and disestablish the I. O. E. as a representative of its employees, to reinstate with back pay two of three employees found to have been discriminatorily discharged, to reimburse its employees in the amount of dues and assessments deducted from their wages by the Company and paid to the I. O. E., and to post appropriate notices. 44 N. L. R. B. 404. The court below, one judge dissenting in part, upheld the order in full. 132 F. 2d 390. The I. O. E. then apparently decided to dissolve, and the Company withdrew recognition from and disestablished it. Because of an apparent conflict of decisions, we granted the Company's petition for certiorari which challenged only the authority of the Board to require reimbursement of the checked-off dues, a point not reached when the case was here before.[1]

The new findings are much more elaborate than those originally before us in 314 U. S. 469, and it would serve no

[1] In eleven cases five circuits, under varying circumstances and on diverse reasoning, have refused to enforce Board orders requiring reimbursement of checked-off dues. See *Western Union Telegraph Co.* v. *Labor Board*, 113 F. 2d 992 (C. C. A. 2); *Corning Glass Works* v. *Labor Board*, 118 F. 2d 625 (C. C. A. 2); *Labor Board* v. *West Kentucky Coal Co.*, 116 F. 2d 816 (C. C. A. 6); *Labor Board* v. *U. S. Truck Co.*, 124 F. 2d 887 (C. C. A. 6); *Labor Board* v. *Gerity Whitaker Co.*, 137 F. 2d 198 (C. C. A. 6); *Labor Board* v. *J. Greenebaum Tanning Co.*, 110 F. 2d 984 (C. C. A. 7); *A. E. Staley Mfg. Co.* v. *Labor Board*, 117 F. 2d 868 (C. C. A. 7); *Reliance Mfg. Co.* v. *Labor Board*, 125 F. 2d 311 (C. C. A. 7); *Kansas City Power & Light Co.* v. *Labor Board*, 111 F. 2d 340 (C. C. A. 8); *Labor Board* v. *Southwestern Greyhound Lines*, 126 F. 2d 883 (C. C. A. 8); *Labor Board* v. *Continental Oil Co.*, 121 F. 2d 120 (C. C. A. 10).

useful purpose to discuss them minutely. The following outline is sufficient for an understanding of the issues raised: The findings sketch in considerable detail the anti-union background of the Company and the activities of Bishop, the superintendent of the Company's Norfolk transportation department, including his suggestions to employees Ruett and Elliott that they form unaffiliated organizations. The growth of the I. O. E. is traced from the speeches and meetings of May 24, 1937, which were held after requests for collective bargaining were received by the Company from several small groups of employees as a result of the bulletin of April 26, and which were attended by representatives selected by the employees at the suggestion of the Company. The tracing continues with a discussion of the reactions of those representatives after the Company officials left the meetings and their subsequent reports delivered to the employees on Company property and in some instances on Company time with the help of supervisory employees. Emphasis is placed upon the frequent meetings on Company property held by the resultant Norfolk and Richmond steering committees during the first part of June. The Constitution and by-laws of the I. O. E. were adopted on June 15. The membership campaign began June 17, and within two weeks the I. O. E. had a majority of the Company's 3,000 widely scattered employees. The Board contrasted this with its findings that during the critical formative period of the I. O. E. the Company discharged one Mann, an outspoken foe of an "inside" union, that Edwards, a supervisor, kept C. I. O. meetings under surveillance and warned some employees against "messing with the C. I. O.," and that the Company denied the use of its premises to representatives of national labor organizations, and then drew the conclusion that the quick success of the I. O. E. membership campaign "must be attributed in large part to the respondent's [Company's]

sponsorship of and assistance to the I. O. E. and its persistent and well-known opposition to national unions."

Continuing, the findings relate that the representatives of the I. O. E. in convention on July 17 and 18, drew up a proposed contract, embodying demands for a closed-shop, check-off of I. O. E. dues and substantial wage increases, which was sent to the Company with a request for a bargaining conference. The conference began on July 30, and the Company quickly gave recognition and offered no objection to the check-off provision, with the addition of a proviso that the employees might revoke their authorizations at any time. The by-laws of the I. O. E., however, required all members to authorize the deduction of dues, and the membership applications contained such authorizations. The closed-shop provision was discussed for two hours and then postponed for other matters until the following day, when it was again taken up for two hours and then agreed to with the addition, at the instance of the Company, of a provision that nothing in the contract should prevent employees from joining or remaining members of any other labor organization. Wage increases, costing the Company $600,000 annually, were granted, and, as President Holtzclaw had promised at the May 24 meeting in Richmond, they were made retroactive to June 1. The contract was formally executed August 5, and on August 20 the Company paid $3,784.50 to the I. O. E. as dues under the check-off provision, although it had not yet deducted that entire amount from the wages of its employees. The Board considered "the promptness with which the respondent [Company] agreed to grant the I. O. E. a check-off of dues and a closed shop . . . after a comparatively few hours discussion," and then found that the Company "agreed to the closed shop and the check-off of I. O. E. dues in order to entrench the I. O. E. among the employees and to insure its financial stability."

On the basis of these findings the Board concluded that:

"the respondent has engaged in a course of conduct calculated to restrain and discourage its employees from self-organization in nationally affiliated unions and to divert and canalize their organizational efforts to the establishment of a company-wide unaffiliated labor organization; that in its totality, the respondent's conduct has been coercive of its employees in the exercise of their right to self-organization, with the result that when they formed the I. O. E. they were not as free as the statute requires; that the I. O. E. is the fruit of the respondent's illegal interference with, and restraint and coercion of its employees; and that the respondent has dominated the formation and administration of the I. O. E., and has contributed financial and other support to it."

and again that:

"the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their 'own' organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, . . ."

In discussing the appropriate remedy for the unfair labor practices found, the Board stated that the Company's domination and interference in the formation and administration of the I. O. E. constituted "a continuing obstacle to the exercise by the employees of the rights guaranteed them by the Act" and therefore the disestablishment of the I. O. E. was necessary. In addition the Board was of opinion that "under the circumstances of

this case" the Company should be ordered to reimburse its employees for the amounts checked-off their wages and paid to the I. O. E.[2]

The Company no longer attacks the conclusion that the I. O. E. was dominated by it, but it does contest the validity of the findings relating to domination in so far as may be pertinent to the reimbursement order, and it challenges the power of the Board to make that order under the circumstances of the case.

Under the applicable principles governing the scope of our review of Board orders, we think the Board's findings and conclusions regarding the Company's domination of and interference with the I. O. E. are supported by sub-

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[2] The Board's full statement on this point follows:

"The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The bylaws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances, the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the *status quo*. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E."

stantial evidence, and therefore conclusive. See *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584; *I. A. of M.* v. *Labor Board*, 311 U. S. 72; *Labor Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105; *Labor Board* v. *Southern Bell Tel. Co., ante*, p. 50. These findings and conclusions are not subject to the infirmities of the original ones which prompted our decision in 314 U. S. 469. While the bulletin of April 26 and the speeches of May 24 are still stressed, they are considered not in isolation but as part of a pattern of events adding up to the conclusion of domination and interference. We are also of opinion that the Board had power to enter the check-off reimbursement order in the circumstances of this case.

Section 10 (c) of the Act [3] authorizes the Board to require persons found engaged or engaging in unfair labor practices "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The declared policy of the Act in § 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187–89. The particular means by which the effects of unfair labor practices are to be expunged are matters "for the Board not the courts to determine." *I. A. of M.* v. *Labor Board, supra*, at p. 82; *Labor Board* v. *Link-Belt Co.*,

[3] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

supra, at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here.

The Board found that the Company was responsible for the creation of the I. O. E. by providing its initial impetus and direction and by contributing support during its critical formative period. It further found that the Company quickly agreed to give its creature closed-shop and check-off privileges "in order to entrench the I. O. E. among the employees and to insure its financial stability." The result was that the employees, under the I. O. E. by-laws, had to authorize wage deductions for dues to remain members of the I. O. E., and they had to remain members to retain their jobs.[4] Thus, as a price of employment they were required by the Company to support an illegal organization which foreclosed their rights to freedom of organization and collective bargaining. To hold that the Board is without power here to order reimbursement of the amounts so exacted is to hold that an employer is free to fasten firmly upon his employees the cost of maintaining an organization by which he effectively defeats the free exercise of their rights to self-organization and collective bargaining. That this may pervert the purpose of the Act is clear. It is equally clear that the undoing of the effects of such a practice may, in the judgment of the Board, remove a very real barrier to the effec-

[4] The proviso in the check-off agreement that employees might revoke their individual authorizations at any time was admittedly meaningless in view of the closed shop agreement and the requirement in the I. O. E. by-laws that its members authorize the check-off.

tuation of the policies of the Act, the protection of commerce through the elimination of industrial conflict by guaranteeing full freedom of association and genuine collective bargaining to employees. An order such as this, which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy.

It is argued that disestablishment of the I. O. E. sufficiently effectuates the policies of the Act by restoring to the employees of the Company their freedom of association. But the Board need not be satisfied with the remedy alone. It has here determined that, to effectuate fully the policies of the Act, it is necessary to expunge the effects of the unfair labor practices by ordering the reimbursement of checked-off dues. Such a determination seems manifestly reasonable. It returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation. The deduction of dues from wages under the circumstances of this case is not unlike a loss occasioned by a discriminatory discharge, and an order for the return of those checked-off dues promotes the policies of the Act in substantially the same manner as would a back pay award. By returning their money to the employees, the order severs possible economic ties which they may have with the employer-dominated I. O. E. and to this extent aids in completely disestablishing that organization and restoring to the employees that truly unfettered freedom of choice which the Act demands. If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights.

The Company contends that the Board did not find that it continued to interfere with the I. O. E. after its organization, except with regard to the closed-shop and check-off clauses of the contract, and this finding is attacked as without foundation in evidence. It is said that the demand for a closed-shop and check-off originated with the employees who were free to abandon those provisions at any time by changing their by-laws or the contract, and that therefore the continuation of those requirements was the voluntary action of the employees for which the Company is not responsible. Finally it is urged that the Company should not be compelled to reimburse these voluntary payments because the employees received benefits, including substantial wage increases, from the I. O. E.

The short answer is that the Board has resolved all these contentions against the Company, and we cannot say it exceeded its competence in so doing. It made no finding of specific management interference in the I. O. E. after the execution of the contract, but it did conclude that the I. O. E.'s existence was a "continuing obstacle" to the employees' exercise of their statutory rights. This conclusion of continuation of the effects of an employer-dominated beginning is a permissible one for the Board to draw. Cf. *Labor Board* v. *Southern Bell Tel. Co.*, *ante*, p. 50. It disposes of the argument that the men were free at any time to eliminate the check-off; because of the I. O. E.'s origin the Board could conclude, as it did, that they were not as free as the statute requires. Also, in view of the Company's interference in and support given to the I. O. E. and the celerity of agreement in the bargaining conference, the Board could infer, despite the fact that demands for the closed-shop and the check-off originated with the I. O. E., that the Company seized upon those provisions to establish the I. O. E. firmly. The fact that a contrary inference is possible from the evidence does not allow us to set aside the one

drawn by the Board. *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105. This dissipates the force of the argument that the closed-shop and check-off provisions were forced upon the Company against its will.

The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights. Cf. *Agwilines, Inc.* v. *Labor Board*, 87 F. 2d 146, 150–51; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.

The argument that the employees received some value from their contributions via the check-off to the company-dominated I. O. E., is based upon the assumption that

such an organization necessarily gives some *quid pro quo*. But in view of the purposes of the Act, a contrary assumption, that employees receive no benefit from a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest, is possible. These are considerations for the Board to decide according to its reasoned judgment. We hold that the Board here made an allowable judgment. That judgment cannot be upset by pointing to substantial wage increases which the I. O. E. was granted. As the court below said, "it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." 132 F. 2d at 398. Cf. *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548, 559.

This reimbursement order cannot be labelled "penal." The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act. This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole. Cf. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7. The fact that the Board may only have approximated its efforts to make the employees whole, because of asserted benefits of dubious and unascertainable nature flowing from the I. O. E., does not convert this reimbursement order into the imposition of a penalty. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 583–84.

We need not now examine the various situations that were before the Circuit Courts of Appeals in the cases collected in Note 1, *ante,* or consider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring:

If the controlling facts in this case were like those in *Western Union Tel. Co.* v. *Labor Board,* 113 F. 2d 992, I too would accept the reasoning of Judge Learned Hand's opinion in that case and join my brother ROBERTS. But the vital difference between the *Western Union* and this case is that, in the former, "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." *Id.,* at 997. Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs.

We start with the Board's finding—a finding not here for review—that through its domination of the I. O. E. the Company indulged in an unfair labor practice. But not only did it foster that company union, it foisted membership in the union upon all its employees. The Board had a right to find that membership in the union, which the employees had no power to reject, equally denied the employees the power to reject the costs of that membership. It was therefore justified in concluding that the employees should be made whole for that which was the consequence of the Company's compulsion upon them. Therein this case differs not only from the *Western Union* case but also from the decisions in four other circuits upon which my brother ROBERTS relies: *Labor Board* v. *West Kentucky Coal Co.,* 116 F. 2d 816, 823 (C. C. A. 6); *Reliance Mfg. Co.* v. *Labor Board,* 125 F. 2d 311 (C. C. A. 7);

Labor Board v. *Southwestern Greyhound Lines,* 126 F. 2d 883, 887 (C. C. A. 8); *Labor Board* v. *Continental Oil Co.,* 121 F. 2d 120, 125 (C. C. A. 10).

Needless to say, we have nothing to do with the wisdom of the Board's requirement that the coerced dues be restored to the employees. Our decision can go no further than that, within the framework of the general authority given to it by Congress, the Board is empowered to find that when men pay dues to a company-dominated union, upon pain of forfeiting their jobs, it is the company which has in fact commanded the payment of the dues and it is the company which must make restoration.

MR. JUSTICE ROBERTS:

The single question presented is whether the National Labor Relations Board, in ordering disestablishment of an unaffiliated union, may, in the circumstances disclosed, order reimbursement of dues paid by the employes to the union pursuant to individual assignments by employes and a union agreement for a closed shop and a check-off of dues.

The court below (one judge dissenting) has sustained this feature of the order. I am of opinion that its judgment should be reversed.

The only provision of the Act on which the Board relies is that found in § 10 (c)[1] which is that the Board may require the employer "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The critical phrase is "to take such affirmative action . . . as will effectuate the policies of this Act." The policies of the Act are stated in § 1 [2] as the encouragement of the

[1] 29 U. S. C. § 160 (c).

[2] 29 U. S. C. § 151.

practice and procedure of collective bargaining and the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[3] It is plain that a reimbursement order may be made by the Board only if it will effectuate these policies.

The court below has interpreted this grant of power to the Board as permitting what the court characterizes as a restoration of the *status quo*. The Act, however, contains no such expression and if it is given, as I think it has been in the present instance, the meaning of redress of private wrongs, it misrepresents the clear intent of the statute.[4]

The Act gives the Board no power to impose liability for any supposed injury arising out of the compulsion of employes to contribute dues to the union. Nor can the order of restitution be grounded upon any theory that, although the unfair labor practice constitutes a public rather than a private wrong, the power granted to effectuate the policies of the Act envisages imposition of a penalty for wrongful conduct on the part of the employer.[5]

There remains the question whether the order under review can be justified as appropriate to effectuate the policies of the Act. This question should be answered in the light of the facts disclosed by the record. The Board has found that the employer was guilty of unfair labor practices in influencing employes in favor of a company

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[3] See *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 10; *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 257.

[4] H. R. 972, 74th Cong., 1st Sess., p. 21; H. R. 1147, 74th Cong., 1st Sess., p. 24. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362, 363.

[5] *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 236; *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 11, 12.

union. The order requires the company to cease and desist from the practices, to cease giving effect to the existing agreement with the union, and to withdraw recognition from and disestablish that organization as a bargaining unit. This order is supported by findings that, at a time when no union existed, the company threw its influence in favor of an unaffiliated or company union. All the facts found in this connection relate to a time anterior to the organization of the union. There is no finding, and no facts which would justify a finding, that subsequent to the organization of the union the employer interfered with it, dominated it, or supported it in any manner. The union then organized made demands upon the company which were the subject of negotiations and out of those negotiations grew an increase of wages totaling about $600,000 per annum and a collective bargaining agreement which contained provisions for a closed shop and for the check-off of union dues, both of which features were demanded and insisted upon by the union. There is no finding and no evidence that the employer in fact inspired, instigated, or coerced the employes to make these demands or had, even remotely, anything to do with them other than they followed its earlier encouragement of the organization of the union. From the day that contract was signed, no act of interference or domination, and no word even of suggestion from the company as to the union policy or practices is shown. The record demonstrates that the employer insisted that the check-off of union dues should be authorized by each employe individually, subject to his untrammeled right of revocation, and that the closed-shop provision should not prevent any member of the company union from also joining any other union of his choice. The fixation of the union dues was a matter within the control of the union members and continuance of check-off as respects any employe was a matter for his voluntary determination so far as the

employer was concerned. While it is not denied that the union procured substantial benefits for its members or that it represented them faithfully and fairly, nevertheless, because of the company's interference at the time of the organization of the union, that organization has been disestablished and indeed has now been dissolved.

It is to be noted that had it not been for the defect which tainted its capacity to represent the employes, its other activities would have been wholly in accordance with the objects and purposes of the National Labor Relations Act. Nothing in that Act invalidates a collective bargaining agreement providing for a closed shop or for a check-off of dues. If in fact those features of the agreement were the voluntary act of the employes, as on this record they must be found to have been, it is difficult to see how the policies of the Act are to be effectuated by repayment to the employes of the dues heretofore paid when such repayment can in no wise benefit the association which has been disestablished.

The company union having been disestablished, the employes are free to form or join any union and make it their bargaining agent. Any possible effect of company influence has been dissipated. The only possible effect of restitution of dues to employes who have not asked for repayment, who have received substantial benefits from their contribution of dues, is to punish the employer and perchance operate as a warning to other employers that they will similarly be punished for unfair labor practices.

The Board seeks to sustain the order on the ground that the Act authorizes, as one form of affirmative action to effectuate the policies of the Act, the reinstatement of employes with or without back pay. The award of back pay, however, stands on a different basis. If employes are to be faced with discriminatory discharge for advocating union representation by an organization of their choice, the threat will render doubtful, if not impossible, free and

uncontrolled action on the part of the employes. The Act, therefore, is an announcement to employes that if they are discharged for such activity they may have reinstatement and, in proper cases, back pay. Such a promise to employes was essential to assure them immunity for conduct made lawful by the Act. But the payment of union dues is quite another matter, particularly where, as here, no employe was obliged to join the union, and no discrimination between employes resulted from joining or paying dues to the recognized union. It is inconceivable that the hope of reimbursement of dues paid to the union in question would have any effect on the conduct of the members to join or refrain from joining this union or joining another as they were free to do. Moreover, the employes were free under the Act to adhere to another organization and to bring about an election for the choice of another bargaining representative. The Board made no inquiry and no finding respecting coercion of individual employes.

As I have already indicated, the only effect of the order is to redress a supposed private wrong to employes which the evidence and findings indicate never was inflicted, and to inflict drastic punishment of the employer for its earlier violation of the statute by encouraging its employes to organize. Neither is within the competence of the Board, as this court has repeatedly held.[6]

Like orders have been before the courts in eleven other cases, as shown by the opinion of the Court. All have reached the conclusion that the Act does not authorize such an order.[7] I think that should be the decision of the Court in this case.

The CHIEF JUSTICE and MR. JUSTICE JACKSON join in this dissent.

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[6] See Notes 4 and 5, *supra*.

[7] I might well have contented myself, in lieu of writing, with a reference to the opinion in *Western Union Tel. Co.* v. *Labor Board*, 113 F. 2d 992, which exhaustively and convincingly deals with the subject.

Counsel for Parties.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* COLUMBUS & GREENVILLE RAILWAY CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 628. Argued April 7, 8, 1943. Reargued May 13, 1943.—Decided June 7, 1943.

One of several railroads whose lines connected at points where cottonseed was milled, and whose respective tariffs allowed "cut-backs" on rates on inbound hauls of cottonseed the milled products of which were hauled outbound by the same carrier that hauled in the seed from which they were produced, filed a tariff allowing shippers the benefit of the cut-backs on shipments outbound over its line, whether the corresponding inbound haul was over that line or one of the connecting lines. The Interstate Commerce Commission ordered the tariff canceled upon the ground that, in violation of § 6 (4) of the Interstate Commerce Act, it operated to reduce established outbound joint rates to points beyond that carrier's line without the concurrence of participating carriers, and upon the ground that its operation entailed violations also of §§ 1 (6) and 6 (7). *Held* that the order of the Commission should not have been enjoined. P. 555.

46 F. Supp. 204, reversed.

APPEAL from a decree of a District Court of three judges which enjoined the enforcement of an order of the Interstate Commerce Commission.

Mr. Daniel W. Knowlton, with whom *Mr. Daniel H. Kunkel* was on the brief, for the Interstate Commerce Commission; and *Mr. John E. McCullough* argued the cause on the original argument and *Mr. Elmer A. Smith* on the reargument (*Messrs. Erle J. Zoll, Jr.,* and *M. G. Roberts* were with them on the brief) for J. M. Kurn et al.,—appellants.

Messrs. Robert C. Stovall and *Forrest B. Jackson* for appellee.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case is here on direct appeal from a decree of a specially constituted District Court of three judges [1] enjoining the enforcement of an order of the Interstate Commerce Commission cancelling certain "cut-backs" on cottonseed and its products contained in appellee's I. C. C. Tariff No. 81.[2]

The appellee operates 168 miles of railway extending east and west within the State of Mississippi. Cottonseed and its products, to which the tariff in question relates, are important items of traffic in the region, and there are cottonseed mills at a number of points on appellee's line. Appellee originates about 15 or 20 per cent of the cottonseed milled there; trucks originate about 50 per cent; and the balance comes to the mills on other lines with which the appellee connects at these points, including the Illinois Central Railroad Company, the Mobile & Ohio Railroad Company, the St. Louis-San Francisco Railroad Company, and the Yazoo & Mississippi Valley Railway Company.

Since 1931, these railroads and appellee have maintained a system of cut-backs originally designed, and successively revised, for the purpose of meeting the competition of truck lines. Speaking generally, the system permitted one who shipped cottonseed into the mill point and paid the full local rate for that inbound haul to receive back part of the amount so paid if he later shipped the product outbound by the same carrier. If the outbound haul was not by the carrier that had made the inbound haul, he was not entitled to the cut-back.

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[1] Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47a; § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

[2] 248 I. C. C. 441; 46 F. Supp. 204.

To better its position with respect to the outbound hauls of cottonseed originated by other lines, appellee took measures which it calls "self-help to meet competition." It sought by its I. C. C. Tariff No. 81 to establish schedules of payments to shippers which would give them the benefit of the cut-backs on cottonseed and its products shipped outbound over its line, whether the inbound haul was over its own line or over a connecting line. This tariff was neither protested nor suspended, and became effective October 16, 1938. After the Commission's Bureau of Traffic had criticized this tariff and requested its correction, appellee filed its I. C. C. Tariff No. 83, differing in immaterial particulars from its Tariff No. 81. The Commission ordered No. 83 suspended and entered upon an investigation of its lawfulness.[3]

In its report,[4] Division 3 of the Commission held: The suspended tariff was an effort to reduce the outbound joint rates, established to points beyond appellee's line with the concurrence of the participating carriers, without obtaining their concurrence in such reduction, and therefore it violated § 6 (4) of the Act.[5] The suspended schedules did not "lawfully name or provide any legal rates whatsoever," [6] and were in violation of § 6 (7),[7] since the con-

[3] § 15 (7) Interstate Commerce Act, 49 U. S. C. § 15 (7).

[4] 238 I. C. C. 309.

[5] "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties." 49 U. S. C. § 6 (4).

[6] 238 I. C. C. at 315.

[7] "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the

templated "refund would be, essentially, a rebate, whereby the property would be transported from the mill point to the destination on another line at a lower rate than that named in the joint tariff published and filed by the several carriers participating in the movement and lawfully in effect. . . . Respondent's suspended tariff, granting an alleged allowance to the shipper notwithstanding that he performs no part of the transportation service, as the result of which he would obtain the out-bound transportation at less than the rates lawfully in effect would constitute an unreasonable practice, in violation of section 1 (6)[8] and other provisions of the Interstate Commerce Act."[9] Although not shown to be unlawful as applied to traffic originated and carried to the mills by appellee over its line, the tariff was defective in the proposed form, and should be cancelled.

The Commission then of its own motion entered upon an investigation of the lawfulness of appellee's I. C. C. Tariff No. 81, which had remained in effect as the result of the suspension of No. 83.

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same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C. § 6 (7).

[8] "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce . . . just and reasonable regulations and practices affecting classifications, rates, or tariffs, . . . and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U. S. C. § 1 (6).

[9] 238 I. C. C. at 317–318.

The brief and not altogether clear opinion of the full Commission concluded with the statement that "We find that, to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act."[10] From this and other statements contained in the opinion of the full Commission it appears that the Commission shared the views of Division 3 as to the effect of the schedule upon the outbound joint rates and the unlawfulness of that effect. The Commission's view that the tariff operated to reduce such outbound rates without the concurrence of the participating carriers is at least a tenable one, and one we are not disposed to gainsay. When that view is taken, violation of § 6 (4)[11] is clear. With the impropriety of the tariff under § 6 (4) established, the Commission could reasonably conclude that its operation entailed violations also of §§ 1 (6) and 6 (7).[12]

Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under § 15.[13] In the exercise of its power under § 15 to fix joint rates without the concurrence of the participating carriers, the Commission is required by § 15 (4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers.[14] The appellant railroad carriers

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[10] 248 I. C. C. at 446. For the texts of §§ 1 (6), 6 (4) and (7), see footnotes 8, 5 and 7, *supra*.

[11] For the text, see footnote 5, *supra*.

[12] For the texts, see footnotes 8 and 7, *supra*.

[13] § 15 (3), 49 U. S. C. § 15 (3).

[14] "In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the

claim, with what foundation we do not decide, to be entitled to protection in both regards, and that to deny them such protection may force the abandonment of branch lines which Congress sought by amendment to § 15 (4) to avoid. It is said that in recent years the Illinois Central System has already abandoned branch lines in Mississippi having greater mileage than the whole of appellee's line.[15] Division 3 found that the existing cut-back rates were "extremely low, averaging only about 8.5 percent of the first-class rates, whereas in the general cottonseed proceeding the Commission prescribed 18.5 percent of first class as reasonable, and that these low cut-back rates can be justified only in consideration of the in-bound carrier's obtaining the out-bound movement." [16] The full Commission reiterated Division 3's further finding that "Instead of

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carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. . . ." 49 U. S. C. § 15 (4).

[15] See, e. g., Abandonment of Line By Mississippi Valley Co. and Illinois Central R. Co., 145 I. C. C. 289; Abandonment of Branch Line By Y. & M. V. R. Co., 145 I. C. C. 393; Helm and Northwestern Railroad Co. Abandonment, 170 I. C. C. 33; Gulf & Ship Island R. Co. Abandonment, 193 I. C. C. 749; Y. & M. V. R. Co. Abandonment, 249 I. C. C. 561; Y. & M. V. R. Co. Abandonment, 249 I. C. C. 613.

[16] 238 I. C. C. at 314.

placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier." [17]

Although it appears that by far the greatest part of the outbound traffic over the appellee's line moves beyond on the lines of connecting carriers at jointly established rates, it appears that some traffic does reach its ultimate destination at points along appellee's line. It was apparently with reference to this traffic that the Commission stated that "the form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1)," [18] which provides, *inter alia*, that "If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection . . . the separately established rates, fares, and charges applied to the through transportation." [19] The challenged tariff provided that upon shipment outbound over appellee's line "the freight charges . . . to the manufacturing or mill point will be reduced" in stated amounts, although such charges had been made by other carriers in accordance with their own tariffs for transportation over their own lines. That the Commission may hold that a carrier in "separately establishing" its rates for a portion of a through haul must not purport to alter the rates established by connecting lines, surely is a permissible construction of § 6 (1).

Whether cut-backs even as applied to previous transportation over the carrier's own lines are ever permissible under the Act, we do not decide; and, like the Commission,

[17] 238 I. C. C. at 313; 248 I. C. C. at 445.

[18] 248 I. C. C. at 445.

[19] 49 U. S. C. § 6 (1).

we express no opinion whether the particular cut-backs employed by appellee's competitors are valid. We simply hold that, whatever may be the appellee's rights in appropriate proceedings, cf. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, the appellee may not realize upon them by means which the Commission has properly found to be unlawful.

Reversed.

MR. JUSTICE DOUGLAS, concurring:

Commissioner Splawn dissented from the report of the Commission in this case. 248 I. C. C. 441, 446–447. He noted that respondent's tariff "in no wise affects the amount of the rates paid for the inbound service to the mill point," its only effect being to "reduce the outbound rate and thus make applicable the same rate as applies when the outbound haul is performed entirely by the trunk lines." In his view, the outbound traffic is "free" traffic, as that term was used in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768. That is to say, "it is traffic which has previously moved in on local or joint rates to the milling point and has there come to rest." Hence the fact that respondent is not a party to the inbound rates is "without legal significance." Commissioner Splawn concluded that the decision of the Commission violated "all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines." The fact that no other carrier is a party to respondent's tariff containing the cut-back provision and that respondent absorbs the allowances out of its proportion of the joint outbound rate was unimportant in his view. As he stated, "The identical facts are true of the tariffs and practice of at least one of the intervening trunk lines"—tariffs which concededly constituted

the necessity for respondent's tariff. Moreover, as he observed, "there can be no doubt that the provision is lawful as to outbound traffic to points reached by respondent over its line." That traffic would seem to be as "local" as the transit privilege which this Court held in *Central R. Co. of New Jersey* v. *United States*, 257 U. S. 247, a carrier might establish for its individual tariff, even though there was a joint through route with joint rates. So I would be inclined to support the judgment of the court below in setting aside the order of the Commission at least to the extent that the court allowed the tariff to apply on outbound traffic to points on respondent's own line.

But I am voting for a reversal of the judgment of the court below in the view that the case should be returned to the Commission for adequate findings.

Although there are two reports on this problem—one by the full Commission and one by a division of the Commission—they have an obscurity and vagueness which two full arguments before this Court have not dispelled. Commissioner Splawn complained without success of the lack of findings under § 1 (6), § 6 (1), and § 6 (4). But if we pass by those deficiencies and cut and sew the meager materials at hand into the pattern which we guess the Commission had in mind, there are still important questions left unanswered. (1) The tariffs containing the joint outbound rates specifically authorize "privileges, charges and rules" to be covered by separate tariffs even though the joint or through rate is affected, provided the carrier granting the privilege does so upon its own responsibility and at its own cost. We are not informed why that provision does not authorize appellee's proposed tariff at least to the extent that it applies to outbound traffic to points on appellee's line. (2) If concurrence of the other carriers to appellee's tariff is necessary, we are not told why the foregoing provision of the joint tariff is not

adequate. (3) In case that provision of the tariff covering joint rates is not applicable, there is another phase of the problem which is in the dark. The Commission does not seem to deny that this traffic was "free" traffic within the rule of *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.* It was merely concerned with the "form and manner" of the tariff. But we are not told why appellee's tariff is not within the rule of *Central R. Co. of New Jersey* v. *United States, supra,* so far as the tariff specifies the rate from milling points to destinations on appellee's line. The rule governing the right of carriers to initiate rates has not changed. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 506.

Mr. Justice Cardozo speaking for the Court stated in that case, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." 294 U. S. p. 511. That was said about another obscure and vague report of the Interstate Commerce Commission. We should say the same thing about the present report. The questions left unanswered by this report may be simple ones to experts. But we should have those answers before we put the imprimatur of this Court on the Commission's order.

MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join in this opinion.

BOONE *v.* LIGHTNER ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 698. Argued May 3, 4, 1943.—Decided June 7, 1943.

Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, providing for stays in court proceedings involving persons in military service, addresses to the discretion of the court the question whether "the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." In the circumstances of this case, denial of a stay at the instance of a defendant in military service was not an abuse of that discretion. Pp. 565, 572.
222 N. C. 205, 22 S. E. 426, affirmed.

CERTIORARI, 318 U. S. 750, to review the affirmance of a judgment against a defendant who during the time of the proceeding was in the military service.

Mr. Milton I. Baldinger, with whom *Messrs. Stuart H. Robeson, Roy L. Deal, J. G. Moser, I. Irwin Bolotin,* and *Clifford M. Toohy* were on the brief, for petitioner.

Mr. M. R. McCown for respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The federal question in this case is whether a stay of proceedings against a defendant in military service has been refused under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act of 1940. The controversy in which he was engaged is for state courts to settle, and we deal with the facts only as they relate to this federal question.

The petitioner Boone was summoned into a state court in North Carolina in an action to require him to account as trustee of a fund for his minor daughter, to remove him as trustee, to surcharge his accounts for losses caused by

illegal management, and to obtain personal judgment for deficiency in the fund.

Boone's mother-in-law, by will of which he was executor and trustee, created a trust fund for the education of her grandchildren, including one child of Boone's. Shortly after her death, and in September, 1938, another child was born to him. Since this child was unprovided for in the will, the father-in-law made arrangements which upon his death put into Boone's hands a fund of about $15,000. It is conceded that the fund was a trust for the benefit of the daughter. There was controversy whether it was governed, as Boone claimed, by a letter signed by the father-in-law which placed no restriction on his discretion; or, as Mrs. Boone, who has been sustained by the courts of North Carolina, claimed, by the same conditions as the testamentary trust set up by her mother. For our purposes it is enough that it was admittedly a trust and that grounds were alleged sufficient to move the state court to require an accounting.

The summons and complaint were served on Boone personally in North Carolina on June 23, 1941. He was then in military service of the United States as a Captain stationed in the office of the Under Secretary of War in Washington.

Boone filed a verified answer denying the jurisdiction of the court, claiming that on June 23, 1941, the same day the summons was served, he changed his "domicile and legal residence" to Washington, D. C., and his daughter's as well. He admitted receipt of the fund in trust, asserted the trust was governed by the letter referred to, and pleaded that he "is not bound to report to any Court." He denied all charges of misconduct of the fund, denied that there were grounds for apprehension that the funds were unsafe, and asserted that "he has exercised at all times good faith in caring for this fund." He also stated

that "he has not dissipated one penny of the fund, nor has he made any withdrawal from the fund since the day the money was turned over to him." He pleaded at length facts to support his claim that he was no longer domiciled in North Carolina and to support his allegation that the trust was "a voluntary trust not subject to the jurisdiction of any court or restricted in any way by the terms of any will."

On February 2, 1942, the cause came on for hearing. Boone moved for a continuance to the 25th of May, 1942, his counsel, Roy L. Deal, stating that he expected soon to be called into service and would be unable to try the case, and asking the continuance in order to give defendant ample time to employ other counsel. The request was granted, and that date peremptorily set for the trial. The court forbade transfer of securities constituting the trust and required that on the trial date they and any funds of the trust be turned over to the Clerk of the Court to abide further orders. Its order admonished that the court would at the earliest practical date ascertain the status of the trust fund and that the presence of Boone himself at the trial "is highly desirable," but left to the discretion of Boone and his counsel whether it was necessary. In order, however, to advise defendant Boone and his superior officers of the importance of the litigation, the court directed that a certified copy of the order be sent to The Adjutant General of the United States Army at Washington.

When the trial day came, Boone invoked the Soldiers' and Sailors' Civil Relief Act of 1940, and demanded that the trial be continued until after the termination of his service in the Army or until "such time as he can properly conduct his defense." At this time there were before the trial court not only the pleadings and the affidavits submitted by Boone and his counsel but also certain depo-

sitions which Boone had made and procured and which had been returned to the court, and also Boone's own statement of transactions which accompanied certain securities and funds which he turned over to the Clerk of the Court. Boone was not present, but counsel appeared for him to move for a further continuance under the Soldiers' and Sailors' Civil Relief Act. This motion was denied, counsel who had presented the motion withdrew from the case, and the trial proceeded. The verdict of the jury went against Boone; and judgment was entered that the trust was governed by the terms of the will, that Boone had been guilty of serious misconduct of the trust fund, and that he be held personally liable for the consequent loss to the trust fund of more than $11,000, and removed as trustee.

Boone then appealed to the Supreme Court of North Carolina, on the merits as well as on denial of the continuance, and that court affirmed. 222 N. C. 205, 22 S. E. 2d 426. As the decision below presented an important question of construction of the Act, we granted certiorari.

The section of the Soldiers' and Sailors' Civil Relief Act of 1940 principally invoked is § 201,[1] which reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prose-

[1] 54 Stat. 1178, 1181, 50 U. S. C. App. § 521.

We express no opinion on the question whether Boone could have the judgment opened upon proper application under § 200 (4), 50 U. S. C. App. § 520 (4).

cute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The positions urged by petitioner come to these: first, that defendant's military service in Washington rendered a continuance mandatory; second, if not mandatory, that the burden of showing that he could attend or would not be prejudiced by his absence was not on him, but on those who would force the proceedings; third, that the court did not make the finding required by the Act for denial of a stay; and last, that in any view of the law the trial judge abused his discretion in this case. The petition raises other questions, including the constitutional one as to whether he has been denied due process of law, which we do not discuss because in the light of the facts of the case they are frivolous.

1. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The Act of 1940 was a substantial reënactment of that of 1918. The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act.[2] While this Court

[2] As originally proposed, the Soldiers' and Sailors' Civil Relief Bill, S. 2859, 65th Cong., 1st Sess., provided in § 6 that:

"At any stage thereof any action or proceeding commenced in any court against a person in military service may, in the discretion of the

Footnote 2.—Continued.

court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the defendant is not embarrassed by reason of his military service."

Accompanying "Notes as to the Provisions of the Bill" stated that a "sweeping exemption" such as that provided by most States in Civil War days, was "too broad, for there are many cases where the financial ability of soldiers and sailors to meet obligations in some way is not materially impaired by their entrance into service." Hearings and Memoranda before Senate Judiciary Committee on S. 2859 and H. R. 6361, 65th Cong., 1st and 2d Sess., p. 27.

Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that "a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, 'No; your affair is a going concern; go ahead with the lawsuit. You have a lawyer, you have an agent, you have a corporation manager, and other things.'" *Id.* at p. 97.

As reported by the House Judiciary Committee, H. R. 6361, 65th Cong., 1st Sess., provided in § 201:

"That at any stage thereof any action or proceeding commenced in any court against a person in military service during the period of such service or within 60 days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by reason of his military service."

The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated:

"Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against soldiers will be for small amounts and will thus

Footnote 2.—Continued.

be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki; . . ." (p. 2.)

"The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit.

"But in any case a rigid stay of all actions against the soldier is too broad. There are many men now in the Army who can and should pay their obligations in full.

"On the other hand there are already tens of thousands of men in military service who will be utterly ruined and their families made destitute if creditors are allowed unrestrictedly to push their claims; and yet these same soldiers, if given time and opportunity can, in most cases, meet their obligations dollar for dollar. The country is asking 2,000,000 of its young men to risk their lives and, if need be, to give up their lives for their country. Before long even more will be asked to make the same sacrifice. Is it more than naked justice to give to the savings of these same men such just measure of protection as is possible?" (pp. 2–3.)

"Section 201 illustrates how the committee has avoided an arbitrary, a rigid bill. The clause 'unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought, is not materially affected by reason of his military service,' is the key to the whole scheme of the bill. This mere fact of being in military service is not enough; military service must be the reason for the defendant not meeting his obligations." (p. 5.)

Congressman Webb, Chairman of the House Judiciary Committee, stated on the floor of the House, with reference to this bill, that:

Footnote 2.—Continued.

"Heretofore during wars the various States have undertaken to pass the private stay laws for the benefit of the soldiers who are in the service of their country. If you will read the various laws of this kind which the committee has set out in its report, you will see what contrariety of such laws have been passed during recent years and during the various wars. The next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case.

"Manifestly, if this Congress should undertake to pass an arbitrary stay law providing that no creditor should ever sue or bring proceedings against any soldier while in the military service of his country, that would upset business very largely in many parts of the country. In the next place, it would be unfair to the creditor as well as to the soldier. It would disturb the soldier's credit probably in many cases and would deny the right of the creditor to his just debts from a person who was amply able to pay and whose military service did not in the least impair his ability to meet the obligation." 55 Cong. Rec. 7787.

On the floor of the Senate, § 201 was amended to substitute for "the ability of the defendant to comply with the judgment or order," "the ability of the defendant to conduct his defense," and to extend its protection to plaintiffs as well as to defendants. 56 Cong. Rec. 1696, 1753–1754. The amendments were agreed to in conference, with the managers stating with respect to the former amendment that "As the bill passed the House relief was to be given the party in military service unless his ability to comply with the judgment or order sought was not materially affected by such service. The amendment agreed on makes the test depend upon his ability to conduct his defense." 56 Cong. Rec. 3023. As so amended, the Bill became § 201 of the 1918 Act, 40 Stat. 442, which was carried into § 201 of the 1940 Act without amendment of the provision under consideration. While it is true that the discussion set forth in the preceding paragraphs related to a stay on a different basis than the one enacted, in so far as it deals with the question whether a mandatory or a discretionary stay was intended it is not made inapplicable or uninstructive by the amendment.

had no occasion to speak on the subject, the Act was generally construed consistently with this policy.[3]

Reënacted against this background without reconsideration of the question beyond a statement in the Senate Committee Report that "There are adequate safeguards incorporated in the bill to prevent any person from taking undue advantage" of its provisions,[4] we are unable to ignore or sterilize the clause which plainly vests judicial discretion in the trial court.

2. The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of per-

[3] *Davies & Davies* v. *Patterson*, 137 Ark. 184, 208 S. W. 592; *State ex rel. Clark* v. *Klene*, 201 Mo. App. 408, 212 S. W. 55; cf. *Swiderski* v. *Moodenbaugh*, 44 F. Supp. 687, 45 F. Supp. 790; *Dietz* v. *Treupel*, 184 App. Div. 448, 170 N. Y. S. 108; *Gilluly* v. *Hawkins*, 108 Wash. 79, 182 P. 958.

[4] Sen. Rept. No. 2109, 76th Cong., 3d Sess., p. 2.

suasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

In the present case, whoever might have had the burden originally, the continuance was finally denied upon a record which disclosed the facts so far as either party saw fit to do so. The defendant and his counsel submitted affidavits and the depositions and accounts before the court revealed facts relevant to the issue.

Whether, if the court knew only the existence of this complicated controversy and that the defendant was absent in military service, it could have cast upon the defendant the burden of showing that the litigation could not go ahead without prejudice to him, is not before us. The court made no such ruling. The defendant appeared, he pleaded his defense, he took depositions showing fully what had happened to the fund, and he supplied his own affidavit showing where he was and what he was doing. Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Cooper* v. *Dasher,* 290 U. S. 106, 109. The trial court and the Supreme Court of North Carolina did just this. They did not deny his stay because he failed to meet their ideas of burden; they weighed the evidence he offered and found its conclusions discredited by its avoidance of supporting facts within his knowledge and not within that

of his adversary. That is not a ruling on burden of proof. Finding that the courts below have proceeded upon no misapprehension of the law, we turn to their dealing with the facts of the particular case.

3. Some question is raised as to whether the findings of the trial court meet the requirements of the Act. In the order denying the continuance it found as a fact that "the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the Act referred to above to avoid such determination." It also found the defendant "is not upon the motion for continuance acting in good faith." In the final judgment the court found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his military service has not prevented him from doing this." It found that "defendant had full opportunity to prepare and put in his defense if he had one," and that "It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride, does not intend for this to be done."

Of course this is not a finding in the words of the statute that the ability of the defendant "to conduct his defense is not materially affected by reason of his military service," but there is no doubt that it was intended to be in substance the equivalent. It was so treated by the Supreme Court of North Carolina and to send the case back for further findings seems unwarranted. The Act does not expressly require findings. It is one intended to apply to courts not of record as well as those of record, and it requires only that the court be of opinion that ability to defend is not materially affected by military service. We

accept the findings as sufficiently evidencing the opinion of the court to that effect.

4. The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion.

We think the opinion of the court that Boone's military service did not prevent him from being present and doing whatever could have been done by way of defense finds ample support in the evidence. Boone had been able to get away from Washington to go to New York for the taking of depositions on two separate occasions. He had long notice of the trial date and the court had placed in the files of his Department its order showing the desirability of his presence at that time. Boone, being a lawyer and presumably knowing the gravity of the accusations against him, might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance. Boone's affidavit, after reciting that he was assigned to the International Division, Headquarters, Services of Supply, Washington, D. C., says "The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant. Prior to the declaration of War on Dec. 8, 1941 the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency."

Most lawyers trained in the equity tradition of trustee fidelity would regard a trial of this kind as a serious emergency. Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. We think the court had ample grounds for the opinion that Boone

made no effort to attend to duties that should weigh heavily upon the honor of a lawyer-trustee.

There was likewise support for the opinion that the failure to be represented by counsel did not result from Boone's military service. On February 2, 1942, the court granted his request for a continuance and set the case for trial on May 25, 1942. It was stated to the court that counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel. Nevertheless, when the trial date arrived, the fact that this counsel had gone into service on May 13, 1942, was urged as a reason for further postponement. No showing whatever was made as to any effort to obtain other counsel in the long interval allowed by the court for the purpose. This counsel was also stationed at Washington and said he "would not assume to ask for leave at the present time, so soon after having reported for duty."

On the trial date defendant was nevertheless represented in court by local counsel. That counsel however was consulted only three or four days before the trial date and was employed for the sole purpose of making the motion for continuance, and when the court ruled on it he withdrew and declined to proceed further. The defendant's accounts presented to the trial judge showed disbursements since the beginning of the action and before trial for the following matters, among others, in connection with this case: On August 15, 1941, defendant's deposition was taken at Washington, D. C. This entailed a reporter's fee of $66.00 and a fee of $248.88 paid a Detroit attorney for appearing at the proceeding. On November 3 and 5, 1941, depositions were taken in New York City with the defendant present. These involved a court reporter's fee of $32.25, and fees in the amount of $375.00

for the Detroit attorney and New York counsel obtained to assist him. This item carried a notation that it did not "include services rendered in the taking of depositions in other cases on same date." From August 4, 1941, to January 26, 1942, Deal, the attorney who had represented defendant before withdrawing to accept a commission in Washington, received $218.00 for his services in representing defendant in the case. Two days after judgment, another lawyer from the firm of counsel who had withdrawn after making the motion of May 25 appeared and moved to set the verdict aside and took an appeal, later filing extensive assignments of error. Counsel who had withdrawn from the trial argued the appeal in the Supreme Court of North Carolina.

At all times since the action began defendant has also been represented by counsel from Detroit, Michigan. His inability to appear on the trial date was explained on the ground that he was "definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days." No affidavit from this counsel was produced, and no explanation is made as to how it came that other "cases" were given priority over this in view of the long notice of the trial date and its importance to the client.

In this Court, Boone is represented by his Detroit counsel and by Deal, the lawyer who withdrew from the case to accept a commission in Washington. Besides these, there also appear four other lawyers, none of whom are included in the five who have represented him at previous stages in the case.

In addition to the facts presented to the trial court which we have recited, the trial court apparently considered matters not of record in this case, but of which he took judicial notice. He recites that "the motion to continue is made after the defendant's refusal in one or more instances arising out of litigation respecting the

subject matter and personnel involved in this action to appear in the Courts of North Carolina, even on citation for contempt." We know nothing of these events and disregard this ground of the court's action.

The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. Defendant in spite of his military service in Washington was continuing to administer the fund. The defendant was a member of the bar, and the charges struck at his honor as well as at his judgment. Instead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day. He was both present and represented by counsel when depositions were taken which establish his speculation with the trust funds in his personal margin account. We think the record amply supports the conclusion of the trial judge that the claim that military service would prejudice the conduct of his defense, was groundless, and that the absence of himself and all of his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy.

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Affirmed.

MR. JUSTICE BLACK, dissenting:

The petitioner is a soldier who was on duty in Washington throughout the course of the litigation in North Carolina of this action against him. He duly claimed the protection of the Soldiers' and Sailors' Civil Relief Act of 1940, and rests upon it here. I think he should prevail.

The relevant statutory provision before us may be summarized as follows: Actions brought against a person in military service shall be stayed upon application of that person "unless, in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service."

The statutory language has no legislative history and has not previously been interpreted by this Court. The elaborate legislative history set forth by the Court is a history of a clause which was stricken from the 1917 Act, which is not before us now, and which, on its face, has a meaning wholly different from the clause under construction.[1] Hence the problem is a narrow one of analysis of the words of the statute itself.

I believe that the clause under consideration requires that an action against a person in military service must be

[1] The clause for which the Court gives the legislative history is as follows: An action against a person in military service shall be stayed, upon request, "unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by reason of his military service." This means, in rough substance, what its legislative history says, that the action was to be stayed except where the defendant could readily pay a judgment against himself. But that language was removed and the present provision inserted: the action upon proper request shall be stayed unless in the opinion of the trial judge, "the ability of the defendant to conduct his defense" is affected by military service. The difference between ability to pay a judgment and ability to conduct a defense is so great that the two clauses have substantially nothing in common. The ability to pay clause has been left in some sections of the Act, as, e. g., §§ 203, 206, but it is not before us here.

stayed unless the trial judge concludes (a) that no personal judgment will result and that the action will in effect preserve the interests of all the parties for the duration of the war; or (b) that the defendant is only a formal party; or (c) that the defendant need not be present for any purpose, either before, during, or after the trial, and that he will be adequately represented and has no need to testify or participate in any way; or (d) that the defendant's military service does not preclude him from having ample opportunity to get ready for, and to take his necessary part in, the litigation.

In my opinion, none of these conditions are met here. Although the action began as a proceeding to preserve the trust estate, which was quite proper, it terminated with a personal judgment against the petitioner for $11,000 after a trial by jury of many disputed facts. The petitioner was obviously not merely a formal party. One issue in the case was whether he had dissipated trust funds, and for such an inquiry his presence to hear the evidence against him was essential to his interests and his own testimony was, in the words of the trial court, "highly desirable."

The sole possible ground for the Court's action, therefore, is that the defendant could have been present and, wilfully taking advantage of the Act, chose instead to absent himself. In reaching this result the Court engages in precisely the speculation which I think the Act prohibits. The Court does not know, and the state court did not try to find out, whether Boone applied for a leave or disclosed its urgency to his superiors; it concludes that he did neither. The Court does not know whether Boone attempted to find new counsel; it assumes that he did not. The Court does not know why Boone chose to participate in certain other law suits against him conducted simultaneously with this one; it assumes that the others were less important than this case. The Court can not know

whether the petitioner truly owes the amount of the judgment against him; it must assume that he does because of a proceeding conducted against him in his absence.[2]

The Court emphasizes that Boone is a member of the bar. But, for the duration of the war, he is primarily a soldier, with a job to do which Congress intended should overshadow personal interests, whether his or those of others who seek a personal judgment against him. It is difficult for me to believe that he could adequately have prepared for this trial without a leave of many weeks. The purpose of the Act is to prevent soldiers and sailors from being harassed by civil litigation "in order to enable such persons to devote their entire energy to the defense needs of the Nation." § 100. He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.

The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case. In the course of the war, numerous actions will be brought against soldiers who have never heard of this Act and have no notion that this Court might want them to apply to

[2] Had this been a judgment by default, Boone might have it set aside upon proper motion made at any time within "ninety days after the termination" of his military service. § 200 (4). Whether that section will permit Boone to attack this judgment after the war is a question which the Court expressly reserves.

their superior officers for leave and to make and file a formal record of their superior officers' refusal.

I fear that today's decision seriously limits the benefits Congress intended to provide in the Soldiers' and Sailors' Civil Relief Act. It apparently gives the Act a liberal construction for the benefit of creditors rather than for the benefit of soldiers. It places in trial judges an enormous discretion to determine from a distance whether a person in military service has exercised proper diligence to secure a leave, or whether it is best for the national defense that he make no application at all. These are questions on which the judiciary has no competence, since only the military authorities can know the answers.

BUSEY ET AL. *v.* DISTRICT OF COLUMBIA.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 235. Argued June 1, 1943.—Decided June 14, 1943.

In view of *Jones* v. *Opelika,* 319 U. S. 103, and *Murdock* v. *Pennsylvania,* 319 U. S. 105, the judgment in this case is vacated and the cause is remanded in order that the court below may reëxamine the questions whether § 47–2336 of the District of Columbia Code (1940), which forbids unlicensed sales upon the public streets, or from public space, should be construed as applicable to the facts of this case, and whether, if applicable, it is constitutional. P. 580.

75 U. S. App. D. C. 352, vacated.

CERTIORARI, *post,* p. 735, to review the affirmance (129 F. 2d 24) of a judgment of the Police Court of the District of Columbia.

Mr. Hayden C. Covington for petitioners.

Mr. Vernon E. West, with whom *Mr. Richmond B. Keech* was on the brief, for respondent.

PER CURIAM.

In this case petitioners, who are Jehovah's Witnesses, were convicted of selling, on the streets of the District of Columbia, magazines which expound their religious views, without first procuring the license and paying the license tax required by § 47–2336 of the District of Columbia Code (1940). In affirming the conviction the Court of Appeals for the District of Columbia below had two questions before it: whether the statute was applicable to petitioners, and if so whether its application as to them infringed the First Amendment. The court construed the statute as applicable and sustained its constitutionality (75 U. S. App. D. C. 352, 129 F. 2d 24), following the decision in *Cole* v. *Fort Smith,* 202 Ark. 614, 151 S. W. 2d 1000, the judgment in which was affirmed by this Court in *Bowden* v. *Fort Smith,* 316 U. S. 584, one of the cases argued together with *Jones* v. *Opelika,* 316 U. S. 584. Since the decision below, and after hearing reargument in the *Opelika* case, we have vacated our earlier judgment and held the license tax imposed in that case to be unconstitutional. *Jones* v. *Opelika,* 319 U. S. 103; *Murdock* v. *Pennsylvania,* 319 U. S. 105. Petitioners urge us to construe the District of Columbia statute as inapplicable in order to avoid the constitutional infirmity which might otherwise exist—an infirmity conceded by respondent on the oral argument before us. In view of our decisions in the *Opelika* and *Murdock* cases, we vacate the judgment in this case and remand the cause to the Court of Appeals for the District of Columbia to enable it to reëxamine its rulings on the construction and validity of the District ordinance in the light of those decisions. Cf. *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690–691, and cases cited.

So ordered.

MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

COLE *v.* VIOLETTE ET AL.

APPEAL FROM THE SUPERIOR COURT OF SUFFOLK COUNTY, MASSACHUSETTS.

No. 892. Decided June 14, 1943.

1. In determining what is a final judgment or decree of a state supreme court within the meaning of § 237 of the Judicial Code, this Court is not controlled by the designation applied to it in state practice. P. 582.
2. A rescript from the Supreme Judicial Court of Massachusetts to the state Superior Court embodied an order directing that the final decree of the latter court dismissing a suit on the merits be modified by the insertion of a clause "to the effect that the bill is dismissed on the ground that the questions raised have become moot"; and declaring that "the decree as so modified is affirmed with costs," *held* final within the meaning of § 237 of the Judicial Code so that an appeal applied for more than three months from the date of the order was too late. P. 582.

312 Mass. 523, 45 N. E. 2d 400, appeal dismissed.

Mr. Harold E. Cole, pro se.

Messrs. George L. Sisson and *Ray C. Westgate* were on the brief for appellees.

PER CURIAM.

The question for our decision is whether the appeal was applied for within the three months' period provided by law. 28 U. S. C. § 350. The suit was dismissed on the merits by the Superior Court of Suffolk County, Massachusetts, and appealed to the Supreme Judicial Court of Massachusetts, which on December 4, 1942, decided that the case had become moot. 312 Mass. 523, 45 N. E. 2d 400. On the same day, that court sent to the Superior Court from which the appeal was taken a rescript which contained the following order: "Ordered, that the clerk of said court . . . make the following entry under said case in the docket of said court: viz., Final Decree to be modified by the insertion of a clause to the effect that the

bill is dismissed on the ground that the questions raised have become moot; decree as so modified is affirmed with costs." The rescript was filed that day in the Superior Court, which, on January 7, 1943, entered a decree as had been directed.

Applications for the allowance of an appeal to this Court, presented within three months after December 4th, were denied by the Chief Justice of the Superior Court of Massachusetts and by an Associate Justice of this Court. An application presented to another Associate Justice on March 6th was allowed. But this last application was not timely if the time to take an appeal ran from December 4th. *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412.

Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the "final decree" in the case. See *Boston* v. *Santosuosso,* 308 Mass. 189, 194, 31 N. E. 2d 564; *Carilli* v. *Hersey,* 303 Mass. 82, 84, 20 N. E. 2d 492. But in determining what is a final judgment or decree within the meaning of § 237 of the Judicial Code, 28 U. S. C. § 344, we are not controlled by the designation applied to it in state practice. *Department of Banking* v. *Pink,* 317 U. S. 264, 268; *Gorman* v. *Washington University,* 316 U. S. 98, 101. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was not applied for within the time provided by law. *Department of Banking* v. *Pink, supra,* and *Matton Steamboat Co.* v. *Murphy, supra.*

Dismissed.

TAYLOR *v.* MISSISSIPPI.*

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 826. Argued April 15, 16, 1943.—Decided June 14, 1943.

1. The Fourteenth Amendment prohibits punishment under a state statute for urging and advising that, on religious grounds, citizens refrain from saluting the flags of the United States and the State. P. 588.
2. Conviction under a state statute denouncing as a crime the disseminating of literature tending to create "an attitude of stubborn refusal to salute, honor, or respect" the national and state flags and governments denies the liberty guaranteed by the Fourteenth Amendment. P. 589.
3. The Fourteenth Amendment prohibits that a State should punish the communication of one's views of governmental policies and one's prophecies of the future of this and other nations, when this is without sinister purpose and is not in advocacy of, or incitement to, subversive action against the nation or state and does not involve any clear and present danger to our institutions or government. P. 589.

194 Miss. 1, 59, 74, 11 So. 2d 663, 683, 689, reversed.

APPEALS from judgments by an evenly divided court affirming sentences imposed in three criminal prosecutions.

Mr. Hayden C. Covington for appellants.

Mr. Geo. H. Ethridge, Assistant Attorney General of Mississippi, with whom *Mr. Greek L. Rice,* Attorney General, was on the brief, for appellee.

Mr. Charles C. Evans filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

March 20, 1942, the State of Mississippi enacted a statute[1] the title of which declares that it is intended to

*Together with No. 827, *Benoit* v. *Mississippi,* and No. 828, *Cummings* v. *Mississippi,* also on appeals from the Supreme Court of Mississippi.

[1] Chap. 178, General Laws of Mississippi, 1942.

secure the peace and safety of the United States and of the State of Mississippi during war and to prohibit acts detrimental to public peace and safety. The first section, with which alone we are here concerned, provides:

"That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any other means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States or who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the state of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years."

At the June 1942 term of the Madison County Circuit Court, Taylor, the appellant in No. 826, was indicted for orally disseminating teachings designed and calculated to encourage disloyalty to the government of the United States and that of the State of Mississippi; and for orally disseminating teachings and distributing literature and printed matter reasonably tending to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States and of the State of

Mississippi, and designed and calculated to encourage disloyalty to the government of the United States.

At the June 1942 term of the Marion County Circuit Court, Betty Benoit, the appellant in No. 827, was indicted for disseminating and distributing literature and printed matter designed and calculated, and which reasonably tended, to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States.

At the July 1942 term of the Warren County Circuit Court, Cummings, the appellant in No. 828, was indicted for distributing printed matter designed and calculated to encourage disloyalty to the United States Government and to the State of Mississippi, and tending to create an attitude of stubborn refusal to salute, honor or respect the flag or the government of the United States and the State of Mississippi.

Demurrers and motions to quash, challenging the constitutional validity of the statute, were overruled. The defendants pleaded to the indictments and, after trial, were convicted. Each was sentenced to imprisonment in the state penitentiary for a term to expire at the end of the existing war, but not to exceed ten years. Appeals were perfected to the Supreme Court of Mississippi which, by an evenly divided court, affirmed the convictions.[2]

The appellants maintained below, and assert here, that their convictions denied them the rights guaranteed by the Fourteenth and First Amendments, in that, as construed and applied to them, the Act abridges freedom of press and of speech and is so vague, indefinite, and uncertain as to furnish no reasonably ascertainable standard of guilt.

The evidence was contradictory and conflicting but the juries resolved the conflicts against the appellants. We

[2] 194 Miss. 1, 59, 74; 11 So. 2d 663, 683, 689.

must, therefore, examine the questions presented on the basis of the proofs submitted by the State.

In No. 826 the prosecution offered evidence to show that Taylor, in the course of interviews with several women, the sons of two of whom had been killed in battle overseas, stated that it was wrong for our President to send our boys across in uniform to fight our enemies; that it was wrong to fight our enemies; that these boys were being shot down for no purpose at all; that the two women's sons may have thought they were doing the right thing to fight our enemies, but it was wrong; that Hitler would rule but would not have to come here to rule; that the quicker people here quit bowing down and worshiping and saluting our flag and Government the sooner we would have peace. Books and pamphlets distributed by Taylor were placed in evidence. Certain statements in these books, said by the Supreme Court of Mississippi to be typical, are copied in the margin.[3]

[3] "All nations of the earth today are under the influence and control of the demons. . . . All the nations suffer the same fate or come to the same end, because all nations of earth are on the wrong side, that is, on the losing side. All of such nations are against the Theocratic Government, that is, the government of kingdom of Almighty God . . . and all are under the control of the invisible host of demons, . . ."

"But to compel people to salute a flag or any other image is wrong, and particularly if that person believes on God and Christ Jesus. For the Christian to salute a flag is in direct violation of God's specific commandment."

"Almighty God commands that they must remain entirely neutral in the controversy. Because his covenant people are servants and representatives of THE THEOCRACY they must hold themselves entirely aloof from warring factions of this world."

"Non-Christians may salute the flag without reference to the foregoing rules. Those who are real conscientious Christians are in a class entirely different from others of the world. Jehovah's witnesses are Christians and in a covenant to be entirely obedient to God's law. They must teach their children and admonish them to obey God's law, as he has commanded. They are conscientious and they sincerely be-

In No. 827 it was proved that the appellant Betty Benoit distributed Volume XXIII, No. 583, of a publication entitled "Consolation," which contained a reprint of an editorial from a Lewiston, Maine, newspaper commenting adversely upon the decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586, and vigorously asserting that the salute of the national flag amounted to a contemptible form of primitive idol worship. The publication also contained an alleged foreign dispatch which stated that the flag salute ceremony, a daily event in French schools, originated in the Catholic schools of France; commented that the type of mind which finds satisfaction in worshiping images would also be most inclined towards various kinds of emblem worship, and added that the dispatch confirms the claim that the flag salute in the United States has been covertly pushed by the Catholic hierarchy here.

In No. 828 the State proved that the appellant Cummings distributed a book called "Children." The volume was placed in evidence. Long excerpts were read to the jury most of which seem irrelevant to the charges in the indictment. One passage, however, appears to be that on which the prosecution especially relied. It is copied in the margin.[4]

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lieve that for them to indulge in the formalism or ceremony of saluting any flag is a violation of God's specific commandment. . . ."

In its opinion the court added:

"Other passages in this literature teach that 'the so-called democracies' hold out no hope of peace, security, life or happiness—that the only place of safety is in Theocracy; that if there is a conflict between state law and what Jehovah's witnesses conceive to be Jehovah's law, the state law should not be obeyed; that Jehovah's witnesses take a pledge not to salute the flag and that to undertake by law to force a child to salute the flag is to 'frame mischief by law.'"

[4] "Satan knows that his time is short, and therefore he is desperately trying to turn all persons, including the children, against God. (Revelation 12: 12, 17.) Therefore Satan influences public officials and others to compel little children to indulge in idolatrous practices by

The appellants are all members of Jehovah's Witnesses. There is nothing in the records to indicate that, in making the statements and distributing the printed matter in question, they were communicating and teaching any doctrine in which they did not sincerely believe.

Section 1 of the Act defines six offenses. The indictments in Nos. 826 and 828 charge the commission of two of them [5] in a single count,—(1) teaching and dissemination of printed matter designed and calculated to encourage disloyalty to the national and state governments, and (2) distribution of printed matter reasonably tending to create an attitude of stubborn refusal to honor or respect the flag or government of the United States or of the State of Mississippi. In No. 827 the single offense charged is the dissemination of literature reasonably tending to create the denounced attitude towards the flag and Government.

In *West Virginia State Board of Education* v. *Barnette*, *post*, p. 624, the court has decided that a state may not en-

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bowing down to some image or thing, such as saluting flags and hailing men, and which is in direct violation of God's commandment. (Exodus 20: 1–5.) That is why in the last few years rules are made and enforced in the public schools compelling children of the Jonadabs, who are in a covenant to do God's will, to indulge in the idolatrous practice of flag-saluting and hailing men. It is the influence of that subtle foe, the Devil, that has brought about this state of affairs, and now Satan's agents cause great persecution to be brought upon the parents and the children who insist on obeying the commandments of God. This makes the way of both parents and children more difficult, but at the same time it puts a test upon them and affords them the opportunity to prove their faith and obedience and to maintain their integrity towards God and his King."

[5] There is no charge in any of the indictments of (1) preaching, teaching, dissemination of teachings, or distribution of written or printed matter designed or calculated to encourage violence or sabotage; (2) advocacy, by action or speech, of the cause of the enemies of the United States; (3) the giving of information as to military affairs; (4) incitement of racial disturbances, disorder, prejudice or hatred.

force a regulation requiring children in the public schools to salute the national emblem. The statute here in question seeks to punish as a criminal one who teaches resistance to governmental compulsion to salute. If the Fourteenth Amendment bans enforcement of the school regulation, *a fortiori* it prohibits the imposition of punishment for urging and advising that, on religious grounds, citizens refrain from saluting the flag. If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views.

Inasmuch as Betty Benoit was charged only with disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor, or respect the national and state flags and governments, her conviction denies her the liberty guaranteed by the Fourteenth Amendment. Her conviction and the convictions of Taylor and Cummings, for advocating and teaching refusal to salute the flag, cannot be sustained.

The last-mentioned appellants were also charged with oral teachings and the dissemination of literature calculated to encourage disloyalty to the state and national governments. Their convictions on this charge must also be set aside.

The statute as construed in these cases makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophecies concerning the future of our own and other nations. As applied to the appellants, it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state,[6] or to have threatened any clear and present danger to our institu-

[6] See *Schenck* v. *United States*, 249 U. S. 47; *Abrams* v. *United States*, 250 U. S. 616; *Whitney* v. *California*, 274 U. S. 357.

tions or our Government.[7] What these appellants communicated were their beliefs and opinions[8] concerning domestic measures and trends in national and world affairs.

Under our decisions criminal sanctions cannot be imposed for such communication.

The judgments are

Reversed.

INTERSTATE TRANSIT LINES *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 552. Argued April 19, 1943.—Decided June 14, 1943.

1. A corporation, operating a bus line interstate and intrastate, finding that in a particular State it could not lawfully engage in the local business because it had not been there incorporated, organized, pursuant to the laws of that State, a wholly-owned subsidiary which took over the parent company's traffic from the state line and operated intrastate as well. Pursuant to the contract between them, the parent corporation kept the accounts of the subsidiary, managed its finances, paid its bills, and absorbed all of its profits and deficits. *Held*:

(1) That a payment made by the parent company to cover an operating deficit of the subsidiary during a tax year was not deductible by the parent company under § 23 (a) of the Revenue Act of 1936 from gross income as an ordinary and necessary business expense of that company. P. 593.

(2) In the absence of proof allocating the deficit as between the intrastate and interstate business of the subsidiary, the entire deficit must be attributed to the intrastate business. P. 594.

(3) The mere fact that the expense was incurred under contractual obligation did not sustain the deduction. P. 594.

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[7] See *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242.

[8] See *Stromberg* v. *California*, 283 U. S. 359; *Thornhill* v. *Alabama*, 310 U. S. 88.

2. An income tax deduction is by legislative grace; and the burden of showing his right to the deduction is on the taxpayer. P. 593.
130 F. 2d 136, affirmed.

CERTIORARI, 318 U. S. 751, to review the affirmance of a ruling (44 B. T. A. 957) sustaining a deficiency assessment of income tax.

Mr. Nelson Trottman, with whom *Mr. Joseph F. Mann* was on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This case involves a claim by the taxpayer to treatment of itself and a subsidiary as a single taxable person. The writ of certiorari was granted because of uncertainties in this area of important federal tax law. See *Moline Properties* v. *Commissioner, ante,* p. 436, n. 1. Petitioner, Interstate Transit Lines, sought to deduct $28,100.66 as an ordinary and necessary business expense for the year 1936. § 23 (a), Revenue Act of 1936.[1] This sum represented a credit to its subsidiary, Union Pacific Stages of California, pursuant to a contract by which petitioner was to be liable for all operating deficits of the subsidiary. The claimed deduction was disallowed and a deficiency determined. The Board of Tax Appeals sustained the Commissioner and the Circuit Court of Appeals has affirmed the Board. *Interstate Transit Lines* v. *Commissioner,* 44 B. T. A. 957; 130 F. 2d 136.

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[1] 49 Stat. 1648:

"Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ."

Petitioner, a Nebraska corporation, operated an interstate bus transportation line between Illinois and California, and Missouri and Wyoming, and did an intrastate business in most of the states en route. Because of its foreign incorporation, petitioner was barred, under the California Railroad Commission's interpretation of California law, from obtaining a certificate of public convenience to do intrastate business in California. To avoid this situation, petitioner in 1930 organized Stages in California as its wholly-owned subsidiary to do the business it was unable to do. It contracted with Stages that Stages was to operate solely for petitioner's benefit and under petitioner's direction; all profits were to be paid to petitioner and it was to reimburse Stages for any operating deficit. In addition to its own intrastate business, Stages was to carry on all of petitioner's interstate business in California, the agreement providing that as each party's buses crossed the state line, the other became its lessee. The lessee was to pay the lessor five cents per mile operated by the bus in the lessee's custody. All this resulted in no change and no added expense in the business formerly done in respects other than accounting except for the addition to the gross revenues of the enterprise of the proceeds of intrastate California business. Petitioner kept Stages' accounts, managed its finances and paid its bills and payroll. Each month petitioner apportioned between the two companies the revenues and expenses on the basis of passenger and traffic mileage. On the books of each a "clearing account" with the other showed the absorption by petitioner of Stages' annual deficit or profit. It is the 1936 operating deficit of Stages, entered on the books of both on December 31 of that year, which petitioner now seeks to deduct as its business expense. Some years after 1936, by reason of a change in California law or its interpretation, petitioner became able to conduct intrastate

business in California. Consequently Stages was dissolved and its assets and franchises transferred to petitioner. In 1932 and 1933, consolidated income tax returns were filed by petitioner pursuant to § 141 of the Revenue Act of 1932, 47 Stat. 169, 213.

Whether phrased as the payment of an expense in a business conducted for a principal by an agent or as a case where equity and reality require that the separate corporate identities be ignored or as the incurring under contract of a necessary expense, petitioner's argument for its success depends on the contention that Stages' operating deficit is an expense of petitioner's business. Without this keystone the entire argument must fall. And we examine the argument in the light of the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer. *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440; *Deputy* v. *du Pont,* 308 U. S. 488, 493. The decision of the two courts below is that this burden has not been met.

This is not the case of a mere branch or division of a business conducted solely for convenience' sake under a separate corporate form. Petitioner did an interstate bus business and was a corporation foreign to California. On the other hand, the business of Stages in the tax year in question was both interstate and intrastate. For petitioner to engage in intrastate business in California was, on the findings, illegal. Thus, the businesses of the two companies were distinct. Cf. *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 454, 456; *Texas-Empire Pipe Line Co.* v. *Commissioner,* 127 F. 2d 220. Even assuming that the interstate business of Stages could be the business of the petitioner,[2] it follows that at most only that part of

[2] Cf. *Moline Properties* v. *Commissioner, ante,* p. 436; *Higgins* v. *Smith,* 308 U. S. 473, 477, n. 8–10.

the deficit attributable to Stages' interstate business could be an expense of petitioner's business and petitioner could not conceivably deduct as a business expense the cost of Stages' intrastate business. There was no showing below as to the allocation of the deductions sought as between Stages' intrastate and interstate business. There is thus no record requiring a further examination of petitioner's argument since in the absence of affirmative proof to the contrary we must assume that the entire deficiency was found correctly by the Commissioner and that the deficit is attributable to Stages' intrastate business.

It is no answer to this defect of proof that petitioner was obligated by contract to assume Stages' deficit. The mere fact that the expense was incurred under contractual obligation does not of course make it the equivalent of a rightful deduction under § 23 (a). That subsection limits permitted deductions to those paid or incurred "in carrying on any trade or business." The origin and nature, and not the legal form, of the expense sought to be deducted determines the applicability of the words of § 23 (a). *Deputy* v. *du Pont, supra,* 494. It was not the business of the taxpayer to pay the costs of operating an intrastate bus line in California. The carriage of intrastate passengers did not increase the business of the taxpayer. The profit earned on their carriage increased the taxpayer's profit but so would any other profitable activity wholly disconnected from the taxpayer's own business. As the Circuit Court pointed out, the assumption of the deficit was not dependent upon a corresponding service or benefit rendered to the petitioner by Stages in connection with petitioner's business. 130 F. 2d 136, 139.

In view of these conclusions, it is unnecessary to characterize the payment by petitioner as a capital expenditure or otherwise, or to decide whether if the record were complete petitioner and Stages should be treated as a

taxable entity for the claimed purpose. Cf. *Moline Properties* v. *Commissioner, ante,* p. 436.

Affirmed.

MR. JUSTICE JACKSON, dissenting:

This taxpayer operated a bus system between Chicago and Los Angeles. It could not pick up intrastate passengers in California, as it did elsewhere, because the State denied foreign corporations permission to do so. In order to obtain local traffic to help carry the cost of operating the interstate buses, taxpayer organized a wholly-owned and dominated California subsidiary. This contented the local authorities, and it was granted permission to carry local business. It took over buses arriving at the state line, operated them in California, thus performing a part of the taxpayer's agreements of through carriage and benefiting from local traffic to reduce the cost. It was a common-sense business arrangement, for the purpose of making its business profitable.

The taxpayer made a contract with the subsidiary, by which the subsidiary undertook the service; the parent company became entitled to the profits and assumed the losses. The taxpayer agreed to reimburse the subsidiary for any operating deficit. This, too, was a common-sense business arrangement. To pay its wholly-owned subsidiary more would be pointless, for it would only come back. To pay it less would result in its bankruptcy to the injury of creditors. So the taxpayer agreed that the operating deficits should be the measure of its contractual obligation to the subsidiary.

There is no suggestion that this arrangement was for tax avoidance, or for that matter that it did not actually reduce taxpayer's costs and thus increase its tax liability. The Commissioner ruled, however, that the amount of operating deficit paid by the taxpayer was not a business expense.

To require the Commissioner in all cases to allow a deduction so fixed might be turned by the unscrupulous to tax-evasion ends. It could then, through its controlled subsidiary, make expenditures not properly allowable as business expense, but get them allowed as part of the deficit assumed by contract. Of course the Commissioner is not obliged to allow this, or any other arrangement, when it is used as a cover for tax skullduggery. Examination of the items is open to the Commissioner. But this deduction has been denied, not for such reasons, but upon a legal theory which I think is erroneous.

The taxpayer took inconsistent positions: first, that the corporate entity of the subsidiary should be disregarded and the two companies taxed on a consolidated basis; second, that the amount was a proper deduction under the contract, which of course implies existence of two parties to contract. The Government, not to be outdone in the matter of inconsistency, denied the separate entity theory and also disregarded the contract, and argues to us "the contract of the taxpayer to make good Stages' operating deficits is one pervaded by the stockholder-corporation relation. Any contribution to Stages under this contract must therefore be regarded as incident to the taxpayer's stockholder status." So the Government says the payment was not a compensation for services which the contract provides that it was, but was a "capital contribution" which the contract says it was not.

I think there is no merit in the taxpayer's theory that the Commissioner must disregard the corporate entity of the subsidiary. If a taxpayer itself creates and uses a corporation, he cannot require the Commissioner to say it isn't there.

But on the other hand, if the Commissioner says there are two entities, it would seem that they would be able to contract with each other, one to perform a service and the other to pay a price. The service may be, and often is,

one that the taxpayer could not perform for itself, but if it is hired to build up its business, I see no reason why its proper cost is not a business expense deduction. The price need not be a fixed one, but may be determinable by costs or other contingencies; but when fixed, its amount (barring use as a device to evade) is the amount of the deduction. Cost or "cost plus" is one of the Government's own methods of contracting. It is not an illicit method for a taxpayer to employ.

But it is urged that since the taxpayer could not itself pick up local business under California law, it cannot be the business of the taxpayer in a legal sense to have a subsidiary do so, and disbursements to have local business brought in are legally foreign to its business, although for its benefit. I do not suppose the taxpayer corporation can itself legally practice law or medicine, but I would suppose if it needed legal service for its business or thought it good business to supply medical attention to injured or ailing employees, the cost would be a business deduction, even though the agent was doing what the taxpayer could not legally do for itself. The taxpayer may not be authorized to run a newspaper or put up billboards, but if it contracted for services of those who are, in order to fill vacant seats in its buses, I do not suppose its cost would be disallowed for that reason.

This company has not violated the law, even of California. Indeed, it went to this trouble to comply with it. The fact that it used a subsidiary to benefit its business in areas where its own competence was lacking can hardly invalidate the arrangement, particularly since it is insisted that the subsidiary had separate legal and tax existence. If states create dummies, business men may utilize them so long as they keep within the law, and the function of the revenue laws is not to tell them how they shall manage business, but to see that what they do has proper tax consequences.

Since the decision of this case the Tax Court has held in a very similar case that where a wholly-owned subsidiary exclusively performs services essential to the business of the parent corporation, advances made by the parent to meet the subsidiary's operating deficit are deductible as a business expense. Texas & Pacific Ry. Co. *v.* Commissioner, No. 105730, March 25, 1943. I think this is a correct rule. Judge Harron there avoids the force of this case only upon the ground that the parent corporation here could not itself engage in the business done in its behalf by the subsidiary. That distinction is good enough to get the Tax Court away from a bad rule, but I see no reason why such a deduction should be available in case of an unnecessary subsidiary and be refused in the case of one needed to comply with state laws in making a profitable enterprise. I would reverse.

The CHIEF JUSTICE and MR. JUSTICE MURPHY join in this dissent.

OKLAHOMA TAX COMMISSION *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Nos. 623, 624, and 625. Argued April 9, 1943.—Decided June 14, 1943.

1. The statutes of Oklahoma taxing transfers of estates of decedents apply to Indians of the Five Civilized Tribes. P. 600.
2. The doctrine of implied constitutional immunity of "restricted" Indian lands from state estate taxation, based on the federal instrumentality theory, has in effect been overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376. P. 603.
3. The Act of January 27, 1933, by declaring that all funds and securities under the supervision of the Secretary of the Interior belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood are "restricted," did not intend to exempt transfers of such property from estate taxes imposed by the State. P. 604.

4. The status of members of the Five Civilized Tribes in Oklahoma as wards of the Federal Government does not exempt transfers of their property from estate taxation by the State; exemption depends on the plainly expressed intention of Congress. P. 607.
5. "Restricted" cash and securities, lands not specifically exempt by Acts of Congress from direct taxation, and miscellaneous personal property and insurance, all belonging to members of the Five Civilized Tribes in Oklahoma, *held* not exempt by any existing legislation from state estate taxation. P. 610.
6. Lands in Oklahoma belonging to Indians of the Five Civilized Tribes and which, by Act of Congress, have been specifically exempted from direct taxation by the State, *held* exempt also from state estate taxation. P. 610.

131 F. 2d 635, reversed.

CERTIORARI, 318 U. S. 748, to review reversals of judgments of the District Court of the United States in actions to recover moneys collected by the State of Oklahoma as taxes.

Messrs. A. L. Herr and *Clifford W. King,* with whom *Mr. E. L. Mitchell* was on the brief, for petitioner.

Mr. Warner W. Gardner, with whom *Solicitor General Fahy* and *Messrs. Felix S. Cohen* and *Norman A. Gray* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States brought these three actions to recover inheritance taxes imposed by the State of Oklahoma upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior from funds under his control belonging to those estates. The district court entered judgment on the merits for the State in each case. The Circuit Court of Appeals reversed. 131 F. 2d 635. We granted certiorari because of the importance of the cases in the administration of Indian affairs and to the

State of Oklahoma. The basic questions to be decided are whether, as a matter of state law, the state taxing statutes reach these estates, and whether Congress has taken from the State of Oklahoma the power to levy taxes upon the transfer of all or a part of property and funds of these deceased Indians.

The properties of which the estates are composed fall into four main categories: land exempt from direct taxation; land not exempt from direct taxation; restricted cash and securities held for the Indians by the Secretary of the Interior; and miscellaneous personal properties and insurance. The total value of the three estates was assessed at approximately $1,245,000, of which about 90% represents the value of the cash and securities.[1]

Initially we are met with the contention that Oklahoma did not intend to tax the estates of the members of the Five Civilized Tribes. We cannot agree with this view. The two controlling statutes broadly provide for a tax upon all transfers made in contemplation of death or intended to take effect after death as well as transfers "by will or the intestate laws of this state." [2] The language of the statutes does not except either Indians or any other persons from their scope. Efforts of Oklahoma to apply this tax to the estate of a deceased Quapaw Indian were frustrated by this Court's opinion in *Childers* v. *Beaver*, 270 U. S. 555,

[1] The taxes assessed on this property totalled approximately $37,000. The properties of which the estates were composed was as follows:

No. 623: Approximately 70 acres of restricted allotted land; 40 acres of land purchased from restricted funds; restricted cash and securities. Assessed value: $250,000.

No. 624: 240 acres of restricted allotted land; personal property; restricted cash and securities. Assessed value: $677,000.

No. 625: 160 acres of allotted restricted land; 160 acres of inherited restricted land; a four-fifths interest in 40 acres; an automobile; miscellaneous property, and insurance; restricted cash and securities. Assessed value: $318,000.

[2] Ch. 162, Sess. Laws, 1915; Ch. 66, Art. 5, Sess. Laws, 1935.

decided in 1926. Shortly afterwards the Oklahoma Supreme Court refused to sustain the tax on an Osage estate under the impression that this result was required by the *Beaver* decision; but, significantly, the Oklahoma court held that the scope of the state law should not be limited "further than the rule therein established." *Childers* v. *Pope,* 119 Okla. 300, 303, 249 P. 726, 729. About 1938, the Oklahoma taxing authorities apparently initiated new efforts to collect an estate tax from Indians. This state action followed our decision in *Superintendent* v. *Commissioner,* 295 U. S. 418, in which we held that the restricted income of Indians was subject to the federal income tax, and our decision in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, which overruled previous decisions limiting the power of the State to impose certain types of taxes on incomes derived from tax-exempt and restricted Indian property. The state tax authorities have with reasonable consistency interpreted their acts as covering estates such as these, and have attempted to enforce the statutes except when they considered enforcement precluded by decisions of this Court. The district court held that the state law does apply to these estates. This interpretation is consistent with that given by the state administrative authorities, with the language of the acts themselves and with the State Supreme Court's holding in *Childers* v. *Pope, supra.*

The respondent's second and major contention is that the State may not impose an estate tax upon the transfer of the restricted cash and securities because Congress by placing restrictions upon this property manifested a purpose to exempt it from Oklahoma estate taxes. Restricted property of an Indian is that which may not be freely alienated or used by the Indian without the approval of the Secretary of the Interior. We find, upon an examination of both the cases dealing generally with the taxation of Indian property and the statute which imposes the re-

striction, that the restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities.[3]

The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the Government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. *Worcester* v. *Georgia,* 6 Pet. 515, held that a State might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status—a condition which has not existed for many years in the State of Oklahoma. The same principle was carried into the tax field in *The Kansas Indians,* 5 Wall. 737, and for the same reasons. That case also emphasized that the Indians could "not look to Kansas for protection," 759, and that Kansas was not "obliged to confer any rights on them," 758. The tax exemption, said the Court, must last until the Indians were "clothed with the rights and bound to all the duties of citizens," 756. A similar result was reached in *The New York Indians,* 5 Wall. 761, decided the same day, where the State sought to raise money by taxes to build roads in Indian reservations and where existing treaties forbade the State's building such roads. Later, for a

[3] It is unnecessary to consider the State's argument that Congress is without power to exempt these estates from taxation. This issue is not foreclosed by *Board of Commissioners* v. *Seber,* 318 U. S. 705, since there we decided no more than that Congress might authorize the exemption of certain Indian lands from taxation because of an historic policy in respect to those lands. Cf. *McCurdy* v. *United States,* 246 U. S. 263, 269.

Choate v. *Trapp,* 224 U. S. 665, holding that under certain circumstances the United States could not withdraw a tax exemption once assured, has no bearing on the instant problem since it is conceded that the question here is entirely one of what Congress has in fact directed.

period of time, Indian lands held in trust by the United States were found to be constitutionally tax-exempt on the theory that they were federal instrumentalities, i. e., that the lands were held by the United States for the Indians, and were therefore non-taxable. *United States* v. *Rickert,* 188 U. S. 432. In time, this constitutional concept was expanded to grant tax exemption to the income derived from Indian lands, whether tribally or individually owned, even when the privilege of exploitation had been granted to non-Indian lessees.[4] The instrumentality concept ultimately resulted in a decision exempting Indian estates from taxation. *Childers* v. *Beaver, supra.* None of these cases held, nor has this Court ever decided, that congressional restriction of an Indian's income carried an implication of estate tax exemption.

The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.[5] Their lands are held in fee, not in trust, as in the *Rickert* case, and the doctrine of constitutional immunity from taxation for the income of their holdings on the federal instrumentality theory has been renounced, *Helvering* v. *Mountain Pro-*

[4] *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

[5] Under the Acts of June 18, 1934, 48 Stat. 984, and June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501 *et seq.,* some progress has been made in the restoration of tribal government. Cohen, Handbook of Federal Indian Law, 455, 129–133, 142–143.

ducers Corp., 303 U. S. 376. *Childers* v. *Beaver, supra,* was in effect overruled by the *Mountain Producers* decision. The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.

The cash and securities of which these estates are almost entirely composed were restricted by the Act of January 27, 1933.[6] Unless the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

The 1933 Act was intended to serve two purposes relevant to this case. One was to continue the restrictions on Indian property for the purpose of protecting the Indians from loss to individuals who might take advantage of them; and the other was to preserve the status of certain

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[6] 47 Stat. 777.

". . . That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted . . . *Provided,* That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, . . . *And provided further,* That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495)."

Indian land as non-taxable until 1956. See the concurring opinion of MR. JUSTICE RUTLEDGE in *Board of Commissioners* v. *Seber,* 318 U. S. 705, 719. This Act was before two Congresses, the 71st and the 72d. It was the subject of exhaustive debate, as well as of several committee reports, and there is no indication whatever in all that discussion of an intention to exempt Indians from estate taxes.[7]

The bill was sponsored by Oklahoma Congressmen who said nothing which supports the imputation that they intended to deprive their State of this income. It was described by its sponsor, Congressman Hastings, as follows:

"You ask me what the bill does. If the Members of Congress understood the bill there would not be a vote against it. Oil has been struck underneath some of the lands allotted to the members of these tribes. Some of these full-blood allottees without business experience, now have to their credit $100,000, $200,000 and, it is estimated, up to $1,000,000. Suppose one of these Indian allottees died after April 26, 1931. Then this money must be turned over to these heirs without supervision. Do you want to do that? Is there a man on the floor of the House who would want to do that?" [8]

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[7] Elements of the 1933 statute were included in H. R. 15603, 71st Congress. The bill was recommitted to the Committee on Indian Affairs for further consideration, 74 Cong. Rec. 3956–3958. This discussion includes a report of the Department of the Interior recommending legislation substantially similar to that finally enacted in 1933. The House later amended the provisions of its own bill into S. 6169. 74 Cong. Rec. 7219–7222. The bill as amended was not approved by the Senate. The plan was re-introduced in the 72d Congress as H. R. 8750 and was discussed by the House at 75 Cong. Rec. 8163–8170, and by the Senate at 76 Cong. Rec. 2200. This bill was passed by the 72d Congress and became the statute under consideration.

[8] 75 Cong. Rec. 8163.

This purpose, and none other, is reiterated throughout the discussion—not a word of an intention to expand tax exemptions was spoken by any Congressman.

The legislative history not only fails to give any affirmative support to such an implication but expressly negatives that intent. The principal clause of the bill dealing with taxation is that which continues a limited land tax-exemption for twenty-five years. On two separate occasions, in two Congresses, the bill's sponsor assured the House of Representatives: "This [bill] only applies to restricted and tax-exempt land. This does not increase tax-exempt land at all." [9] Such a bill, carefully drawn so as not to widen tax exemptions for land, and without a word of such intent in its legislative history, cannot be supposed by implication to have prohibited estate taxes. If there could be any doubt of this proposition it is surely removed by a later clause of the 1933 statute which provides that all minerals extracted from the land should be subject to state taxation. [10] Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune.

This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering,* 307 U. S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "If the exemption had been intended, it would doubtless have been expressed." *Cherokee Tobacco,* 11 Wall. 616, 620. In holding the income tax applicable to Indians, the Court said, "The terms of the 1928 Revenue Act are very broad, and nothing there

[9] 74 Cong. Rec. 7222 and, similarly, 75 Cong. Rec. 8170.

[10] See the last clause of the statute as set forth in Note 6, *supra.*

indicates that Indians are to be excepted. . . . If exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs." *Superintendent* v. *Commissioner, supra,* 420. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. "Nontaxability and restriction upon alienation are distinct things," *Superintendent* v. *Commissioner, supra,* 421, and when Congress wants to require both nonalienability and nontaxability it can, as it has so often done, say so explicitly.[11]

It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. *Superintendent* v. *Commissioner, supra,* 421. "Wardship with limited power over his prop-

[11] See, for examples, Act of July 1, 1898, 30 Stat. 567, tract made "inalienable and nontaxable"; Act of March 1, 1901, 31 Stat. 861, tract made "nontaxable and inalienable"; Act of June 30, 1902, 32 Stat. 500, tract to remain "nontaxable, inalienable, and free from any incumbrance"; Act of April 26, 1906, 34 Stat. 137, "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation." Cf. for special treatment of the Quapaw Indians the Act of April 17, 1937, 50 Stat. 68.

erty" did not there "without more render [the Indian] immune from the common burden." A federal court has held, in a well-reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. *Landman* v. *Commissioner*, 123 F. 2d 787.[12] Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma.[13] Ok-

[12] Cert. den., 315 U. S. 810. The Department of the Interior in the *Landman* case made substantially the same argument it makes here against taxation of Indians' estates. It emphasizes that the decision of the Circuit Court of Appeals would lead to similar taxation by states. The Solicitor General, opposing the Department of Interior in the *Landman* case, insisted that under *Superintendent* v. *Commissioner*, 295 U. S. 418, and *Choteau* v. *Burnet*, 283 U. S. 691, the Indians' estates should be subjected to taxation; and that even if the Indians' lands were exempt from direct taxation, the estate tax should be upheld as an excise tax, indirect in its nature, citing *United States Trust Co.* v. *Helvering*, 307 U. S. 57; *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*, 258 U. S. 384. In other words, the Solicitor General in seeking to uphold the validity of a federal estate tax as applied to Indian estates opposed the argument which the Department of the Interior made then and which it makes now, the only difference being that in the instant case the Department of the Interior is seeking to invalidate a state instead of a federal tax.

[13] It must not be assumed that the Oklahoma Indians are all unable to pay estate taxes. The estates of the three Indians here involved, as has been noted, total well over $1,200,000. Oil and gas receipts of the Five Civilized Tribes from 1904 to 1937 were in excess of one hundred million dollars. Hearing on S. Res. 168, Senate Committee on Indian Affairs, 75th Cong., 3d Sess., p. 36. The Osages in the same period received $261,000,000. p. 34. Annual per capita income for the Osage Tribe as shown by a careful study made in 1928 was $19,119. The Problem of Indian Administration, Institute for Government Research, Lewis Meriam, Director, chapter 10, General Economic Condi-

lahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a State, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totalled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the State.[14] If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay.[15] "Only the same duties are exacted as from our own citizens. The burden must rest

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tions, 430, 450. 2,826 Osage Indians are reported to own tribal and individual property valued at $31,968,000. p. 443. The economic status of the Osages is discussed in *McCurdy* v. *United States,* 246 U. S. 263, 265.

For a discussion of the respected position of Indians in Oklahoma, see the dissenting opinion of Judge Williams, *Board of Commissioners* v. *Seber,* 130 F. 2d 663, 681–683. The 1933 Act discussed above was sponsored in the House of Representatives by Congressman Hastings of Oklahoma, who was himself of Indian descent.

[14] Hearings before the Senate Committee on Indian Affairs, note 13, *supra,* p. 4.

[15] "The view of the survey staff is that the Indians must be educated to pay taxes just as they must be educated to do other things. The taxes imposed upon them must always be properly related to their capacity to pay. For them an income tax would be infinitely better than a general property tax because of its direct relationship to their capacity to pay. The returns from such a tax would obviously be extremely small at the outset, but they would increase with the increasing productivity of the Indians." The Problem of Indian Administration, note 13, *supra,* 478; and see also 43, 98.

somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" *Cherokee Tobacco, supra,* p. 621.

Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, permitted states to impose income taxes upon government employees, and *Helvering* v. *Gerhardt,* 304 U. S. 405, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodrough,* 307 U. S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering* v. *Mountain Producers Corp., supra,* repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, and *James* v. *Dravo Contracting Co.,* 302 U. S. 134. The trend of these cases should not now be reversed.

What has been said requires the conclusion that the cash and securities are not exempted by any existing legislation from state estate taxation, and this is likewise true of the personal property in two of these estates.

The validity of the taxes on the transfer of the land presents a somewhat different problem. Some of these lands are exempt from direct taxation by virtue of explicit congressional command. The Act of May 10, 1928, 45 Stat. 495, for example, provides that Indians of a class which includes the three deceased should select up to 160 acres of his allotted, inherited or devised restricted lands, which "shall remain exempt from taxation while the title remains in the Indian designated . . . or in any full-blood Indian heir or devisee," while all other restricted lands are made subject to taxation by Oklahoma. The State argues that congressional exemption of the land

from direct state taxation does not exempt the land from an estate tax, because of the principles announced in *United States Trust Co.* v. *Helvering, supra.* A majority of the Court concludes that this principle does not apply to Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the State are also exempted from estate taxes.

To summarize:

In No. 623, the transfer of the cash and securities is taxable, the transfer of the homestead and other allotted land, exempted under the Act of May 10, 1928, is not. The 43 acres purchased for the intestate from her restricted funds was taxable at the time of her death, *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, and hence is subject to the estate tax.

In No. 624, the transfer of the cash and securities and the personal property is taxable. The deceased died before the Act of May 10, 1928, took effect, but her 240-acre holding was specifically exempt from direct taxation at the time of her death under § 19 of the Act of April 26, 1906, and the transfer of lands is therefore not taxable.

In No. 625, the same result as in No. 623 follows for the restricted lands which were appropriately selected for exemption under the Act of May 10, 1928, and for the personal property, cash, and securities. The judgment and the insurance policy are to be treated as in a class with the personal property, cash, and securities. It is conceded that the 160 acres of inherited property held by the deceased was taxable at the time of his death because in excess of the exemption permitted by the 1928 Act, and this land is, therefore, subject to the estate tax. While the status of the deceased's four-fifths interest in a 40-acre tract is not clear from the record, no showing has been made that it is not taxable.

The Government is entitled to recovery of the estate tax paid on the transfer of lands exempt from direct taxation, and to no more. The judgment below is vacated and the cause is remanded to the district court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS:

I concur in the result and in the disposition of the case. While I agree that transfers of the restricted Indian lands are not subject to Oklahoma's estate tax, I take the contrary view as respects the funds and securities covered by the Act of January 27, 1933, 47 Stat. 777. In my opinion transfers of those funds and securities are subject to the tax for the two reasons set forth in the opinion of the Court.

MR. JUSTICE MURPHY, dissenting in part:

I dissent because the opinion of the Court rejects a century and a half of history. We are not here dealing with mere property or income that is tax-exempt. This is not the ordinary case of government and its citizens, or a group of citizens who seek to avoid their obligations. Our concern here is entirely different. It is with a people who are our wards and towards whom Congress has fashioned a policy of protection due to obligations well known to all of us. It rests with Congress to choose when we are done with that trusteeship. Meanwhile it is our obligation to interpret in the light of the history of that relationship all legislation which Congress has enacted to carry out its Indian policy.

Normally it is true that strong considerations of fiscal and social policy view tax exemptions with a hostile eye. Such exemptions are not to be lightly implied, and every reasonable implication in construing legislation is to be

made against their grant. But this general doctrine against tax exemption is irrelevant in considering the taxing power of a state in relation to Indians. For as to them a totally different principle comes into operation, namely, the special status of Indians during the whole course of our constitutional and legal history. There can be no doubt of Congress' plenary power to exempt Indians and their property from all forms of state taxation. Such power exists to prevent impairment of the manner in, or means by which Congress effectuates its Indian policy, at least so long as Congress has not determined that the interests of the Indians require their complete release from tutelage or the final termination of the United States' guardianship over them. *Board of Commissioners* v. *Seber,* 318 U. S. 705; cf. *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 315–16; *Brader* v. *James,* 246 U. S. 88, 96; *United States* v. *McGowan,* 302 U. S. 535, 538. See *United States* v. *Sandoval,* 231 U. S. 28, 45–47. To deny such constitutional power is to deny the presupposition of all legislation relating to Indians as well as an unbroken line of decisions on Indian law in this Court and all that underlies them. This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field. Therefore, so far as the power of a state to tax Indian property is concerned, the ordinary rule of tax exemption is reversed; a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation. This is so because it is Indian property and because Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested

a clear purpose to terminate such an immunity and allow states to treat Indians as part of the general community.

Congress has manifested no such purpose with regard to the estates of the deceased Indians before us. On the contrary, those Indians were subject to federal control.[1] Most of their allotted lands were expressly exempt from taxation, and, as the opinion of the Court recognizes, this removed them from the operation of Oklahoma's estate tax.[2] But apart from these express exemptions, the bulk of the properties in the three estates were restricted against alienation and encumbrance by various acts of Congress.[3] History, as well as statements of Congress itself,[4] leave no doubt that property so restricted is beyond the taxing power of the states, unless and until Congress gives its consent. In other words restriction is tantamount to im-

[1] The deceased Indians in these three cases were enrolled full-blood Indians of the Five Civilized Tribes. Two were Seminoles and one was a Creek. Congress has not terminated the guardianship relation with respect to these tribes. They still exist (§ 28 of Act of April 26, 1906, 34 Stat. 137), and have recently been authorized to resume some of their former powers (Act of June 26, 1936, 49 Stat. 1967). Congress has regarded their members of the half Indian blood or more, whether enrolled or not, as restricted tribal Indians subject to federal control. The fact that these Indians are citizens is not inconsistent with their restricted status or the exercise of federal supervision over them. See *Board of Commissioners* v. *Seber, supra; Glenn* v. *Lewis,* 105 F. 2d 398.

[2] See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of Act of May 10, 1928, 45 Stat. 495 and 733.

The fact that the exemptions do not mention inheritance or estate taxes is unimportant. As pointed out before, contrary to the general rule Indian tax exemptions are to be liberally construed. See *Carpenter* v. *Shaw,* 280 U. S. 363, 366–67. For that reason decisions, such as *U. S. Trust Co.* v. *Helvering,* 307 U. S. 57, that statutory exemptions from taxation do not include an exemption from estate taxes, have no application here.

[3] In addition to the statutes cited in Note 2, *supra,* see also Act of May 27, 1908, 35 Stat. 312; and Act of January 27, 1933, 47 Stat. 777.

[4] See Note 12, *infra.*

munity from state taxation. That was the basis of decision in *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Gillespie* v. *Oklahoma,* 257 U. S. 501. In all those cases a non-Indian lessee of restricted Indian lands was held immune from state taxation of various kinds because, and only because, the lands themselves and the leasing of them were held to be immune from taxation, and this in turn because they were the lands of Indians held in Government tutelage, who were permitted to lease the lands only with the approval of the Secretary of the Interior. This immunity for lessees was withdrawn by *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, which overruled *Gillespie* v. *Oklahoma, supra.* Cf. the dissenting opinions in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393. In neither the *Coronado* case nor in the *Mountain Producers* case was there any contention that the land in the hands of the lessors was subject to taxation. That was recognized and accepted as correct. The point was that even though the land was tax immune in the hands of the lessor, the lessor's immunity did not extend to the lessee who had no personal immunity and who acquired the land for his own purposes and made a profit from it. In other words, the withdrawal of immunity from a non-Indian lessee of restricted Indian land rests upon the remoteness of the effect of that taxation upon such Indian property, cf. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, not upon a notion that Congress did not intend by imposing restrictions to prohibit state taxation of the interest of Indians in their restricted property, nor upon the supposition that Congress lacks power to do so. Congress plainly has power to implement its Indian policy by forbidding state taxation to burden the interest of an Indian in his property. Cf. *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276

U. S. 575; *Board of Commissioners* v. *Seber,* 318 U. S. 705. It exercises that power simply by imposing the restrictions.

That Congress has considered the restriction of Indian property against alienation and encumbrance as carrying with it immunity from state taxation for the period of the restriction is clear not only from statements of Congress itself to that effect,[5] but also from the long history of such restrictions and the purpose sought to be achieved, the protection of a dependent people from their own improvidence and the exploitation of others.

Congress early established the complete and exclusive control of the federal government over the purchase and disposition of Indian lands, both tribal and individual.[6] The protection afforded by those and subsequent restrictive acts and treaties extended to trespasses, transfers, tax sales, tax liens, and other attempted interferences by the state governments with federal control over Indian lands. See *Worcester* v. *Georgia,* 6 Pet. 515; *The Kansas Indians,* 5 Wall. 737; *The New York Indians,* 5 Wall. 761.

The United States was unable, however, to prevent state interference with the Creeks and the Seminoles in their domains east of the Mississippi, and accordingly proposed removal west of the Mississippi, guaranteeing that there no State or Territory should "ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them." Article XIV, Treaty of March 24, 1832 (7 Stat. 366). Long after the removal this guarantee was reaffirmed. Article IV, Treaty of August 7, 1856 (11 Stat. 699). Nothing in the subsequent

[5] See Note 12, *infra.*

[6] Indian Trade and Intercourse Acts of July 22, 1790, 1 Stat. 137; March 1, 1793, 1 Stat. 329; March 3, 1799, § 12, 1 Stat. 743, 25 U. S. C. § 177.

treaties and allotment acts relating specifically to the Creeks and the Seminoles was inconsistent with this guarantee of freedom from state control.[7] And Congress was careful to provide that nothing in the creation of the State of Oklahoma should qualify this promise. Thus the Oklahoma Enabling Act (34 Stat. 267) provided that the Oklahoma Constitution should not "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." The constitution adopted by the people of Oklahoma renounced any claims to Indian lands (Art. 1, § 3), and exempted from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by Federal laws, during the force and effect of such treaties or Federal laws" (Art. X, § 6). See *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309; *Ex parte Webb,* 225 U. S. 663, 682–83; *Ward* v. *Love County,* 253 U. S. 17; *Carpenter* v. *Shaw,* 280 U. S. 363, 366.

As we recently said in *Board of Commissioners* v. *Seber, supra,* Congress in 1887 turned from a policy of protecting Indian tribes in the possession of their domains to a program, now discontinued, of assimilating the Indians through dissolution of their tribal governments and the compulsory individualization of their lands. This allotment program evolved out of the historical background sketched above, and took its cue from the previous protection and freedom from state control accorded Indians and their lands. The Indian surrendered tribal land, pro-

[7] See Treaty of March 21, 1866, 14 Stat. 755; Treaty of June 14, 1866, 14 Stat. 785; Curtis Act of 1898, 30 Stat. 495; Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.

tected against state taxation as well as against all other forms of voluntary and involuntary encumbrance and alienation. Cf. *The Kansas Indians, supra; The New York Indians, supra.* Under the various allotment acts he received in return land which was intended to have the same measure of protection for a temporary period, generally subject to extension. Thus the General Allotment Act of 1887 (24 Stat. 388) provided for the issuance to allottees of trust patents which were to declare: "the United States does . . . hold the land thus allotted, for the period of twenty-five years, in trust . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever." [8] Lands so held in trust are immune from state taxation. *United States* v. *Rickert,* 188 U. S. 432.

The lands here involved were not allotted under "trust patents"; they were grants in fee subject to restrictions against alienation and encumbrance.[9] But there are no differences of substance between the two forms of tenure which suggest that while the one is exempt from state taxation, the other is not, or that Congress intended to favor Indians holding under "trust patents" over those holding restricted fees. Cf. *The Kansas Indians, supra,* at p. 755. The power of Congress over "trust" and "restricted" lands is the same, *Board of Commissioners* v. *Seber, supra,* and in practice the terms have been used interchangeably. See *United States* v. *Bowling,* 256 U. S. 484; cf. *Minnesota* v. *United States,* 305 U. S. 382. Both devices had a common purpose, to protect a dependent

[8] The President was authorized to extend the trust period in his discretion.

[9] See Act of July 1, 1898, 30 Stat. 567; Act of June 2, 1900, 31 Stat. 250; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 1 of Act of May 27, 1908, 35 Stat. 312; Act of May 10, 1928, 45 Stat. 495.

people against loss of their property through their own improvidence or the greed of others during the period of transition in which they began to assume the responsibilities of citizenship. To achieve this purpose the protection afforded by Congress was not niggardly. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *Brader* v. *James*, 246 U. S. 88.

State taxation of "restricted" lands as well as taxation of "trust" lands, in the absence of Congressional authorization, is a possible cause of the loss which Congress has said shall not occur. The restrictions are not limited to voluntary sale—consistently with their purpose they extend to all forms of transfer or encumbrance, involuntary as well as voluntary. Cf. *Goudy* v. *Meath*, 203 U. S. 146. The interference of state taxation with Congress' program of protection is made clear by the fact that the instant Oklahoma inheritance tax acts impose liens upon the property until the taxes are paid.[10] The possible consequences of a tax lien upon Indian property are pointed out in *The New York Indians, supra,* where it was held that the mere existence of a lien in a state taxing act invalidates it, despite a provision to the effect that no foreclosure of a lien should affect the Indian's right of occupancy. And, even when permitting specified forms of state taxation of restricted Indian property, Congress has significantly provided in numerous statutes that no tax lien should attach.[11] I conclude that when Congress imposed restrictions upon Indian property, it meant, and was saying in effect, that the property was exempt from state taxation while the restrictions continue or until

[10] Okla. S. L. 1915, c. 162, § 8, as amended by c. 296, § 5, Okla. S. L. 1919; Okla. S. L. 1935, c. 66, art. 5, § 9.

[11] See Act of May 6, 1910, 36 Stat. 348; Act of March 3, 1921, 41 Stat. 1225, 1249; Act of May 27, 1924, 43 Stat. 176; Act of May 29, 1924, 43 Stat. 244; Act of April 17, 1937, 50 Stat. 68.

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Congress waives the immunity. Indeed, Congress has clearly stated that this was its intention by declaring in the Act of April 17, 1937, 50 Stat. 68, which permitted a gross production tax to be imposed by Oklahoma on lead and zinc produced from restricted Quapaw lands: "In accordance with the uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the income therefrom free from State taxation of whatsoever nature, except as said immunity is expressly waived, and, in pursuance of said fixed policy, it is herein expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom, . . ." [12]

When Congress has intended that restricted property should be taxed, it has explicitly said so.[13] In the absence of such assent restricted property remains beyond the reach of a state's taxing power. Non-alienability and tax exemption have been said to be distinct things so far as vested rights are concerned, see *Choate* v. *Trapp*, 224 U. S. 665, 673, but this of course does not mean that the concepts of restriction and immunity from state taxation are unrelated. Nor does the circumstance that some of the ap-

[12] There are various other expressions of Congressional understanding on this point. For example, H. Rep. No. 2415, 71st Cong., 3d Sess., p. 1, advocating passage of what is now the Act of February 14, 1931, 46 Stat. 1108, declares: "Under existing law the restricted allotted lands of Indians of the Five Civilized Tribes are tax exempt while restricted." See also S. Rep. No. 982, 70th Cong., 1st Sess., pp. 3, 4, 5; S. Rep. No. 330, 65th Cong., 2d Sess., p. 4.

The Act of May 27, 1908, 35 Stat. 312, by specifically providing in § 4 that lands from which "restrictions have been or shall be removed shall be subject to taxation," strongly indicates a Congressional understanding that restriction amounted to tax exemption.

[13] For example, among the statutes applicable to the Creeks and Seminoles, see §§ 3 and 4 of the Act of May 10, 1928, 45 Stat. 495 and 733. See generally the statutes collected in Note 11, *supra*.

plicable statutes expressly provide specific tax exemptions for restricted lands indicate that restriction is not tantamount to immunity from state taxation.[14] At the time the allotments to the members of the Five Civilized Tribes were made there was no State of Oklahoma. It had been held that Congress had power to lay taxes upon Indian property within Indian Territory, *Cherokee Tobacco,* 11 Wall. 616, and its creature, the Territorial government, was agitating for the taxation of Indian property.[15] Restrictions, designed to protect the Indians from themselves and the actions of third parties, including state governments, did not bar taxation by the federal government which was the guardian of their interests.[16] Accordingly, specific tax exemptions were written into the allotment acts.[17] Express provisions as to the taxable status of restricted property in the later legislation appear only where the immunity is being limited and expressly waived in part or the restrictions are being changed.[18]

All of the lands which the opinion of the Court holds immune from Oklahoma's estate tax because of express exemptions were therefore also exempt at the moment of death on the additional ground that they were then subject to restrictions imposed by Congress and the concomitant tax immunity had not been waived. The other restricted lands in the estates are lands to whose taxation Congress has specifically consented, or else were of the type

[14] Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of the Act of May 10, 1928, 45 Stat. 495 and 733.

[15] See Sen. Doc. 169, 58th Cong., 2d Sess.

[16] It is for this historical reason that cases such as *Superintendent* v. *Commissioner,* 295 U. S. 418, and *Landman* v. *Commissioner,* 123 F. 2d 787, have no bearing upon a consideration of the effect of restrictions upon the power of a state to tax.

[17] See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.

[18] Act of April 26, 1906, 34 Stat. 137; Act of May 10, 1928, 45 Stat. 495.

to be taxable at the time of death under the decision in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

The origin of restrictions upon the fund of members of the Five Civilized Tribes is somewhat different from that upon the lands, but the effect of the restrictions upon the taxability of the cash and securities in the three estates with which we are dealing is the same. Proceeds from sales or leases of restricted lands have always been regarded as "trust" or "restricted" funds by the Secretary of the Interior, who by regulations has required them to be paid to him or his representatives and held for the benefit of the Indian owner.[19] The validity of those administrative restrictions and the power of the United States to enforce them have been recognized. *Parker* v. *Richard,* 250 U. S. 235; *Mott* v. *United States,* 283 U. S. 747. And it has been held that funds so restricted by departmental regulation are exempt from state and local taxation. See *United States* v. *Thurston County,* 143 F. 287; *United States* v. *Hughes,* 6 F. Supp. 972. But we do not have to consider whether this administrative restriction alone is sufficient to confer tax exemption upon the cash and securities in the three estates.[20]

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[19] Since 1908 the regulations prescribed by the Secretary under § 2 of the Act of 1908, 35 Stat. 312 and related statutes governing oil, gas and other mining leases of restricted lands, have recognized that proceeds from such leases are restricted and have required that all such money be paid to a representative of the Secretary. See 25 C. F. R. §§ 183.18, 183.20; see also § 20 of the regulations approved April 20, 1908.

[20] In *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, the interest of an oil lessee in land purchased for an Indian by the Secretary of the Interior with the Indian's restricted funds and conveyed to the Indian by a restricted form of deed pursuant to conditions imposed by the Secretary, was held subject to an Oklahoma oil production tax. The opinion emphasized the difference between "a mere conveyancer's restriction" and action by Congress.

The Act of January 27, 1933 (47 Stat. 777), imposes Congressional restrictions by providing:

"That all funds . . . now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby . . . restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, . . ."

This Act does not stand alone. It is part of Congress' long continued program of protection and it carries with it the gloss of the history of the restrictions outlined above. Congress was not imposing restrictions for the first time, and there is nothing to suggest that Congress intended them to have less than their traditional historical meaning of tax exemption in this Act. It is immaterial that the legislative history of the Act is silent with regard to the tax status of Indian funds. We are dealing not with a word, nor with an act, but with a course of history. That course makes it clear that the restricted funds in these estates were beyond the taxing power of Oklahoma.[21]

It is not our function to speculate whether it is wise at this late day to relieve from the ordinary burden of taxation Indians who enjoy the privileges of citizenship and who in some instances are persons of substantial means. Nor is it our legitimate concern that grants of tax exemption to Indian inhabitants may create serious fiscal problems in some states or in their local govern-

[21] Two of the decedents died before the Act was passed. The House Committee report, however, makes it clear that the restriction on funds was intended to be declaratory and retroactive. H. Rep. No. 1015, 72d Cong., 1st Sess. In view of this there is no reason why the restricted funds in the estates of those decedents, held by the Secretary, should not be deemed covered by that Act, and hence tax exempt by virtue of the restrictions.

mental subdivisions. Those matters, as well as the character, extent and duration of tax exemptions for the Indians, are questions of policy for the consideration of Congress, not the courts. *Board of Commissioners* v. *Seber, supra.* Our inquiry is not with what Congress might or should have done, but with what it has done. That inquiry can be answered here only by holding that the restricted funds in these estates, as well as the lands which the Court holds immune, were not subject to Oklahoma's estate tax.

The CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this dissent.

WEST VIRGINIA STATE BOARD OF EDUCATION ET AL. *v.* BARNETTE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 591. Argued March 11, 1943.—Decided June 14, 1943.

1. State action against which the Fourteenth Amendment protects includes action by a state board of education. P. 637.
2. The action of a State in making it compulsory for children in the public schools to salute the flag and pledge allegiance—by extending the right arm, palm upward, and declaring, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—violates the First and Fourteenth Amendments. P. 642.

   So *held* as applied to children who were expelled for refusal to comply, and whose absence thereby became "unlawful," subjecting them and their parents or guardians to punishment.
3. That those who refused compliance did so on religious grounds does not control the decision of this question; and it is unnecessary to inquire into the sincerity of their views. P. 634.
4. Under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity." P. 640.

5. *Minersville School Dist.* v. *Gobitis,* 310 U. S. 586, overruled; *Hamilton* v. *Regents,* 293 U. S. 245, distinguished. Pp. 642, 632.

47 F. Supp. 251, affirmed.

APPEAL from a decree of a District Court of three judges enjoining the enforcement of a regulation of the West Virginia State Board of Education requiring children in the public schools to salute the American flag.

Mr. W. Holt Wooddell, Assistant Attorney General of West Virginia, with whom *Mr. Ira J. Partlow* was on the brief, for appellants.

Mr. Hayden C. Covington for appellees.

Briefs of *amici curiae* were filed on behalf of the Committee on the Bill of Rights, of the American Bar Association, consisting of *Messrs. Douglas Arant, Julius Birge, William D. Campbell, Zechariah Chafee, Jr., L. Stanley Ford, Abe Fortas, George I. Haight, H. Austin Hauxhurst, Monte M. Lemann, Alvin Richards, Earl F. Morris, Burton W. Musser,* and *Basil O'Connor;* and by *Messrs. Osmond K. Fraenkel, Arthur Garfield Hays,* and *Howard B. Lee,* on behalf of the American Civil Liberties Union,—urging affirmance; and by *Mr. Ralph B. Gregg,* on behalf of the American Legion, urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis,* 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appel-

lant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools." [1]

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." [2]

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[1] § 1734, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

[2] The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amend-

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl

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ment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development

Scouts, the Red Cross, and the Federation of Women's Clubs.[3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses.[4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of

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in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[3] The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Fascist salute, "although quite similar to it. In the Pledge to the Flag the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same except they raise the arm slightly higher." James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

[4] They have offered in lieu of participating in the flag salute ceremony "periodically and publicly" to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" [5] and may be proceeded against as a delinquent.[6] His parents or guardians are liable to prosecution,[7] and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.[8]

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

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[5] § 1851 (1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

[6] § 4904 (4), West Virginia Code (1941 Supp.).

[7] See Note 5, *supra*.

[8] §§ 1847, 1851, West Virginia Code (1941 Supp.).

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.[9]

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do.[10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce

[9] § 266 of the Judicial Code, 28 U. S. C. § 380.

[10] See authorities cited in *Helvering* v. *Griffiths*, 318 U. S. 371, 401, note 52.

attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U. S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected [11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.[12] This issue is not prejudiced by

[11] See the nation-wide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 per cent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen per cent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country.

"Seventy-two per cent of the colleges and universities do not require United States history for admission, while 28 per cent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country.

"Less than 10 per cent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 per cent of the freshman class took courses in United States history, although 30 per cent was enrolled in European or world history courses."

[12] The Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity (see footnote

the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents,* 293 U. S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a

2), which justification is considered later in this opinion. No information as to its educational aspect is called to our attention except Olander, Children's Knowledge of the Flag Salute, 35 Journal of Educational Research 300, 305, which sets forth a study of the ability of a large and representative number of children to remember and state the meaning of the flag salute which they recited each day in school. His conclusion was that it revealed "a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute."

symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg* v. *California,* 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.[13]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of com-

[13] Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911–912. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 200, 229–230, 232–233, 447, 451; Fox, Quakers Courageous (1941) 113.

pulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations.[14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views

[14] For example: Use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.

hold such a compulsory rite to infringe constitutional liberty of the individual.[15] It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed,* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.[16] The question which underlies the

[15] Cushman, Constitutional Law in 1939–40, 35 American Political Science Review 250, 271, observes: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses see: Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

[16] The opinion says "That the flag-salute is an allowable portion of a school program *for those who do not invoke conscientious scruples* is *surely not debatable.* But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents,* is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." (Italics ours.) 310 U. S. at 599–600. And elsewhere the question under consideration was stated, "When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?" (Italics ours.) *Id.* at 593. And again, ". . .

flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reëxamine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?' " and that the answer must be in favor of strength. *Minersville School District* v. *Gobitis*, *supra*, at 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is

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whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ." (Italics ours.) *Id.* at 595.

doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.* at 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to ac-

count. The action of Congress in making flag observance voluntary [17] and respecting the conscience of the objector in a matter so vital as raising the Army [18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free." *Id.* at 597–598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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[17] Section 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U. S. C. (1942 Supp.) § 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all,' be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress . . ."

[18] § 5 (a) of the Selective Training and Service Act of 1940, 50 U. S. C. (App.) § 307 (g).

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervi-

sion over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism

and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[19]

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School*

[19] The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.

District v. *Gobitis,* 310 U. S. 586, and are of the opinion that the judgment below should be reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. *Jones* v. *Opelika,* 316 U. S. 584, 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave

and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court and join in it.

The complaint challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement, the State law prescribes ex-

pulsion. The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but noncompliance is virtually made unlawful. In effect compliance is compulsory and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again,—all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

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 may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, in-

cluding the members of this sect, it is apparently regarded as incompatible with a primary religious obligation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged." [1]

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: ". . . all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . ." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and

[1] See Jefferson, Autobiography, vol. 1, pp. 53–59.

action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

United States v. *Butler,* 297 U. S. 1, 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton* v. *Regents,* 293 U. S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different rôles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, n. 4. But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this

Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," *Missouri, K. & T. Ry. Co.* v. *May,* 194 U. S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and rôle of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed," the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws," be presented to a Council of which the judges constituted a majority, "for their revisal and consideration." Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York

for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. . They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole." *Rippey* v. *Texas,* 193 U. S. 504, 509; *Skiriotes* v. *Florida,* 313 U. S. 69, 79. Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here con-

cerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general require-

ment. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible." *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Hurtado* v. *California*, 110 U. S. 516, 530, 531. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248–51.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equal-

ity and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal foot-

ing—it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many

claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see *Jacobson* v. *Massachusetts,* 197 U. S. 11, food inspection regulations, see *Shapiro* v. *Lyle,* 30 F. 2d 971, the obligation to bear arms, see *Hamilton* v. *Regents,* 293 U. S. 245, 267, testimonial duties, see *Stansbury* v. *Marks,* 2 Dall. 213, compulsory medical treatment, see *People* v. *Vogelgesang,* 221 N. Y. 290, 116 N. E. 977—these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual con-

science may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton* v. *Regents,* 293 U. S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce* v. *Society of Sisters,* 268 U. S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned.

But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton* v. *Regents, supra,* are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." 293 U. S. 245, 266. The religious worshiper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Id.,* at 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction

concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks." *Farrington* v. *Tokushige,* 273 U. S. 284, 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the State of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of rea-

son as a means of relating the individual to his fellowmen and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States* v. *Kauten,* 133 F. 2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero* v. *Showalter,* 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363. What of conscien-

tious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this

case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegiance to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? See *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom." A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran* v. *Portland,* 318 U. S. 768.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any rea-

sonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing it deserves to be noted that the four cases which unani-

mously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs.

Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles* v. *Landers,* 302 U. S. 656; *Hering* v. *State Board of Education,* 303 U. S. 624; *Gabrielli* v. *Knickerbocker,* 306 U. S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson* v. *Deerfield,* 306 U. S. 621. The fifth case, *Minersville District* v. *Gobitis,* 310 U. S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Jus-

tice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties—men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses

cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably

differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

". . . there has developed a vast and growing increase of judicial interference with legislation. This is a very differ-

ent state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted,—would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; today it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years

ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coördinate department of the government,

charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of their coördinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." J. B. Thayer, John Marshall, (1901) 104–10.

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Re-

liance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* INLAND WATERWAYS CORP. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 175. Argued January 11, 12, 1943.—Decided June 14, 1943.

Proportional rates on reshipments from Chicago to eastern destinations of grain coming from distant points Northwest on through shipment with transit privileges and arriving at Chicago by rail or by lake steamer, became applicable by reason of tariff wordings to grain coming from points close to Chicago arriving by barge over the Illinois Waterways route which was established after the tariffs were adopted. The railroads filed tariff amendments which would deny to the ex-barge grain the privilege of moving eastward on the proportional rates, and remit it to the higher local rates which grain entering Chicago by truck or from local origins by rail was obliged to pay. *Held:*

1. That an order by the Interstate Commerce Commission in a proceeding under § 15 (7) of the Interstate Commerce Act, which relieved the proposed tariff amendments from suspension, as not "unlawful," but which did not prevent future adjustments on specific complaint of the rates on the ex-barge traffic, was a determination within the administrative competency of the Commission with which the District Court should not have interfered. P. 685.

2. Proportional rates differing from each other according to the origin of the commodity may be fixed lower than local rates and may apply to outbound movements after stopover in transit. P. 684.

3. Since the Commission refused to approve or prescribe the rates here in controversy, they stand only as carrier-made rates and are subject to possible recovery of reparations. P. 686.

4. To perpetuate the existing rate structure by sustaining the District Court's injunction would favor the ex-barge grain over grain

moving east from Chicago on local rates, thereby entailing violations of § 4 (1) of the Act as it stood before and after amendment by the Transportation Act of 1940. P. 687.

5. Nothing in the Transportation Act of 1940 warrants holding that the ex-barge grain (mostly corn), merely because it moved over a comparatively slight distance by water, must as a matter of law be given the benefit of proportionals fixed with reference to grain (mostly wheat) from the Northwest, including points in Canada and as far west in the United States as Washington and the Dakotas. P. 687.

6. Sec. 15 (7) of the Interstate Commerce Act, providing that after suspension of a carrier-proposed rate the Commission "may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective," did not oblige the Commission, in the circumstances of this case, to continue the suspension proceedings and establish special proportionals for the barge lines under § 6 (1) of the Act. P. 689.

7. The function of this Court does not permit it to prescribe or approve rates, and the decision in this case carries no implication of approval of any rates here involved; nor can the Court prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it, rather than to the courts, by the Act of Congress. P. 691.

44 F. Supp. 368, reversed.

APPEAL from a decree of the District Court of three judges enjoining the enforcement of an order of the Interstate Commerce Commission. The bill was filed by the Inland Waterways Corporation. Other parties, including the Interstate Commerce Commission and the Secretary of Agriculture, were allowed to intervene as plaintiffs or defendants. The Attorney General, for reasons explained in the opinion, *infra* (p. 683), did not participate.

Mr. Daniel H. Kunkel, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission; *Mr. Frank H. Cole, Jr.,* with whom *Mr. Leo P. Day* was on the brief, for the Baltimore & Ohio Railroad Co. et al.; and *Messrs. Bryce L. Hamilton* and *A. B. Enoch* submitted for the Alton Railroad Co. et al.,—appellants.

Mr. Nuel D. Belnap, with whom *Messrs. Luther M. Walter* and *John S. Burchmore* were on the brief, for the Inland Waterways Corp. et al.; *Mr. Edward B. Hayes,* with whom *Mr. Luther M. Walter* was on the brief, for A. L. Mechling (doing business as A. L. Mechling Barge Line); and *Mr. W. Carroll Hunter,* with whom *Messrs. Robert H. Shields* and *James K. Knudson* were on the brief, for the Secretary of Agriculture of the United States,—appellees.

Mr. Justice Jackson delivered the opinion of the Court.

By schedules filed with the Interstate Commerce Commission to become effective October 15, 1939, the appellant eastern railroads [1] sought to deny grain arriving at Chicago by barge over the Illinois Waterways the privilege of moving out of Chicago by rail on "proportional" rates applicable to competing grain arriving at Chicago by lake steamer or rail. The only other rates on which the ex-barge grain could move eastward by rail from Chicago were "local" rates, which were in all cases higher than the existing "proportional" rates. The proposed schedules were protested by barge lines and others desirous of maintaining the existing proportionals as to ex-barge grain.

Understanding of the controversy thus precipitated and the consequent litigation which has brought it to this Court requires a statement of the rather complicated rate structure to which the proposed schedules related.

The proposed schedules applied to grain, grain products and grain by-products, but for convenience we refer to them all as "grain." They dealt not only with grain com-

[1] Baltimore & Ohio Railroad Company, New York Central Railroad Company, New York, Chicago and St. Louis Railroad Company, Pennsylvania Railroad Company, Erie Railroad Company, and the Chesapeake & Ohio Railway Company.

ing by barge *via* the Illinois Waterways to Chicago, but also with grain so arriving at Peoria, Illinois, St. Louis, Missouri, and other related rate-break points. Chicago is illustrative of all, and for convenience we shall follow the practice employed by the parties in briefs and argument, and confine our discussion to it.

Grain originating at Chicago, grain brought there by truck, or by rail under intrastate rates, and grain which had forfeited its transit privileges, moved eastward by rail from Chicago on local rates. Their validity as such has not been questioned in this case.

Grain originating at certain places distant from Chicago had the privilege, however, of moving eastward from Chicago by rail on the lower proportional rates, although it came to rest at Chicago for marketing or processing. These "proportionals" varied according to the region of origin or the region of destination; and, in some instances, according to both.

"Official Territory" lies east of Chicago, and is divided into "Central Territory," "Trunk-line Territory," and "New England Territory." Central Territory lies west of a line drawn through Pittsburgh and Buffalo. To this territory there were three different sets of proportionals, set with reference to the territory of origin.

Grain originating at certain points in Illinois moved out of Chicago by rail to Central Territory on "Illinois Re-Shipping" proportionals, which, however, did not apply to ex-barge grain and were not affected by the proposed schedules.

Grain originating in "Northwest Territory" moved out of Chicago by rail to Central Territory on "Northwest" proportionals, which were in some instances higher, and in others lower, than the Illinois Re-Shipping proportionals. As first published, these proportionals applied only to grain originating in Northwest Territory, which comprises generally North Dakota, South Dakota, Minne-

sota, Wisconsin, the upper peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, Washington, and certain Canadian provinces. The Northwest proportionals were originally and have continued to be applicable on grain arriving at Chicago by lake. In 1932 the Northwest proportionals were amended to make them apply to shipments which "arrived by boat line at Chicago . . ." At the time this wording was put into the tariffs the only water-borne grain to which they applied was that arriving from the Northwest by boat over the Great Lakes. The Commission has decided that the effect of this amendment was to make the Northwest proportionals apply to grain arriving by barge over the Illinois Waterways, which were opened in the following year, 1933; and we accept its determination of this issue. While shipping points along the Waterways vary from 57.5 to 200.9 miles in distance from Chicago, some grain arriving there by barge originated at points as far beyond as Kansas City and St. Louis. The Northwest proportionals were the only ones which applied to ex-barge grain moving out of Chicago by rail to Central Territory, and the proposed schedules cancelled them as to such grain.

Grain brought by rail from "Trans-Mississippi Territory," which included, among other places, Kansas City and St. Louis, moved out of Chicago to Central Territory on "Trans-Mississippi" proportionals, which had been set by the Commission 3 cents lower than the Northwest proportionals, in order to equalize the Twin Cities with Kansas City. The Trans-Mississippi proportionals did not apply to grain coming from these points by barge, and therefore such grain had to pay a higher rate for the outbound haul than was required of grain coming from them by rail. No complaint has been made, however, of this; and the appellees have been content to assert that they are entitled to the Northwest proportionals as to such grain.

"Trunk-line Territory" lies between Central Territory and New England Territory, which comprises the New England States. To Trunk-line and New England Territories the proportionals did not vary with the point of origin of the grain. These proportionals applied to grain coming to Chicago by barge over the Illinois Waterways, and the proposed schedules cancelled them as to such grain. The existing schedules provided that "in no case shall the combination through rate to and from the re-shipping point *via* rail be less than the local rate from the re-shipping point to destination, the difference necessary to protect the local rate from the re-shipping point to be added to the re-shipping rate therefrom." No such provision was made with respect to the barge-rail traffic, and the Commission found accordingly that "the barge-rail rates are far below the local rates from the re-shipping points in contravention of the fourth-section rule,[2] while the all-rail rates are in strict conformity with that rule."

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[2] § 4. "(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water

When the proposed schedules were filed with the Commission, that body, acting pursuant to its authority under § 15 (7) of the Act,[3] suspended them for the allowable

competition not actually in existence: *And provided further,* That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice." 54 Stat. 904, 49 U. S. C. § 4 (1).

[3] 44 Stat. 1447 as amended by 54 Stat. 912, 49 U. S. C. § 15 (7), reading:

"Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose

period of seven months and entered upon a hearing of their lawfulness. The last testimony was heard, and the record in the case closed, on January 26, 1940. On September 18, 1940, the President approved the Transportation Act of 1940.[4] Thereafter the appellee Inland

behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

[4] The provisions of the Interstate Commerce Act particularly relied upon by appellees which were amended or added by the Transportation Act of 1940 read as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

"§ 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gate-

Waterways Corporation requested the Commission to dispose of the proceeding in the light of the new Act. On July 31, 1941, Division 2 of the Commission found that "the proportional rates here in issue have never been applicable on this barge traffic moving on unfiled rates," and that "the schedules under suspension are not shown to be unlawful." It announced that an order would be entered vacating the already expired order of suspension and discontinuing the proceedings.[5] When the period of compulsory suspension ended, the carriers had voluntarily continued the suspension.

In its petition for rehearing and reconsideration of this report the Inland Waterways Corporation asserted that the Commission had permitted discrimination against a connecting line forbidden by § 3 (4) of the Interstate

way, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 54 Stat. 902, 49 U. S. C. § 3 (1).

"§ 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." 54 Stat. 903, 49 U. S. C. § 3 (4).

"Part III, § 305 (c) . . . Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act." 54 Stat. 935, 49 U. S. C. § 905 (c).

[5] 246 I. C. C. 353.

Commerce Act as amended by the Transportation Act of 1940.[6] It suggested that the Commission fix the existing proportional rates as the proper ones, stating that: "Theoretically, the Commission is not limited to a choice between the unlawful proposed rates and the present rates, but may, upon an adequate record, prescribe some different basis of rates for the future. Actually, no different proposal has been introduced which could support a different basis of rates than those presently in effect. That fact, however, cannot possibly militate to justify the proposed rates, but could only compel the postponement of any change in the present tariffs pending further hearing, and the introduction of a lawful proposal." [7]

The decision of the whole Commission on reconsideration was announced on December 1, 1941.[8] In it the Commission took official notice that certain of the protestant barge carriers had attained common carrier status under the Act, and stated that "no useful purpose would be served by further hearing or reargument." [9] The Commission reviewed the existing rate structure and the probable effects of the proposed changes in operation as contrasted to the effects of denying them, and said:

"The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their prin-

[6] See footnote 4, *supra*, for the text of this provision.

[7] Petitions for reconsideration were also filed by "Chicago protestants," operating elevators and dealing in grain at Chicago; Illinois Agricultural Association, representing shippers located on the Illinois Waterways; Finnegan Warehouse Company, operating an elevator on the Waterways; and the United States Department of Agriculture. These petitions are not incorporated in the record, but it appears that the action of Division 2 was assailed by these protestants under § 3 (1), set out in footnote 4.

[8] 248 I. C. C. 307.

[9] From the report of the Commission it appears that the Inland Waterways Corporation was the only one asking further hearings. It stated that further hearings could be useful only to establish the information of which the Commission took official notice, and suggested that the Commission avoid the necessity for them by taking such notice.

cipal commercial effect being to reduce the profits of the Chicago elevator operators. . . .[10]

"Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial . . . and unduly preferential. . . . This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.

"The facts of record, as detailed by the division and summarized herein, clearly show that respondents are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the proposed

[10] Even under the proposed schedules, the combination barge-rail rates are in many instances lower than the all-rail rates. Much grain that arrives at Chicago is consumed locally or is shipped out by lake. In the case of grain arriving by rail, such disposition often leaves the elevator with a "transit balance" as a result of which ex-barge grain may move eastward by rail on the proportional rates.

The District Court apparently did not find that there was no evidence to support the Commission's finding that it was the elevator operator, rather than the farmer, who is affected by the proposed schedules. In any event, the foregoing would seem sufficient support for the Commission's finding, and we do not suppose that the finding makes any difference in the law to be applied.

schedules cannot be condemned as unlawful under sections 2 and 3 of the act.

"On reconsideration of the record in the light of the petitions and replies thereto and our prior decisions, we find that:

"(1) The proportional rates here under consideration were legally applicable on the ex-barge traffic where the so-called policing provisions were strictly complied with.

"(2) The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful."

Accordingly the Commission ordered:

"That the order heretofore entered in this proceeding, suspending the operation of the schedules enumerated and described in said order, be, and it is hereby, vacated and set aside as of December 22, 1941, and that this proceeding be discontinued."

After the Commission had announced its decision and on December 12, 1941, appellant Mechling Barge Lines sought to intervene on the ground that since the record had been closed it had become a regular common carrier by water of grain by barge to Chicago and other rate-break points, and was entitled to the protection afforded to such carriers by the Transportation Act of 1940. It urged that the decision be set aside and, if it should be thought necessary to this end, that it be given an opportunity to introduce evidence. This was the first offer to assist the Commission in any way in the establishment of proportional rates fixed with reference to the ex-barge grain. No specific suggestion was made, however, as to the amount of such rates or as to the evidence which would be introduced in support. This petition was denied by the Commission on January 21, 1942.

On January 16, 1942, the Inland Waterways Corporation had filed its complaint in the United States District Court seeking an injunction against the enforcement of the Commission's order. Various other parties were allowed to intervene in the case as plaintiffs and defend-

ants. The Attorney General did not participate, giving as his reason the existence of a conflict in litigation between coördinate agencies of the Government, the Agricultural Adjustment Administration and the Interstate Commerce Commission. The opinion of the specially constituted three-judge District Court was announced on April 16, 1942.[11] It stated that "The Interstate Commerce Commission took no evidence addressed to the issue whether the rate proposal in question is in violation of Section 3 (4) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, or contrary to the National Transportation Policy enacted by the last said act; but the Interstate Commerce Commission passed upon the legality of said rate proposal upon evidence taken without reference to such issues and before they existed." It concluded that the order was of a "character which this Court is authorized to enjoin and set aside," and should be set aside on the ground that it "discriminates against water competition by the users of barges." It decreed that the Commission's order vacating the already-expired suspension of the proposed schedules and discontinuing the proceedings be annulled and that the railroads be "permanently enjoined . . . from acting upon the authority of the aforesaid order."

The case is here on appeal.[12]

In the proceedings before the Commission the protestants pitched their case upon two propositions: (1) To deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated; (2) Since denial of that benefit was necessarily unlawful, the Commission was

[11] 44 F. Supp. 368.

[12] Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47a; § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

bound to maintain the *status quo* by cancelling the proposed schedules and thus perpetuating the existing rate structure, whatever might be its defects.

As the Commission correctly observed with reference to the first contention, "to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned."

Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to more distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance.[13] To get the outbound business competing carriers frequently would offer rates similarly computed.[14] Proportional rates established on this reasoning [15] have become deeply embedded in the transportation system of the country, and have been approved by the Interstate Commerce Commission,[16] by the federal courts, this one in-

[13] E. g., Unlawful Rates in Trans. Cotton by K. C., M. & B. R. R. Co., 8 I. C. C. 121; Central Yellow Pine Assn. *v.* V., S. & P. R. Co., 10 I. C. C. 193.

[14] Berry, A Study of Proportional Rates, 10 I. C. C. Practitioner's Journal 545, 602.

[15] For the variety of practices so sustained, see Locklin, Economics of Transportation (1935), pp. 122–123, 629–631.

[16] See the dissenting opinion of Chairman Eastman in the present case. Other cases are collected in Berry, *supra*, footnote 14.

cluded;[17] and, so far as it has spoken on the subject, by Congress itself.[18] We see no reason for repudiating them now.

Having pointed out the error of the protestants' basic contention, the Commission stated that: "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." Pending the commencement of such a proceeding it ordered the vacation of the already-expired order of suspension and ordered the discontinuance of the instant proceedings.

Despite this statement, much of the argument in this Court has proceeded upon the assumption that the Commission's order resulted from its belief and findings that the discrepancies between the proportional rates not cancelled in the proposed schedules and the local rates as applied to ex-barge grain were in all respects lawful, and that it actually approved or prescribed a rate structure containing such discrepancies. We do not so understand the action of the Commission.

True, the Commission stated that the railroads "are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic," and found that "the proposed schedules are shown to be just and reasonable." But this does not constitute a finding that the rates were lawful; they "may lie within the zone of reasonableness and yet result in undue prejudice" or otherwise violate the Act.[19] The Commission also stated that the facts of record

[17] *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768; *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458; cf. *Board of Trade* v. *United States*, 314 U. S. 534.

[18] § 11 of the Panama Canal Act, 1912, 37 Stat. 566, now 49 U. S. C. § 6 (11), set out in its present form in footnote 25, *infra*. Cf. Sen. Rept. No. 433, 76th Cong., 1st Sess., p. 10.

[19] *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524.

show that "the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act." [20] But this statement followed immediately upon the Commission's statement that from its conclusion that protestants' claim as a matter of right to the existing proportionals was erroneous, "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." Read in the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules "are not shown to be otherwise unlawful" is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension.[21] Since the Commission refused to approve or prescribe

[20] § 2, 49 U. S. C. § 2, reads as follows:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

The pertinent provisions of § 3 are set forth in footnote 4, *supra*.

[21] Standard Packing Co. *v.* Union Pacific R. Co., 190 I. C. C. 433; Parkersburg Rig & Reel Co. *v.* Chicago & N. W. Ry. Co., 198 I. C. C. 709; William Kelly Milling Co. *v.* Atchison, T. & S. F. Ry. Co., 211 I. C. C. 53; Kansas City Ice Co. *v.* Atchison, T. & S. F. Ry. Co., 215 I. C. C. 616, 619; Halifax Coal & Wood Co. *v.* Atlantic & Y. Ry. Co., 219 I. C. C. 594; Morehead Cotton Mills Co. *v.* Chesapeake & Ohio Ry. Co., 231 I. C. C. 437.

them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations.[22] Like the Commission, we also refrain from approving or prescribing them.

The case had been developed before the Commission upon the theory that the proposed schedules must stand or fall in their entirety. There has been no suggestion, nor is it apparent, that it would have been feasible for the Commission to pick and choose among the items in the existing and proposed schedules.

To perpetuate the existing rate structure by sustaining the District Court's injunction would entail numerous and serious violations of § 4 (1).[23] Under that rate structure, ex-barge grain moved from Illinois River points to Baltimore, New York and Boston at combination rates lower than the local rates for domestic grain from all points in Central Territory west of a line running south from Bay City, Michigan, through Fort Wayne and Indianapolis, Indiana. So also did the ex-barge grain move out at combination rates lower than local export rates on grain from all points in Central Territory west of a line running southwardly and south along the Indiana-Ohio line; and lower than the local export rates on corn from all points in Central Territory west of a line between Paynesville and East Liverpool, Ohio, near the Pennsylvania line. Unlike the barge-rail rate, the all-rail rates are, as the Commission has found, in strict conformity with § 4 (1). Congress by the Transportation Act of 1940 amended § 4 (1), but nowhere in the Act or in its legislative history is there any suggestion that from the mere fact that grain moving from beyond Chicago to New York travels by barge for the 60-mile leg of its journey to Chicago—less

[22] See cases cited in footnote 21, *supra*. Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370; 50 Yale Law Journal 714.

[23] See footnote 2, *supra*, for the text.

than one percent of the total haul—it shall as matter of law be entitled to a rate from beyond Chicago to the seaboard less than that from the Pennsylvania line to the seaboard.[24]

Appellees make no better showing with respect to the effect of the injunction on the rate structure west of Chicago. To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

Finally it is claimed that the Commission was obliged to continue the § 15 (7) proceedings and establish special proportionals for the barge lines under § 6 (11) of the Act.[25]

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[24] Indeed, the legislative history shows that the water interests vigorously championed the long-and-short-haul clause as a measure necessary to prevent ruinous competition.

[25] § 6 (11) provides:

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage

This duty is claimed by appellees to derive from the provision of § 15 (7) that after suspension and hearing of a proposed rate change the Commission "*may* make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." (Italics supplied.) The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15 (7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to "readjust the entire rate structure of an important section of the country." [26] We have already noted the breadth of the rate structure here involved. To require the present proceedings to be continued until proportionals can be set with reference to the barge transportation would hardly be within the intention of Congress, which in terms made the Commission's power discretionary, and legislated upon the assumption, formed after much experimentation with the period of suspension,[27] that suspension cases could nor-

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in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

". . . (b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water." 49 U. S. C. § 6 (11).

[26] Salt from Louisiana Mines to Chicago, 69 I. C. C. 312, 313. See also, Livestock to Eastern Destinations, 156 I. C. C. 498.

[27] In the original form provided by § 12 of the Mann-Elkins Act, 1910, 36 Stat. 539, 552, the period of suspension was not to exceed

mally be carried to completion within seven months and to that end commanded in § 15 (7) that "the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

The record had been closed on January 26, 1940, when the last testimony was heard. The Transportation Act of 1940 was not enacted until September 18. At the time the evidence was taken it was not clear whether some of the barge lines operating in the waterway were common carriers, and none had obtained certificates of convenience and necessity from the Commission as now required. They had not filed reports with the Commission from which the results of their own operations might be judged, and they had not filed tariffs showing their rates. All of this has since changed. The applicable law has changed. The issues raised by the position of the parties did not call

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120 days, with the proviso that if the hearing could not be concluded within that period the Commission might in its discretion extend the time for a further period not exceeding six months. § 4 of the Commission Division Act, 1917, 40 Stat. 270, 272, provided that until January 1, 1920, Commission approval must be had for the filing of increased rates. By § 418 of the Transportation Act of 1920, 41 Stat. 456, 486, the initial suspension period of 120 days was retained, but the permissible period of further suspension was shortened to thirty days. "The increased size of the Commission and its divisional organization rendered the shortening of the suspension period feasible." 1 Sharfman, The Interstate Commerce Commission, 203. The Commission was authorized, however, to require the carrier to keep accurate account in detail of all amounts received by reason of an increase going into effect at the end of the period of suspension, and to require at the end of the hearing that they be refunded. The present provisions with regard to the Commission's power of suspension and of requiring an accounting were enacted by § 2 of the Mayton-Newfield Act, 1927, 44 Stat. 1446, 1447.

for a fixing of new combination rates, for it was contended barge grain was entitled to the existing proportionals.

The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks "sound economic conditions" for all kinds of transportation.[28] For more than a year after the enactment of this Act, and until after the Commission had finally disposed of the case, appellees showed no disposition to make proposals or to develop a record upon the basis of which the Commission might prescribe rates in view of their particular circumstances and under the provisions of the Act designed with reference to them. Instead they relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure. Their nearly four years of litigation have not, however, been in vain, for during all this time they have managed to keep the proposed schedules in abeyance—first by compulsory suspension for the allowable period of 7 months at the hands of the Commission, then by the railroads' voluntary act at the expiration of that period, and finally by the compulsion of the District Court's injunction.

Our function does not permit us either to prescribe or approve rates, and our decision carries no implication of approval of any rates here involved. Nor are we at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts. We decide only whether the Commission has acted within the power delegated to it by law. We are of

[28] See footnote 4, *supra*.

opinion that it has and that the decision of the court below must be

Reversed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting:

The issue in this case is whether the farmers and shippers of the middle west can be compelled by the Interstate Commerce Commission and the railroads to use high-priced rail instead of low-priced barge transportation for the shipment of grain to the east. I agree that, in the words of Division 2 of the Commission, "this record is replete with complexities and technicalities" which have almost, but I think not quite, successfully obscured that simple issue. The District Court, which held that the Interstate Commerce Commission's order "discriminates against water competition by the users of barges," understood the issue.[1] The railroads, which proposed the increase in the cost to barge shippers, also understood the issue as is shown by the frank statement of their representative at the Commission hearing: "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive this business off of the water and back onto the rails where it belongs. . . . We are not in love with water transportation . . . and we believe that we are entitled to that grain business." From behind a verbal camouflage of "complexities and technicalities" there emerges one single easily understandable question: Railroads pick up grain in Chicago which may be brought there by rail, lake transport, or inland waterway barge. Is it lawful for a railroad to deprive midwestern grain farmers and shippers of the benefits of cheap barge transportation by charging a higher tariff for re-shipment of grain originally transported to Chicago by barge than

[1] 44 F. Supp. 368, 375.

the same railroad charges for re-shipment of the same grain from Chicago to the same places when the grain is brought to the re-shipping point by rail or by lake?

The record shows, and it was admitted at the bar, that barges can by reason of their inherent advantages carry grain more cheaply than railroads. The Commission found that inbound grain barge rates to Chicago ranged from 2.75 to 4.5 cents per hundred pounds for hauls of distances of 57 to 200 miles as contrasted with rail rates for the same distances ranging from 9.5 to 13 cents. Grain can thus be brought to Chicago far more cheaply by barge than by rail. However, only a small proportion of the grain which is sent to Chicago stays in that city, and the new tariff approved by the Commission and by this Court will charge so much more for the shipment of grain to the east when the grain is brought to Chicago by barge than is charged for shipment of grain brought in by rail that this natural advantage of barge transportation will be destroyed. Hereafter it will cost 8.5 cents more to ship ex-barge than ex-rail grain to the east.[2] Under the existing rates, a farmer can ship his grain from Kansas City to New York by barge to Chicago and rail from Chicago to New York for 4.625 cents less than if he uses rail transport all the way from Kansas City to New York. Under the new schedule approved today, that differential is wiped out, and he will hereafter pay 3.875 more to ship by barge and rail than if he ships rail all the way. This order in substance gives ex-barge traffic a 4-cent disadvantage where it previously had a 4-cent advantage. Similar penalties are imposed upon shippers who use barge lines in Missouri, Iowa, and Illinois. The Commission, as its sole finding on the impact of the rates on the barge lines, found that the new rates would not "prohibit" barge shipments.

[2] The figure given is the increase in cost of shipment to the best eastern market. The cost varies, depending on the destination of the grain.

Such a finding is irrelevant. A rate need not be prohibitive to be discriminatory. The new rate is manifestly intended to and will have the effect of transferring most of the barge traffic to the railroads, since shippers will not customarily pay 10% more to ship by barge-rail than by rail alone.[3]

Certain questions may be put to one side without elaborate discussion. The new rates cannot be justified on a theory of distinction between long and short hauls since the distances covered are substantially the same whether barge-rail or all-rail transportation is used. The Court asserts that the existing all-rail rates are lawful under the long and short haul clauses, while the existing barge-rail rates are unlawful. But there is nothing in the long and short haul clause which requires that shippers by rail to Chicago from points in Illinois, Iowa, Kansas, and Missouri must be granted a low rate for shipment beyond Chicago which is denied to those who ship into Chicago by barge. Nor is the fact that the rates directly affected by the new tariff are "proportional" of any significance.[4]

[3] The new rates for shipment from Chicago to the east of course do not "prohibit" barge shipments to Chicago since the small amount of grain consumed in that city will not be affected by the outgoing rates, and some grain can still be carried to the east by lake transportation for so much of the year as the lakes are open to traffic.

The Court quotes the finding of the Commission that "the proposed schedules are not prohibitive" and that their principal effect will be to reduce the profits of the Chicago elevator operators. If the schedules operate unfairly, as I think they do, it is immaterial whether the farmers or the elevator operators bear the burden of the unfairness; but the Court in relying on this finding pays little regard to the fact that the court below found as a fact that the saving from barge transporation "accrues to the producer" and "does not accrue to the Chicago elevator operator." Unless the Court is willing, as apparently it is not, to reëxamine the evidence and to conclude that the court below is in error, we must take the facts as they are given to us by the District Court. In any case, I think the District Court was correct.

[4] "A through rate is ordinarily lower than the combination of the local rates. When a through rate is made by combination of rates

A through rate may be invalid because of one factor only of the combination of rates which make it up, "and that factor may be a proportional rate." [5] The only issue to be decided is whether the barge shipper shipping from a given point to Chicago should be given any different proportional rate than rail shippers shipping from the same point to Chicago for equal service out of Chicago, and, for reasons to be set forth below, I find no justification for such a discrimination.[6]

There is no factual issue here on which we are bound to accept the Commission's judgment as we were in *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344. Here we have a rate revision which can serve no conceivable purpose except to force shippers to use railroads instead of barge lines. Reasonable persons may differ as to the wisdom of such a policy, but not as to the certainty of its result; and, as will be shown, Congress has made the policy judgment and has flatly forbidden the Commission to do what it has done. The situation is similar to *Mitchell* v. *United States,* 313 U. S. 80, 97, in which the Commission sought to shelter a flatly forbidden discrimination behind the shield of expertise. There, too, we were cited to the *Chicago Heights* case and our many other

for intermediate distances the rate for the later link in the shipment is, when lower than the local, spoken of as a proportional rate." *Atchison, T. & S. F. Ry. Co.* v. *United States,* 279 U. S. 768, 771.

[5] *Ibid.,* 776.

[6] The Commission and the Court refer to the fact that ex-barge rates are now equal to ex-truck rates. This is irrelevant. If there is a discrimination against truck shippers, the remedy is an improvement of their situation, not a destruction of barge shipping. In the words of Chairman Eastman in his dissenting opinion, "My tentative opinion upon it is that where the movement by truck is from territory from which grain can be moved by rail or by water to Chicago subject to the application of the reshipping rates east-bound, the failure to apply such rates to the grain brought in by truck does result in violation of sections 2 and 3, provided adequate provisions for the identification and policing of such shipments are practicable and enforceable."

decisions upholding the right of administrative agencies to make factual judgments. We replied that "On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act." Such I think should be our answer here.

This tariff is an unjust discrimination within the meaning of § 2 of the Interstate Commerce Act, 49 U. S. C. § 2, which prohibits a carrier from demanding a charge either higher or lower than is charged by any other person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Many decisions make clear that this section does in fact require a real equality. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768. The Commission counters with a contention that here there is "a dissimilarity of conditions prior to the rendering of the transportation service for which the charge in issue is assessed." True there is a difference, if only one, in the conditions prior to the rendering of the service from Chicago to the east. The difference is *solely* that one class of grain moves in to Chicago by barge and another moves in by other means; and this is a ground not of legitimate distinction, but of unfair discrimination. The discrimination would be no worse if the benefits of the cheap through rates were given only to shippers on a favored railroad coming into Chicago, and not to other shippers by rail. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra*, 773. Here all circumstances and conditions are substantially similar, and the Court ought to require the Commission to obey the law by following its own previously announced rule in Chattanooga Packet Co. *v.* Illinois Central R. Co., 33 I. C. C. 384, 392, 393, in which the Commission said: "If

carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters. . . . We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are unjustly discriminating against complainant and against shippers who desire to route their goods over complainant's boat line."

The decision of the Commission also violates § 3 (4) of the Interstate Commerce Act, 49 U. S. C. § 3 (4), which under the 1940 amendment to the Interstate Commerce Act is applicable to the appellees, and which forbids carriers to "discriminate in their rates, fares, and charges between connecting lines." This section became applicable to the appellees in the course of the Commission's disposition of this case, but before its opinion was filed. This circumstance is not, as the Commission seems to have supposed, a reason for ignoring the section. No more obvious "discrimination in their rates, fares, and charges" can be imagined, particularly in the light of the general policy of the Transportation Act of 1940.

I think that approval of this tariff is a defiance of the Transportation Act of 1940. 54 Stat. 899. This Act declared it to be "the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." Title I, § 1. The Act commands the Interstate Commerce Commission that "all of the provisions of this Act shall be administered and enforced with a view of carrying out the above declaration of policy." Congress, fearful, in the words of several members, that the Commission was "essentially a railroad

minded body,"[7] took every precaution to prevent discrimination against water carriers.[8]

[7] 84 Cong. Rec. 5965, 5883, 5880–81. Legislation similar in purpose to the 1940 Act was considered by Congressional committees in the 74th and subsequent Congresses. Opposition to legislation giving the Commission authority over water transportation came from representatives of the water shippers. A typical protest was made by Cleveland A. Newton, General Counsel, Mississippi Valley Association, in the hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess., on H. R. 5379: "This bill if enacted into law will place water carriers along the coast and upon our inland rivers under the absolute domination and control of the Interstate Commerce Commission. That Commission was created to regulate, conserve, and control railways. It is a railway-regulating agency. It naturally has the railway viewpoint, and past experience convinces us that the Commission, as now constituted, is railway-minded and that it would not be in the public interest to place water services under its domination and control. . . . We have observed the performance of the Commission in the past, under a comprehensive declaration of policy enacted by Congress, and that experience, we regret to say, has not inspired confidence." Hearings, p. 471.

[8] "Mr. Lucas: . . . Under the bill, as I understand it, the Interstate Commerce Commission would have the power, and it would be its duty, to fix rates on the Illinois River with respect to the transportation of that wheat and corn. Would it be possible for the Interstate Commerce Commission to fix the rate the same as the railroad rate from that point to St. Louis?

"Mr. Wheeler: Not if the Commission does its duty, because the bill specifically provides that it must take into consideration the inherent advantages of the water carrier. Everyone agrees that goods can be shipped more cheaply by water than by rail." 84 Cong. Rec. 5879.

The following Senators and Representatives, among others, either required assurance that the Commission would not discriminate against water carriers or expressed the conviction that under the statement of policy, the Commission would be unable to discriminate against water carriers: Senators Austin, Clark of Missouri, Connally, Ellender, Lucas, Miller, McNary, Norris, Pepper, Shipstead, Truman, and Wheeler; Representatives Bland, Bulwinkle, Crosser, Culkin, Halleck, Lea, Pierce of Oregon, Sparkman, and Wadsworth.

Senators, particularly those from the midwestern states where the barge lines involved here were operating, were especially fearful that the Commission would do substantially what it has done in this case. They required repeated assurance by the Chairman of the Interstate Commerce Committee of the Senate that the bill was written in such manner that the Commission could not if it desired permit discrimination against water carriers. At great length the Chairman of that Committee explained to apprehensive Senators that the bill contained provisions in three different places which imposed upon the Commission the imperative duty of standing in constant opposition to discrimination against shippers by water.[9]

House members shared the same fears. The first conference report was defeated in the House because it was believed that the bill did not offer adequate protection for water carriers against hostile Interstate Commerce Commission action.[10] A proponent of the bill told the House that "It is not fair to suggest, in my opinion, that the Commission and the courts will not look to this declaration of policy whenever they are called upon to make such construction of the statute and application of it . . . The specific provisions of the bill carry out the declaration of policy. The courts and commissions will recognize that. . . ." [11] Defending the policy provisions as a complete protection against Commission action antagonistic to barge transportation, another sponsor of the bill, opposing a safeguarding amendment, declared that to consider it necessary "You will have to further assume that the Interstate Commerce Commission will not enforce it. You will

[9] 84 Cong. Rec. 6125–6128.

[10] The first conference report was rejected by the House on May 9, 1940, 86 Cong. Rec. 5886. The second report was accepted on Aug. 12, 1940, 86 Cong. Rec. 10193.

[11] 84 Cong. Rec. 9865.

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have to assume that if a case goes to the courts, the courts will neither construe nor enforce the provisions of this policy." [12] As I see it, the Commission in this case has declined to enforce Congress' policy and the Court has failed to construe and enforce the Act as Congress clearly intended it should.

This is not all. The first conference report having been defeated, the second conference report brought in changes intended to offer more protection to water carriers. The conferees reported that: "This measure will place upon the Interstate Commerce Commission, not only the power, but the duty, to protect and foster water transportation and preserve its inherent advantages." [13] As a closing, clinching argument intended to persuade the House that the Commission would be fair to water carriers, the statement of Commissioner Eastman (who dissented from the order of the Commission here) was quoted. Eastman assured the Congressmen interested in water transportation that certain provisions of the bill "coupled with the admonition in the declaration of policy in section 1 that the provisions of the act be so administered as to recognize and preserve the inherent advantages of each mode of transportation, will afford adequate protection in this respect. If experience should show that further protection is needed, contrary to our expectation, Congress can amend the act, but such a restriction as is now proposed is, we believe, both unnecessary and undesirable." [14]

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[12] 84 Cong. Rec. 9863.

[13] 86 Cong. Rec. 10172.

[14] 86 Cong. Rec. 10191. In his dissenting opinion, Chairman Eastman said: "The report states that the 'proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profit of the Chicago elevator operators.' I do not so understand the evidence. . . . As I understand it, the effect of the proposed schedules, unless the prices paid to the farmers whose grain is barged are reduced, will be to limit the outlet of the ex-barge grain to local consumption in Chicago and to the lake and lake-rail routes to eastern points."

The final statement of the last proponent of the 1940 Act, spoken just before the vote was taken on the second conference report, were these: "There is nothing whatever in the pending measure which could by any fair interpretation be regarded as unjust to water transportation or to any other kind of transportation." The speaker then read the policy provisions of § 1 and asked: "How much plainer could language be than that is? It is crystal clear that there is no basis in the bill for the apprehension expressed by those opposed to the measure." [15]

Although these proceedings were not initiated under the 1940 Act,[16] the Commission should have felt itself bound by that Congressional expression of policy. Yet the legislative history just recited makes it clear that the Commission has flagrantly flouted the express mandate of Congress. It is said, however, that the Commission reserves the right to take further action in a "proper proceeding" in which it "*might* prescribe proportional rates [on the exbarge traffic] or joint barge-rail rates lower than the combinations." At some future day the Commission may correct this discrimination. But the day for Commission action was the day this case was decided, and the day for action by this Court is now. The Commission is not bound by the technical procedures of the common law, and it should not strain to avoid the enforcement of Congressional will because of the formal fashion in which questions are presented to it. In this proceeding it was the Commission's duty "to protect and maintain a transportation

[15] 86 Cong. Rec. 10192.

[16] The 1940 Act gave the Commission jurisdiction to regulate water transportation directly. Here the same effect is achieved under the Commission's other powers by a tariff aimed at shippers who have previously used water transportation. For the background and nature of the 1940 Act see Eastman, The Transportation Problem, 30 Amer. Econ. Rev. 124; Stein, Federal Regulation of Water Carriers, 16 Jour. Land and Pub. Util. Econ. 478; Harbeson, The Transportation Act of 1940, 17 *ibid.* 291; Regulation of Water Carriers, 50 Yale L. Jour. 654.

system free from partiality to particular shippers. The Commission acted in its capacity as a public agency" and was obligated to carry out "duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest." *United States* v. *Chicago Heights Trucking Co., supra,* 354. The fact that this was not a formal proceeding to fix proportional rates under § 6 (11) (b) did not detract from the Commission's powers. *Chicago, R. I. & P. Ry. Co.* v. *United States,* 274 U. S. 29, 36; *United States* v. *New York Central R. Co.,* 272 U. S. 457, 462. The Commission itself in cases where the command of Congress was far less emphatic than here, has stated that an investigation and suspension proceeding such as this one "opens for consideration the lawfulness of the suspended rates under all provisions of the act." Sugar From Gulf Coast Port Groups To Northern Points, 234 I. C. C. 247, 251. "The reproach of dealing with the matter piecemeal" is incurred by the Commission here as it was in *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 510. It cannot, with due regard to its duty, shift responsibility "from the shoulders of the present to the shoulders of the days to come." Here as in that case, postponement serves to leave "this particular carrier helpless in the interval." [17]

Congressman Bland, who opposed the 1940 Act on the ground that it lacked sufficient safeguards to prevent action by the Commission hostile to water transportation called

[17] The Court interprets the Commission's order as leaving open the right of the shippers affected to bring actions for reparations for injuries suffered under the new rates. This will bring small practical comfort to the barge lines since the shippers will be unlikely to ship by barge when the price of every shipment is dependent on future legal proceedings. The barge lines, "helpless in the interval" pending new legal proceedings, risk serious financial injury, if not bankruptcy. While the shippers can ship by barge now and sue later, they are presumably interested in buying transportation, not lawsuits.

attention to the procedural delays in rate cases before that body, delays which he declared would be used to strangle financially weak water carriers, forcing them to "yield or transfer their operation to other streams." He pointed out this "would mean the death of water carriers"; that the railroads knew how to obtain delay and knew the disastrous consequences that would follow to their competitors; that railroads "seek to profit" by procedural delay; and that the diversity of their interests and extent of their revenues was so great that they could survive delays which would be unendurable for competitors.[18] The Congressman was a good observer and a sound prophet.

The judgment of the District Court enjoining enforcement of this order was correct and should be affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this opinion.

DIRECT SALES CO. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 593. Argued April 12, 1943.—Decided June 14, 1943.

A mail-order wholesale drug corporation made sales of morphine sulphate to a physician in unusually large quantities, frequently, and over an extended period. *Held*, that the evidence, from which it could be inferred that the seller not only knew the physician was selling the drug illegally but intended to coöperate with him therein, was sufficient to sustain the seller's conviction of conspiracy to violate the Harrison Narcotic Act. *United States* v. *Falcone*, 311 U. S. 205, distinguished. P. 714.

131 F. 2d 835, affirmed.

CERTIORARI, 318 U. S. 749, to review the affirmance of a conviction for conspiracy to violate the Harrison Narcotic Act. See also 44 F. Supp. 623.

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[18] 86 Cong. Rec. 10181.

Mr. William B. Mahoney, with whom *Mr. Edwin J. Culligan* was on the brief, for petitioner.

Mr. Valentine Brookes, with whom *Solicitor General Fahy, Assistant Attorney General Berge, Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* were on the brief, for the United States.

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner, a corporation, was convicted of conspiracy to violate the Harrison Narcotic Act.[1] It challenges the sufficiency of the evidence to sustain the conviction. Because of asserted conflict with *United States* v. *Falcone,* 311 U. S. 205, certiorari was granted.

Petitioner is a registered drug manufacturer and wholesaler.[2] It conducts a nationwide mail-order business from Buffalo, New York. The evidence relates chiefly to its transactions with one Dr. John V. Tate and his dealings with others. He was a registered physician, practicing in Calhoun Falls, South Carolina, a community of about 2,000 persons. He dispensed illegally vast quantities of morphine sulphate purchased by mail from petitioner. The indictment charged petitioner, Dr. Tate, and three others, Black, Johnson and Foster, to and through whom Tate illegally distributed the drugs, with conspiring to violate

[1] The conspiracy statute, R. S. § 5440, as amended, 18 U. S. C. § 88, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The pertinent provisions of the Harrison Act are set out in note 3, *infra.*

[2] 38 Stat. 785, as amended, 26 U. S. C. §§ 3220, 3221.

§§ 1 and 2 of this Act,[3] over a period extending from 1933 to 1940. Foster was granted a severance, Black and Johnson pleaded guilty, and petitioner and Dr. Tate were convicted. Direct Sales alone appealed. The Circuit Court of Appeals affirmed. 131 F. 2d 835.

The parties here are at odds concerning the effect of the *Falcone* decision as applied to the facts proved in this case. The salient facts are that Direct Sales sold morphine sulphate to Dr. Tate in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so, but it actively stimulated Tate's purchases.

He was a small-town physician practicing in a rural section. All of his business with Direct Sales was done by mail. Through its catalogues petitioner first made

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[3] 38 Stat. 785, as amended, 26 U. S. C. §§ 2553, 2554. The indictment charged the conspiracy's object was to violate those portions of the Act (as amended) which provide:

"It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a)." 26 U. S. C. § 3224.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; . . ." 26 U. S. C. § 2553.

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary." 26 U. S. C. § 2554 (a).

"It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." 26 U. S. C. § 2554 (g).

contact with him prior to 1933. Originally he purchased a variety of pharmaceuticals. But gradually the character of his purchases narrowed, so that during the last two years of the period alleged for the conspiracy he ordered almost nothing but morphine sulphate. At all times during the period he purchased the major portion of his morphine sulphate from petitioner. The orders were made regularly on his official order forms. The testimony shows the average physician in the United States does not require more than 400 one-quarter grain tablets annually for legitimate use. Although Tate's initial purchases in 1933 were smaller, they gradually increased until, from November, 1937, to January, 1940, they amounted to 79,000 one-half grain tablets. In the last six months of 1939, petitioner's shipments to him averaged 5,000 to 6,000 half-grain tablets a month, enough as the Government points out to enable him to give 400 average doses every day.

These quantity sales were in line with the general mail-order character of petitioner's business. By printed catalogues circulated about three times a month, it solicits orders from retail druggists and physicians located for the most part in small towns throughout the country. Of annual sales of from $300,000 to $350,000 in the period 1936 to 1940, about fifteen per cent by revenue and two and a half per cent by volume were in narcotics. The mail-order plan enabled petitioner to sell at prices considerably lower than were charged by its larger competitors, who maintained sales forces and traveling representatives. By offering fifty per cent discounts on narcotics, it "pushed" quantity sales. Instead of listing narcotics, like morphine sulphate, in quantities not exceeding 100 tablets, as did many competitors, Direct Sales for some time listed them in 500, 1,000 and 5,000 tablet units. By this policy it attracted customers, including a dispropor-

tionately large group of physicians who had been convicted of violating the Harrison Act.

All this was not without warning, purpose or design. In 1936 the Bureau of Narcotics informed petitioner it was being used as a source of supply by convicted physicians.[4] The same agent also warned that the average physician would order no more than 200 to 400 quarter-grain tablets annually [5] and requested it to eliminate the listing of 5,000 lots. It did so, but continued the 1,000 and 500 lot listings at attractive discounts. It filled no more orders from Tate for more than 1,000 tablets, but continued to supply him for that amount at half-grain strength. On one occasion in 1939 he ordered on one form 1,000 half and 100 quarter grains. Petitioner sent him the 1,000 and advised him to reorder the 100 on a separate order form. It attached to this letter a sticker printed in red suggesting anticipation of future needs and taking advantage of discounts offered. Three days later Tate ordered 1,000 more tablets, which petitioner sent out. In 1940, at the Bureau's suggestion, Direct Sales eliminated its fifty and ten per cent discounts. But on doing so it translated its discount into its net price.

Tate distributed the drugs to and through addicts and purveyors, including Johnson, Black and Foster. Although he purchased from petitioner at less than two dol-

[4] Thus, although there were more than 1,350 wholesale drug dealers in the United States from whom physicians might order narcotics (Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941, United States Treasury, Bureau of Narcotics), about 27% of the 204 doctors convicted were petitioner's customers.

[5] Testimony in the record establishes that the practice in the profession is to give one-eighth or one-fourth grain doses, and only rarely one-half grain doses. Cf. *United States* v. *Berman*, 258 U. S. 280, 289. Furthermore, there was expert testimony to the effect that codein may be, and preferably is, used for the same medical purposes as morphine sulphate. During the period from 1934 to 1940, however, the record does not show that Tate ever ordered codein from petitioner.

lars, he sold at prices ranging from four to eight dollars per 100 half-grain tablets and purveyors from him charged addicts as much as $25 per hundred.

On this evidence, the Government insists the case is in different posture from that presented in *United States* v. *Falcone*. It urges that the effort there was to connect the respondents with a conspiracy between the distillers on the basis of the aiding and abetting statute.[6] The attempt failed because the Court held the evidence did not establish the respondents knew of the distillers' conspiracy. There was no attempt to link the supplier and the distiller in a conspiracy *inter sese*. But in this case that type of problem is presented. Direct Sales was tried, and its conviction has been sustained, according to the claim, on the theory it could be convicted only if it were found that it and Tate conspired together to subvert the order form provisions of the Harrison Act. As the brief puts the Government's view, "Petitioner's guilt was not made to depend at all upon any guilt of Dr. Tate growing out of his relationship to defendants other than petitioner or upon whether these other defendants were linked with the Tate-Direct Sales conspiracy."

On the other hand, petitioner asserts this case falls squarely within the facts and the ruling in the *Falcone* case. It insists there is no more to show conspiracy between itself and Tate than there was to show conspiracy between the respondent sellers and the purchasing distillers there. At most, it urges, there were only legal sales by itself to Dr. Tate, accompanied by knowledge he was distributing goods illegally. But this, it contends, cannot amount to conspiracy on its part with him, since in the *Falcone* case the respondents sold to the distillers, knowing they would use the goods in illegal distillation.

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[6] R. S. § 5323, 18 U. S. C. § 550.

Petitioner obviously misconstrues the effect of the *Falcone* decision in one respect. This is in regarding it as deciding that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end. The assumption seems to be that, under the ruling, so long as the seller does not know there is a conspiracy between the buyer and others, he cannot be guilty of conspiring with the buyer, to further the latter's illegal and known intended use, by selling goods to him.

The *Falcone* case creates no such sweeping insulation for sellers to known illicit users. That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those circumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation.

The scope of the concession must be measured in the light of the evidence with reference to which it was made. This related to both the volume of the sales and to casual and unexplained meetings of some of the respondents with others who were convicted as conspirators. The Court found this evidence too vague and uncertain to support a finding the respondents knew of the distillers' conspiracy,

though not inadequate in some instances to sustain one that the seller knew the buyer would use the goods for illegal distilling. It must be taken also that the Government regarded the same evidence as insufficient to show the seller conspired directly with the buyer, by selling to him with knowledge of his intended illegal use.

Whether or not it was consistent in making this concession and in regarding the same evidence as sufficient to show that the sellers knew of and joined the buyers' distilling ring is not material. Nor need it be determined whether the Government conceded too much. We do not now undertake to say what the Court was not asked and therefore declined to say in the *Falcone* case, namely, that the evidence presented in that case was sufficient to sustain a finding of conspiracy between the seller and the buyer *inter sese*. For, regardless of that, the facts proved in this case show much more than the evidence did there.

The commodities sold there were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements. When they left the seller's stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulphate. The difference is like that between toy pistols or hunting-rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and coöperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *United States* v. *Falcone, supra.*[7] Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.

The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high-pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowl-

[7] Although this principle was there applied to aiding and abetting a conspiracy among others, it has at least equal force in a situation where the charge is conspiring with another to further his unlawful conduct, without reference to any conspiracy between him and third persons.

edge is the foundation of intent, the latter thereby also becomes the more secure.

The difference in the commodities has a further bearing upon the existence and the proof of intent. There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.[8] But this is not to say that a seller of harmful restricted goods has license to sell in unlimited quantities, to stimulate such sales by all the high-pressure methods, legal if not always appropriate, in the sale of free commodities; and thereby bring about subversion of the order forms, which otherwise would protect him, and violation of the Act's other restrictions. Such a view would assume that the market for opiates may be developed as any other market. But that is not true. Mass advertising and bargain-counter discounts are not appropriate to commodities so surrounded with restrictions. They do not create new legal demand and new classes of legitimate patrons, as they do for sugar, tobacco and other free commodities. Beyond narrow limits, the normal legal market for opiates is not capable of being extended by such methods. The primary effect is rather to create black markets for dope and to increase illegal demand and consumption.

[8] This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase.

When the evidence discloses such a system, working in prolonged coöperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested coöperation, stimulation, instigation. And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy.[9] Petitioner's stake here was in making the profits which it knew could come only from its encouragement of Tate's illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful coöperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal coöperation.

Unless, therefore, petitioner has been exempted arbitrarily by the statute's terms, the evidence clearly was sufficient to sustain its conviction for conspiring with Tate. Its position here comes down ultimately to the view alluded to above that the statute has, in fact, thus immunized its action. In effect this means the only restriction imposed upon it, apart from other provisions not now material, such as those affecting registration, was the requirement it should receive from purchasing physicians a signed order form for each sale. That done, in its view, its full duty to the law was fulfilled, it acquired a complete immunity, and what the physician had done

[9] Cf. *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. C. A.); and compare *Backun* v. *United States*, 112 F. 2d 635, 637 (C. C. A.); *United States* v. *Harrison*, 121 F. 2d 930, 933 (C. C. A.); *United States* v. *Pecoraro*, 115 F. 2d 245, 246 (C. C. A.).

or might do with the drugs became of no further concern to itself. Such a view would legalize an express written agreement between a registered wholesaler and a physician for the former to supply him with all his requirements for drugs for both legal and illegal distribution, conditioned only upon his using the required order forms. The statute contains no such exemption in explicit terms. Nor was one implied.[10]

This being true, it can make no difference the agreement was a tacit understanding, created by a long course of conduct and executed in the same way.[11] Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. The proof, by the very nature of the crime, must be circumstantial[12] and therefore inferential to an extent varying with the conditions under which the crime may be committed. But this does not mean either that the evidence may be equivocal or that petitioner is exempt from its effects when it is not so, merely because in the absence of excesses such as were committed and in other circumstances the order form would have given it protection. It follows the mere fact that none of petitioner's representatives ever met Dr. Tate face to face or held personal communion with him is immaterial. Conspiracies, in short, can be committed by mail and by mail-order houses. This is true, notwithstanding the overt acts consist solely of sales, which but for their volume, frequency and prolonged

[10] Cf. *Gebardi* v. *United States,* 287 U. S. 112; see also 81 U. of Pa. L. Rev. 474.

[11] *Glasser* v. *United States,* 315 U. S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C. C. A.); *United States* v. *Harrison,* 121 F. 2d 930, 934 (C. C. A.); cf. *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600; *Interstate Circuit* v. *United States,* 306 U. S. 208.

[12] *Ibid.*

repetition, coupled with the seller's unlawful intent to further the buyer's project, would be wholly lawful transactions.

Accordingly, the judgment is

Affirmed.

OWENS, EXECUTRIX, *v.* UNION PACIFIC RAILROAD CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 580. Argued April 7, 1943.—Decided June 14, 1943.

1. Upon the facts of this case under the Federal Employers' Liability Act, it can not be said that, as a matter of law, there was an assumption of risk by the decedent; his conduct amounted, at most, to contributory negligence, which may reduce the damages but does not bar recovery. P. 724.
2. It is unnecessary in this case to determine whether the 1939 amendment of the Federal Employers' Liability Act, abolishing the defense of assumption of risk, applies where the accident occurred before, but the suit is brought after, that enactment. P. 725.

129 F. 2d 1013, reversed.

CERTIORARI, 317 U. S. 623, to review the reversal of a judgment for the plaintiff in an action under the Federal Employers' Liability Act.

Mr. Frank C. Hanley for petitioner.

Mr. L. R. Hamblen, with whom *Mr. Roy F. Shields* was on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Petitioner is the widow of an employee of respondent. In 1941 she brought this suit under the Federal Employers' Liability Act, 45 U. S. C. §§ 51–59. Her hus-

band's death occurred in the course of his employment as foreman of a switching crew on February 16, 1939. She claims this was due to respondent's negligence. Petitioner sought to recover in one cause of action for Owens' suffering before death and in another for his death. The trial judge withdrew from the jury, for insufficiency of proof, four of the five separate grounds of negligence alleged. The case was submitted on the remaining ground, an alleged violation of Company Rule 30, and the defenses of assumption of risk and contributory negligence. Rule 30 provided:

"Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The jury found for petitioner and a judgment was entered on the verdict. The Court of Appeals reversed without considering the questions of negligence and contributory negligence. It held that as a matter of law Owens assumed the risk of death in the activities in which he was engaged when the accident occurred. 129 F. 2d 1013. We think this ruling was erroneous.

At the time of the accident and for fifteen years before, Owens was employed in the Spokane railroad yards as an engine or switching crew foreman. His crew was composed of himself, the engineer, the fireman, and two others. The crew's work consisted in shuttling freight cars about the yards in accordance with the requirements of the railroad's freight schedule.

The fatal switching maneuver was the shifting of two boxcars from their position on the "lead" track, west of a switch designated No. 7, to track 13. To accomplish this the engine was required to proceed westerly along the "lead" line until it hooked up the two freight cars, then to back the train thus formed along that line over switch 7 and, after the switch was set, to "kick" the cars so they

would roll over the switch on to track 13, while the engine stopped and started back to get another car. The engineer's cab was on the north side of the track, the switch stand and handle were on the south side.

While the engine was slowly backing after being coupled to the freight cars, Owens and one of his men, Koefod, rode on the north side of the train, clinging to the facing stirrups and handrails between the two boxcars. As the cars crossed the switch, Owens dropped off on the north side, telling Koefod to "let these cars go 13." When the train had passed, Owens crossed to the south side in order to set the switch. The train stopped with its western end at a distance estimated variously at seven to thirty feet from, but in any event unusually close to, the switch point. Koefod dropped off on the north side of the track and took a position about 20 feet north of the track from which he could see the switch points but could not see either the switch handle or Owens, both being obstructed from his view by the cars. Similarly, the engineer, on the north side of the train, could not see Owens. The other two men also were out of vision. When Koefod saw the switch point move into line, without awaiting any sign from Owens he signalled the engineer to "kick" the cars. This the latter promptly did. No warning was given to Owens either by bell, by whistle, or by call on starting the "kick." It is important to note that, all told, between the stopping of the receding train and the "kick" about ten seconds elapsed.

In this interval, Owens, having set the switch, began to walk across the track to the north side. No evidence was available or introduced to show his reason for doing so.[1]

[1] Indeed, the only evidence on the question of decedent's movements during this time is furnished by an engineer who saw the accident from the cab of a nearby engine. He testified:

"He was looking north—just for an instant he turned his head down to the yard and when he straightened his head up—why just before he

Since he was looking northward, he did not see the "kicked" cars coming toward him until too late. He then tried to leap out of the way, but failed and was struck by the cars, which rolled over him. His legs were severed from his body. Although he was removed to a hospital almost at once, he died within a few hours.

If this were all the evidence, the case would be clearly one in which the jury might find there was negligence on the part of Koefod or the engineer, or both, and that Owens' conduct amounted to no more than contributory negligence, if it was that.

But the company sought to avoid the effect of these facts by proving that Rule 30 was not applicable in ordinary switching operations, that it was not customary to ring the engine's bell during them, that it was customary for the man at the switch handle to remain there until movement of the "kicked" cars stopped, that it was the practice for the man in Koefod's position to signal for the kick without waiting either for a signal from the man at the switch, or to see whether the latter remained there, and that Owens had followed these practices in the past.

The purpose of this evidence apparently was twofold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se.

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straightened his head up I got scared and I says 'them cars are going to corner him'—they were coming about six miles an hour—I had no way of telling how fast they were going—I had a head end view of the cars and before I could do a thing, or give him any warning, I was too far away—just as he turned around he seen the cars coming almost on top of him—he didn't have time to get out of the way—he throwed himself back and sideways, and as I recollect a draw bar hit him about in here—his right side——"

Q. "What happened to him?"

A. "It knocked him down right in the center of the track; as near as I could understand the first part of the trucks run over him."

But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.

The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law.

The difficulty with this ruling is that it ignores conflicting evidence presented on behalf of petitioner. This consisted in testimony to the effect that the men in the switching crew customarily "look out" for each other, particularly when a man was not in sight during operations, that one in Koefod's position would not signal for the "kick" until he saw that the man at the switch was out of harm's way, and that there was a custom to wait before ordering the "kick" until the man at the switch signalled to the man in Koefod's position.

In this state of the record there was a square clash of evidence bearing on whether Owens knew that the cars would be "kicked" without any prior indication to him—either by ringing the bell or by signal from others in the crew—and decided to cross the track anyway. And these questions were crucial, in the circumstances, to whether he voluntarily assumed the risk of the conduct which brought about his death.

That is true, unless it is to be held that Owens, when he accepted and continued in his employment, knew that risks of the general character which caused his death would be incurred and, by taking or continuing in the

work, accepted their burden; in other words, not that he knew of and accepted the particular risk at the time it descended, but knew generally that risks of such a character might fall and elected in advance to sustain them. We think no such view is consistent with the statute's provisions.

Recently this Court reviewed "the maze of law which Congress swept into the discard," [2] when in 1939 it amended the Employers' Liability Act to abolish the defense of assumption of risk.[3] In view of the amendment, no good purpose would be served in going over this morass again merely to dispose of this case. But we point to a few lodestars.

The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground.[4] Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served to create more;[5] so that in time the three became more, rather than less, indistinguishable, And assumption of risk took over also, in misguided appellation, large regions of the law of negligence. What in fact was absence of departure from due care by the defendant came to be labelled "assumption of risk." [6] Apart from this effect, so long as the

[2] *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.

[3] 53 Stat. 1404, 45 U. S. C. § 54.

[4] Cf. *Priestley* v. *Fowler*, 3 M. & W. 1 (1837); *Farwell* v. *Boston & Worcester R. Corp.*, 4 Metc. (Mass.) 49; Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91 (1906); *Butterfield* v. *Forrester*, 11 East 60 (1809); *Davies* v. *Mann*, 10 M. & W. 546 (1842); Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233 (1908).

[5] Cf. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, and authorities cited.

[6] *Ibid.*, concurring opinion of Mr. Justice Frankfurter; *Hocking Valley Ry. Co.* v. *Whitaker*, 299 F. 416 (C. C. A.); Harper, Torts (1933) 292, and authorities cited, note 11; Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91.

area of application was overlapping [7] and each when established had the effect of defeating liability, it was not a matter of great moment to distinguish the defenses sharply or carefully, when the facts would sustain one.

But under the Employers' Liability Act prior to 1939 there was inescapable reason for making accurate differentiation of the three. For each produced different consequences. Assumption of risk remained a complete defense to liability. Contributory negligence merely reduced the damages.[8] The fellow-servant rule was abolished.[9]

These distinct consequences required distinct treatment of the three conceptions. This meant that so far as assumption of risk, which remained a complete defense, had swallowed up contributory negligence and the fellow-servant rule, the latter, having different effects, should be withdrawn from its enfolding embrace. In that way only could the clear legislative mandate be carried out and the distinct consequences attributed by it to each be attained. To permit assumption of risk still to engulf all the proper territory of contributory negligence and the fellow-servant rule would be only and plainly to nullify Congress' command.

Unfortunately the injunction has not been followed consistently. There are decisions which, in the guise of applying assumption of risk, do no more than shift to the injured employee the burden of his fellow-servants' negligence, while others appear to identify the doctrine with mere contributory negligence. Old confusions die hard. And in this instance some refused to die at all or did so only intermittently. We do not now attempt the refined

[7] Cf. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 243, *et seq.*

[8] 35 Stat. 66.

[9] 35 Stat. 65; *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310; *Second Employers' Liability Cases*, 223 U. S. 1; *Reed* v. *Director General of Railroads*, 258 U. S. 92.

distinctions or the broader obliterations which might be required, if the 1939 amendment had not become law, in order to give effect to the original Congressional purpose. It is wholly inconsistent with that object and with the statute's wording to hold that the employee, merely by accepting or continuing in the employment, assumes the risk of his fellow-servants' negligence or that conduct on his part in a particular situation which amounts to no more than contributory negligence can have that effect.

In this case, if there was negligence upon the employer's part, as to which we express no opinion, it lay either in the company's failure to enforce Rule 30, if that rule was applicable to switching operations, or in the negligence of a fellow servant of Owens and nothing more than that.[10] In the former case, assumption of risk would not apply, at any rate as a matter of law, in the absence of conclusive proof that the employee knew the rule was not applicable or had been abandoned and elected to take his chances in crossing the track.

If we turn then to the other alternative, the fellow-servant doctrine contemplated that an employee knew and assumed, when he accepted employment, the risks which negligence of his fellow employees might create. It was in fact a branch of assumption of risk. When therefore Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the

[10] This is true whether the fellow-servant's negligence consisted in a violation of Rule 30, as the trial court permitted the jury to find, or in any of the other allegedly negligent acts or omissions, which the court refused to submit to the jury. For in any event the conduct claimed to be negligent was that of Koefod or the engineer, both of whom were fellow servants. We cannot assume that the court, when it cast its decision in terms of assumption of risk, intended to rule that there was no evidence of negligence (cf. note 6, *supra*), since its opinion expressly disclaims determining the proper construction of Rule 30, whether its violation would constitute negligence per se, and the other questions raised by the parties on the appeal.

defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow-servants' negligence, upon which the fellow-servant rule was founded. If anything of assumption of risk remained in relation to the negligence of a fellow employee, it was such as required a showing that the injured one knew of and accepted the risk in the particular incident or situation which brought about his injury. There was therefore in this case, consistently with the statute, no general assumption by Owens, by virtue of his acceptance or retention of the work, of the risk which caused his death in so far as it consisted in negligence by Koefod or the engineer.

What remained of the defense, therefore, narrows the inquiry to whether Owens can be shown to have anticipated and decided to chance the particular risk here created by the negligence of his fellow employees. Cf. *Reed* v. *Director General of Railroads,* 258 U. S. 92. As has been shown, respondent has not sustained this burden. That is true, whether the injury is couched in terms of Owens' actual knowledge [11] and deliberate choice [12] or of the "obvious" and "apparent" character of the risk.[13] For, to prevail on this defense, respondent had the burden

[11] Cf. 3 Labatt, Master and Servant (1913), §§ 1190–1192; *York* v. *Chicago, M. & St. P. R. Co.,* 184 Wis. 110, 198 N. W. 377; *Dollar Savings Fund & Trust Co.* v. *Pennsylvania Co.,* 272 Pa. 364, 116 A. 299; *Rummell* v. *Dilworth, Porter & Co.,* 111 Pa. 343, 2 A. 355, 363.

[12] Cf. *Thomas* v. *Quartermaine,* L. R. 18 Q. B. D. 685; *Yarmouth* v. *France,* L. R. 19 Q. B. D. 647; *Smith* v. *Baker & Sons* [1891] A. C. 325.

[13] Cf. *Seaboard Air Line Ry. Co.* v. *Horton,* 233 U. S. 492; *Gila Valley, G. & N. Ry. Co.* v. *Hall,* 232 U. S. 94; *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310; *Chicago & North Western R. Co.* v. *Bower,* 241 U. S. 470; *Chesapeake & Ohio Ry. Co.* v. *Proffitt,* 241 U. S. 462; and compare *Schlemmer* v. *Buffalo, R. & P. Ry. Co.,* 205 U. S. 1, 220 U. S. 590; Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233; Alexander, Re-Thinking Negligence, 11 Miss. L. J. 290.

of persuading the jury that the risk of being run down was "so plainly observable" that Owens was in fact aware of it and decided to chance it. Less than that, under this statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense. The jury decided that respondent had not sustained the burden imposed. We cannot agree with the Court of Appeals that as a matter of law it has. The record shows neither such clear evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict nor so "obvious" or "apparent" a danger as would do so.[14]

If there was negligence by the respondent, the statute requires something more than contributory negligence to defeat recovery, though that may minimize the damages. The jury found this issue in favor of the plaintiff. And the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that.

Whether the trial court properly charged the jury that a violation of Company Rule 30 was ipso facto negligence [15] and took from it the other claimed grounds of negligence [16]

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[14] Cf. *Gila Valley, G. & N. Ry. Co.* v. *Hall*, 232 U. S. 94; *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310; *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 241 U. S. 462; *Chicago, R. I. & P. Ry. Co.* v. *Ward*, 252 U. S. 18; *Chicago & North Western Ry. Co.* v. *Bower*, 241 U. S. 470.

[15] Cf. *Gildner* v. *Baltimore & Ohio R. Co.*, 90 F. 2d 635 (C. C. A.); *Pacheco* v. *New York, N. H. & H. R. Co.*, 15 F. 2d 467 (C. C. A.).

[16] "(a) that defendant and defendant's employees carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant; (b) that defendant and defendant's employees carelessly and negligently moved said cars upon said track without

are questions the Court of Appeals did not reach and we therefore have no occasion to decide. Similarly, in view of our conclusion on assumption of risk, we have no occasion to determine whether the 1939 amendment to the Federal Employers' Liability Act, abolishing that defense, operates where the accident occurred before its enactment but suit is brought after.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE REED dissents because he reads the evidence as showing without contradiction that Rule 30 was not applicable to these switching operations and that it was the practice of switching crews under the circumstances of this movement to "kick" the cars without waiting for a signal from the man in decedent's position at the switch. It follows that the defense of assumption of risk is good.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS join in this dissent.

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any notice or warning whatsoever to plaintiff's decedent; (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by defendant; . . . (e) that defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work."

DECISIONS PER CURIAM, ETC., FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.*

No. 885. CENTRAL POWER & LIGHT CO. ET AL. *v.* TEXAS. Appeal from the Court of Civil Appeals, 3rd Supreme Judicial District, of Texas. May 3, 1943. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *H. E. Butt Grocery Co.* v. *Sheppard,* 311 U. S. 608, and cases cited. *Messrs. Frank M. Kemp* and *Everett L. Looney* for appellants. *Messrs. Gerald C. Mann,* Attorney General of Texas, and *Cecil C. Rotsch* for appellee. Reported below: 165 S. W. 2d 920.

No. —, original. EX PARTE HAROLD MCGINNISS. May 3, 1943. Application denied.

No. —, original. WILSON *v.* HINMAN. May 3, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE FRANK CONTARDI;
No. —, original. EX PARTE STANLEY PEPLOWSKI;
No. —, original. EX PARTE ALBERT SMITH;
No. —, original. EX PARTE CHARLES E. WESTBROOK; and
No. —, original. EX PARTE MARK REYNOLDS AND FRANK REYNOLDS. May 3, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

*For decisions on applications for certiorari, see *post,* pp. 733, 740; rehearing, *post,* pp. 777, 779. For cases disposed of without consideration by the Court, *post,* p. 776.

No. 722. STANDARD DREDGING CORP. *v.* MILLER, INDUSTRIAL COMMISSIONER, ET AL.;

No. 723. INTERNATIONAL ELEVATING CO. *v.* MILLER, INDUSTRIAL COMMISSIONER, ET AL.;

No. 783. MATTON STEAMBOAT CO., INC. ET AL. *v.* MILLER, INDUSTRIAL COMMISSIONER, ET AL.; and

No. 813. LAKE TANKERS CORP. *v.* MILLER, INDUSTRIAL COMMISSIONER, ET AL. May 5, 1943. Murphy, Acting Industrial Commissioner, substituted for Miller, appellee. Nos. 722 and 723 reported *ante*, p. 306; Nos. 783 and 813, *ante*, p. 412.

No. —. KELLY *v.* GERDINK. May 10, 1943. Application denied.

No. 839. LEVIN ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. May 17, 1943. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Mr. Charles Martin Kennedy* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al.; and *Messrs. Amos M. Mathews* and *George D. Rives* for the National Bus Traffic Association, Inc. et al.,—appellees.

No. —, original. EX PARTE HENRY R. ANDERSON. May 17, 1943. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE P. A. WHISTLER;

No. —, original. EX PARTE ARTHUR S. HUMES; and

No. —, original. EX PARTE WALTER F. COLE and FANN COLE. May 17, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Martin V. Ross. May 17, 1943. The motion for leave to file petition for writ of habeas corpus is denied, without prejudice, on the ground that it does not appear that petitioner has exhausted state remedies by applying to the Supreme Court of Michigan for a writ of habeas corpus.

No. —, original. Ex parte Dewey Gooch. May 17, 1943. The motion for leave to file petition for writ of habeas corpus is denied, without prejudice, on the ground that it does not appear that state court remedies have been exhausted.

No. —. Spence *v.* Indiana. May 17, 1943. Application denied.

No. —, original. Ex parte Richard Rice. May 24, 1943. The motion for leave to file petition for writ of habeas corpus is denied.

No. 5, original. Colorado *v.* Kansas et al. May 24, 1943. The report of the Special Master herein is received and ordered to be filed.

No. 2, October Term, 1941. Bernards et al. *v.* Johnson et al. May 24, 1943. The motion to recall the mandate is denied. Mr. Justice Rutledge took no part in the consideration or decision of this application.

No. 520. L. T. Barringer & Co. *v.* United States et al. May 24, 1943. It is ordered that the opinion of this Court be amended by adding at the end the following paragraph:

"We have considered appellant's attack on the suffi-

ciency of the evidence to support the Commission's findings, and conclude, as did the court below, that they are adequately supported by substantial evidence of record. Compare *Florida* v. *United States*, 292 U. S. 1, 12; *Merchants Warehouse Co.* v. *United States, supra*, 508."

The petition for rehearing is denied.

Opinion reported as amended, *ante*, p. 1.

No. —. Ex parte Lawrence McClain. June 1, 1943. Application denied.

No. —. Ex parte Gene McCann. June 1, 1943. The application dated March 16, 1943, is denied.

No. —, original. Ex parte Leslie Williams et al. June 1, 1943. The motion for leave to file a petition for writ of habeas corpus is denied, without prejudice to an application to the state courts in conformity to the opinion of the Supreme Court of Nebraska in *Williams* v. *Olson*, 8 N. W. 2d 830.

No. 15, original. Ex parte United States. On motion for leave to file petition for writ of prohibition and/or mandamus and for a writ of certiorari. June 7, 1943. *Per Curiam:* The motion for leave to file the petition is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. The order of that court of May 3, 1943, denying for want of jurisdiction—which we construe to mean want of power to consider on the merits—the Government's motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus, is vacated on the authority of *Ex*

parte United States, 287 U. S. 241, 248–9, *Ex parte Peru,* 318 U. S. 578, and *Roche* v. *Evaporated Milk Assn., ante,* p. 21. The cause is remanded to the Circuit Court of Appeals for further proceedings not inconsistent with this opinion. Other relief sought by the Government in its application to this Court is denied, without prejudice to an application to the Circuit Court of Appeals. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States.

No. 954. BENDER ET AL. *v.* WICKARD, SECRETARY OF AGRICULTURE. Appeal from the District Court of the United States for the District of Columbia. Argued June 1, 1943. Decided June 7, 1943. *Per Curiam:* The judgment is affirmed on the authority of *Wickard* v. *Filburn,* 317 U. S. 111. *Mr. William Lemke,* with whom *Messrs. Robert H. McNeill, Louis M. Day,* and *T. A. Billingsly* were on the brief, for appellants. *Solicitor General Fahy,* with whom *Assistant Attorney General Tom C. Clark* and *Messrs. Robert L. Stern, John S. L. Yost,* and *W Carroll Hunter* were on the brief, for appellee.

No. —. EX PARTE JOSEPH A. ZOHN. June 7, 1943. Application denied.

No. —. EX PARTE HARRY DUNCOMBE. June 7, 1943. Application denied.

No. —. EX PARTE PAULINE STEVENS. June 7, 1943. Application denied.

No. —, original. EX PARTE CHESTEEN MCCONNELL. June 7, 1943. The motion for leave to file petition for

writ of habeas corpus is denied without prejudice on the ground that it does not appear that all the matters alleged in the petition have been previously presented to the state courts of Indiana.

No. —, original. Ex parte Charles Cassidy. June 7, 1943. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. Ex parte Wallace H. Welch. June 7, 1943. The motion for leave to file petition for writ of habeas corpus is denied. Mr. Justice Rutledge took no part in the consideration or decision of this application.

No. —, original. Ex parte George Foley. June 7, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to the pending application in the District Court.

No. —, original. Ex parte Peter J. Innes. June 7, 1943. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to an application to the District Court.

No. 606. Buchalter *v.* New York;

No. 610. Weiss *v.* New York; and

No. 619. Capone *v.* New York. June 7, 1943. The stay orders heretofore entered are vacated and the mandates are ordered to issue forthwith. See 318 U. S. 797; *ante,* p. 427.

No. 28. Washington Terminal Co. *v.* Boswell et al. Certiorari, 315 U. S. 795, to the United States Court

of Appeals for the District of Columbia. Argued October 19, 20, 1943. Reargued March 8, 9, 1943. Decided June 14, 1943. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Mr. John Dickinson,* with whom *Messrs. Guy W. Knight* and *John B. Prizer* were on the briefs, for petitioner. *Mr. Willard H. McEwen,* with whom *Messrs. Frank L. Mulholland, Clarence M. Mulholland,* and *Harold C. Heiss* were on the briefs, for respondents. By special leave of Court, *Mr. Robert L. Stern,* with whom *Solicitor General Fahy* was on the brief, for the United States, as *amicus curiae,* on the reargument. Reported below: 124 F. 2d 235.

No. —. EX PARTE D. PAVEL FIALA. June 14, 1943. Application denied for the want of original jurisdiction.

No. —, original. EX PARTE JOSEPH GRECO;
No. —, original. EX PARTE WILLIAM J. WHITE; and
No. —, original. EX PARTE JOHN RUSSELL MILLER. June 14, 1943. The motions for leave to file petitions for writs of habeas corpus are denied.

DECISIONS GRANTING CERTIORARI, FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.

No. 14, original. STEFFLER *v.* UNITED STATES. See *ante,* p. 38.

No. 761. UNITED STATES EX REL. BRENSILBER ET AL. *v.* BAUSCH & LOMB OPTICAL CO. ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Homer Cummings* for petitioners. *Mr. Whitney North Seymour* for the

Bausch & Lomb Optical Co. et al.; and *Mr. Raymond M. White* for Carl Zeiss, Inc.,—respondents. *Solicitor General Fahy* and *Assistant Attorney General Tom C. Clark* filed a brief on behalf of the United States, as *amicus curiae,* in support of the petition. Reported below: 131 F. 2d 545.

No. 863. MAGNOLIA PETROLEUM CO. ET AL. *v.* HUNT. May 3, 1943. Petition for writ of certiorari to the Court of Appeals, First Circuit, of Louisiana, granted. *Messrs. Cullen R. Liskow* and *Homer Hendricks* for petitioners. Reported below: 10 So. 2d 109.

No. 864. MERCHANTS NATIONAL BANK, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edward C. Thayer* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 132 F. 2d 483.

No. 830. BRADY, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. See *post,* p. 777.

No. 882. NORTHWEST AIRLINES, INC. *v.* MINNESOTA. May 10, 1943. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. M. J. Doherty* and *W. E. Rumble* for petitioner. *Messrs. J. A. A. Burnquist,* Attorney General of Minnesota, and *Geo. B. Sjoselius,* Assistant Attorney General, for respondent. Reported below: 213 Minn. 395, 7 N. W. 2d 691.

No. 881. CONSUMERS IMPORT CO., INC. ET AL. *v.* KABUSHIKI KAISHA KAWASAKI ZOSENJO ET AL. May 10, 1943.

Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted limited to the fifth question presented by the petition. *Messrs. D. Roger Englar, T. Catesby Jones, Ezra G. Benedict Fox,* and *Thomas H. Middleton* for petitioners. *Mr. George C. Sprague* for respondents. Reported below: 133 F. 2d 781.

No. 235. BUSEY ET AL. *v.* DISTRICT OF COLUMBIA. May 10, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Hayden C. Covington* for petitioners. *Messrs. Richmond B. Keech* and *Vernon E. West* for respondent. *Mr. Osmond K. Fraenkel* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 129 F. 2d 24.

No. 890. FEDERAL POWER COMMISSION ET AL. *v.* HOPE NATURAL GAS CO.; and

No. 891. CLEVELAND *v.* HOPE NATURAL GAS CO. May 17, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Fahy* and *Messrs. Charles V. Shannon, A. F. O'Neil,* and *Harry M. Showalter* for petitioners in No. 890. *Mr. Spencer W. Reeder* for petitioner in No. 891. *Messrs. William B. Cockley* and *William A. Dougherty* for respondent. Reported below: 134 F. 2d 287.

No. 913. MIDSTATE HORTICULTURAL CO., INC. *v.* PENNSYLVANIA RAILROAD CO. May 24, 1943. Petition for writ of certiorari to the Supreme Court of California granted. *Messrs. Hiram W. Johnson, Theodore H. Roche,* and

James Farraher for petitioner. *Messrs. Frederic D. McKenney, John Spalding Flannery, G. Bowdoin Craighill, Caesar L. Aiello, R. Aubrey Bogley, John E. Larson,* and *Wm. F. Zearfaus* for respondent. Reported below: 21 Cal. 2d 243, 131 P. 2d 544.

No. 923. MEREDITH ET AL. *v.* WINTER HAVEN. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. D. C. Hull, Erskine W. Landis, John L. Graham,* and *J. Compton French* for petitioners. *Mr. Giles J. Patterson* for respondent. Reported below: 134 F. 2d 202.

No. 796. GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit;

No. 845. GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* SOUTHERN PACIFIC CO. ET AL.; and

No. 918. GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN *v.* GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. On petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit; and

No. 937. SWITCHMEN'S UNION OF NORTH AMERICA ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. May 24, 1943. The petitions for writs of certiorari in these cases are granted. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of the application in No. 937. *Messrs. John W. Madden, Jr., Clarence E. Weisell,* and *Harold N. McLaughlin* for petitioner in No. 796. *Messrs.*

George M. Naus and *Clarence E. Weisell* for petitioner in No. 845. *Messrs. Donald R. Richberg, Felix T. Smith,* and *Francis R. Kirkham* for petitioner in No. 918. *Messrs. Donald R. Richberg* and *Rufus G. Poole* for petitioners in No. 937. *Messrs. George M. Naus, Clarence E. Weisell,* and *Harold N. McLaughlin* for the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, respondent in No. 918. *Solicitor General Fahy* and *Mr. Robert L. Stern* for the National Mediation Board et al.; and *Messrs. Bernard M. Savage* and *Alfred L. Bennett* for the Brotherhood of Railroad Trainmen,—respondents in No. 937. Reported below: 132 F. 2d 91, 194; 135 F. 2d 785.

No. 935. KELLEY *v.* EVERGLADES DRAINAGE DISTRICT. See *ante,* p. 415.

Nos. 973 and 974. MERCOID CORPORATION *v.* MID-CONTINENT INVESTMENT CO. ET AL. June 1, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Geo. L. Wilkinson* for petitioner. *Mr. Richard Spencer* for the Mid-Continent Investment Co.; and *Messrs. William P. Bair* and *Will Freeman* for Minneapolis-Honeywell Regulator Co.,—respondents. Reported below: 133 F. 2d 803.

No. 975. ATLANTIC REFINING CO. *v.* MOLLER. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Otto Wolff, Jr.* for petitioner. *Messrs. Leonard J. Matteson* and *J. Harry LaBrum* for respondent. Reported below: 134 F. 2d 1000.

No. 972. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GOOCH MILLING & ELEVATOR CO. June 1,

1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Fahy* for petitioner. *Messrs. F. W. McReynolds* and *D. M. Kelleher* for respondent. Reported below: 133 F. 2d 131.

No. 15, original. Ex parte United States. See *ante*, p. 730.

No. 991. Snowden *v.* Hughes et al. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. William R. Ming, Jr.* and *Joseph E. Snowden* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for Edward J. Hughes et al.; and *Mr. Isaac E. Ferguson* for Robert E. Straus et al., Co-Executors,—respondents. Reported below: 132 F. 2d 476.

Nos. 945 and 946. Ford Motor Co. *v.* Gordon Form Lathe Co. June 7, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted limited to the first question presented by the petition. *Messrs. Drury W. Cooper* and *I. Joseph Farley* for petitioner. *Messrs. F. O. Richey* and *B. D. Watts* for respondent. Reported below: 133 F. 2d 487.

No. 949. Smith *v.* Allwright, Election Judge, et al. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Thurgood Marshall, W. Robert Ming, Jr., George M. Johnson, Leon A. Ransom,* and *Carter Wesley* for petitioner. *Mr. Arthur Garfield Hays* filed a brief on behalf of the American Civil Liberties Union, as *amicus*

curiae, in support of the petition. Reported below: 131 F. 2d 593.

Nos. 994 and 995. MERCOID CORPORATION *v.* MINNEAPOLIS-HONEYWELL REGULATOR CO. June 7, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Geo. L. Wilkinson* for petitioner. *Messrs. W. P. Bair* and *Will Freeman* for respondent. Reported below: 133 F. 2d 811.

No. 997. MARVICH *v.* CALIFORNIA ET AL. June 7, 1943. Petition for writ of certiorari to the Supreme Court of California granted. *Mike Marvich, pro se. Mr. Eugene M. Elson* for respondents. Reported below: 44 Cal. App. 2d 858, 113 P. 2d 223.

No. 419. R. SIMPSON & CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. See *post,* p. 778.

No. 1010. ICKES, SECRETARY OF THE INTERIOR, ET AL. *v.* ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Fahy* and *Messrs. Warner W. Gardner* and *Arnold Levy* for petitioners. *Mr. Horace R. Lamb* for respondent. Reported below: 134 F. 2d 694.

No. 930. JOHN V. DOBSON *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 931. E. W. DOBSON *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 932. ESTATE OF COLLINS *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 933. HARWICK *v.* COMMISSIONER OF INTERNAL REVENUE. June 14, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Leland W. Scott* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *Samuel H. Levy* and *Miss Louise Foster* for respondent. Reported below: 133 F. 2d 732.

No. 1027. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HEININGER. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Floyd L. Lanham* for respondent. Reported below: 133 F. 2d 567.

No. 903. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* ANGELOS ET AL.; and

No. 904. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* TSAKIRES ET AL. See *post*, p. 778.

Nos. 907 and 908. COLGATE-PALMOLIVE-PEET CO. *v.* UNITED STATES. See *post*, p. 778.

DECISIONS DENYING CERTIORARI, FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.

No. 824. METROPOLITAN-COLUMBIA STOCKHOLDERS, INC. ET AL. *v.* NEW YORK CITY. May 3, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Archibald N. Jordan* and *Glen N. W. McNaughton* for petitioners. *Messrs. Thomas D. Thacher,*

Paxton Blair, and *Leo Brown* for respondent. Reported below: 289 N. Y. 642, 44 N. E. 2d 616.

No. 831. HARTFORD ELECTRIC LIGHT CO. *v.* FEDERAL POWER COMMISSION. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. E. Barrett Prettyman* and *Austin D. Barney* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Charles V. Shannon* and *Howard E. Wahrenbrock* for respondent. *Messrs. John E. Benton* and *Frank B. Warren* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of the petition. Reported below: 131 F. 2d 953.

Nos. 833 and 834. CRANSTON *v.* THOMPSON ET AL. May 3, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence G. Pickard* for petitioner. *Mr. Harold J. Adams* for respondents. Reported below: 132 F. 2d 631.

No. 836. HALLIWELL *v.* COMMISSIONER OF INTERNAL REVENUE. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 131 F. 2d 642.

No. 842. PARKFORD *v.* COMMISSIONER OF INTERNAL REVENUE. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit de-

nied. *Mrs. Ruth Naus* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 133 F. 2d 249.

No. 850. DEAL *v.* ABRAMSON. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles T. Coleman, Richard B. McCulloch,* and *Shields M. Goodwin* for petitioner. *Mr. Geo. K. Cracraft* for respondent. Reported below: 132 F. 2d 252.

No. 851. MUSICRAFT RECORDS, INC. *v.* SHILKRET. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Maurice L. Rabbino* for petitioner. *Mr. Herbert M. Karp* for respondent. Reported below: 131 F. 2d 929.

No. 853. BOSTWICK ET AL. *v.* BALDWIN DRAINAGE DISTRICT ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas B. Adams* for petitioners. *Mr. Giles J. Patterson* for respondents. Reported below: 133 F. 2d 1.

No. 856. BERGOTY *v.* GAMBERA. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Vernon Sims Jones* and *Raymond Parmer* for petitioner. *Mr. Paul C. Matthews* for respondent. Reported below: 132 F. 2d 414.

No. 857. FRANCE STONE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 3, 1943. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Kendrick* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Mr. Sewall Key* for respondent. Reported below: 135 F. 2d 463.

No. 867. ANDREWS *v.* HOTEL SHERMAN, INC. ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles R. Aiken* for petitioner. *Corinne L. Rice* and *Mr. I. E. Ferguson* for respondents. Reported below: 138 F. 2d 524.

No. 877. REED ET AL. *v.* HOUSTON OIL CO. ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. B. Rubin* for petitioners. *Mr. William Hamlet Blades* for respondents. Reported below: 132 F. 2d 748.

No. 899. MARYLAND CASUALTY CO. *v.* DIXIE PINE PRODUCTS CO. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. M. Roberts* for petitioner. *Mr. T. J. Wills* for respondent. Reported below: 133 F. 2d 583.

No. 852. AMERICAN MANUFACTURING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. U. M. Simon* for petitioners. *Solicitor General Fahy* and *Messrs. Robert B. Watts* and *Ernest A. Gross* and *Miss Ruth Weyand* for respondent. Reported below: 132 F. 2d 740.

No. 861. GILBERT *v.* GENERAL MOTORS CORP. May 3, 1943. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Messrs. John D. Meyer* and *Frank Keiper* for petitioner. *Messrs. Drury W. Cooper* and *Allan C. Bakewell* for respondent. Reported below: 133 F. 2d 997.

No. 874. SWOPE ET AL. *v.* KANSAS CITY ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Wm. H. McCamish* for petitioners. *Messrs. Alton H. Skinner* and *Joseph A. Lynch* for Kansas City et al.; and *Messrs. T. M. Lillard* and *T. W. Bockes* for the Union Pacific Railroad Co.,—respondents. Reported below: 132 F. 2d 788.

No. 823. ZIMMERMAN *v.* WALKER. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied on the ground that the cause is moot, it appearing that Hans Zimmerman, on whose behalf the petition is filed, has been released from the respondent's custody. *Weber* v. *Squier,* 315 U. S. 810; *Tornello* v. *Hudspeth,* 318 U. S. 792. *Mr. F. E. Thompson* for petitioner. *Solicitor General Fahy* for respondent. Reported below: 132 F. 2d 442.

No. 859. SPERRY PRODUCTS, INC. *v.* ASSOCIATION OF AMERICAN RAILROADS ET AL.; and

No. 860. ASSOCIATION OF AMERICAN RAILROADS ET AL. *v.* SPERRY PRODUCTS, INC. May 3, 1943. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE REED took no part in the consideration or decision of these applications. *Messrs. Stephen H. Philbin* and *John B. Cunningham* for petitioner in No. 859 and respondent in No. 860. *Messrs.*

L. B. Mann, Robert C. Brown, Jr., and *Louis J. Carruthers* for respondents in No. 859 and petitioners in No. 860. Reported below: 132 F. 2d 408.

No. 900. MUSKOGEE COUNTY ET AL. *v.* UNITED STATES. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. *Messrs. Mac Q. Williamson,* Attorney General of Oklahoma, and *Houston E. Hill,* Assistant Attorney General, for petitioners. *Solicitor General Fahy* for the United States. Reported below: 133 F. 2d 61.

No. 878. PRUDENTIAL INSURANCE CO. *v.* SAXE. May 3, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Benjamin S. Minor, Arthur P. Drury,* and *John E. Powell* for petitioner. *Mr. Sidney V. Smith* for respondent. Reported below: 134 F. 2d 16.

No. 837. MARTIN *v.* AMRINE, WARDEN. May 3, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Robert Martin, pro se.* Reported below: 156 Kan. 388, 133 P. 2d 582.

No. 841. COCHRAN *v.* KANSAS ET AL. May 3, 1943. Petition for writ of certiorari to the Supreme Court of

Kansas denied. *Charles H. Cochran, pro se.* Reported below: 156 Kan. 216, 133 P. 2d 91.

No. 854. CANTY *v.* ALABAMA. May 3, 1943. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Alex C. Birch* for petitioner. *Mr. William N. McQueen,* Attorney General of Alabama, for respondent. Reported below: 11 So. 2d 844.

No. 872. FLEEMAN *v.* KANSAS ET AL. May 3, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Ralph W. Fleeman, pro se.*

No. 875. POSEY *v.* DOWD, WARDEN. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Winston Posey, pro se.* Reported below: 134 F. 2d 613.

No. 780. CLEM *v.* MARYLAND. May 3, 1943. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *James R. Clem, pro se.*

No. 847. UNITED STATES EX REL. JACKSON ET AL. *v.* BRADY, WARDEN. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. Arthur Eby* for petitioners. *Mr. William C. Walsh,* Attorney General of Maryland, for respondent. Reported below: 133 F. 2d 476.

No. 855. FRANKEL *v.* BETHLEHEM-FAIRFIELD SHIPYARD, INC. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Wm. Taft Feldman* for petitioner. *Mr. Ed-*

win A. Swingle for respondent. Reported below: 132 F. 2d 634.

No. 868. BRADY ET AL. *v.* BEAMS ET AL. May 3, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Chas. E. McPherren* for petitioners. *Messrs. Joseph C. Stone, W. T. Anglin, Charles A. Moon, Francis Stewart, Leon C. Phillips, D. A. Richardson, L. O. Lytle, George Jennings, Harry B. Parris,* and *Wilbur J. Holleman* for respondents. Reported below: 132 F. 2d 985.

No. 950. REYNOLDS ET AL. *v.* MAYO, STATE PRISON CUSTODIAN. May 3, 1943. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mark Reynolds* and *Frank Reynolds, pro se.*

No. 942. DEERING *v.* NATIONAL MORTGAGE CORP. ET AL. May 3, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *James R. Deering, pro se.* Reported below: 263 App. Div. 937, 33 N. Y. S. 2d 109.

No. 786. PITT RIVER POWER CO. *v.* UNITED STATES. May 10, 1943. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Sanford H. E. Freund* and *Carl A. Mead* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Valentine Brookes* for the United States. Reported below: 98 Ct. Cls. 253.

No. 862. HINZE ET AL. *v.* DUEL, COMMISSIONER OF INSURANCE. May 10, 1943. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs.*

Austin H. Forkner and *John Wattawa* for petitioners. *Mr. James Ward Rector* for respondent. Reported below: 241 Wis. 394, 6 N. W. 2d 330.

No. 883. FULLARD-LEO ET AL. *v.* UNITED STATES. May 10, 1943. Petition for writ of certiorari to the Circuit 10, 1943. Petition for writ of certiorari to the Circuit *G. M. Robertson* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson, Roger P. Marquis,* and *Valentine Brookes* for the United States. Reported below: 133 F. 2d 743.

No. 896. TEXAS LAND & MORTGAGE CO. *v.* MULLICAN. May 10, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. E. L. Klett* and *Charles L. Black* for petitioner. *Mr. C. C. Crenshaw* for respondent. Reported below: 132 F. 2d 241.

No. 906. COVER *v.* SCHWARTZ, DOING BUSINESS AS HYGEIA RESPIRATOR CO. May 10, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joshua R. H. Potts* and *Eugene Vincent Clarke* for petitioner. *Nathan Schwartz, pro se.* Reported below: 133 F. 2d 541.

No. 911. TENNESSEE EX REL. SHERMAN ET AL. *v.* HYMAN, DEAN OF THE UNIVERSITY OF TENNESSEE COLLEGE OF MEDICINE, ET AL. May 10, 1943. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. A. L. Heiskell* for petitioners. *Messrs. Nat Tipton* and *Wassell Randolph* for respondents.

No. 914. NEW YORK LIFE INSURANCE CO. *v.* CHAPMAN. May 10, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Jones, Jr.* for petitioner. *Mr. David Baron* for respondent. Reported below: 132 F. 2d 688.

No. 961. CAMERON *v.* GORDON. May 10, 1943. Petition for writ of certiorari to the Court of Appeals, Licking County, Ohio, denied. *Mr. J. R. Fitzgibbon* for petitioner.

No. 846. MAGNUS BECK BREWING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 10, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank D. Scott* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, Samuel H. Levy, Edward First,* and *Valentine Brookes* for respondent. Reported below: 132 F. 2d 379.

No. 880. AETNA CASUALTY & SURETY CO. *v.* FIRST CAMDEN NATIONAL BANK & TRUST CO. May 10, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph W. Henderson* and *George M. Brodhead, Jr.* for petitioner. *Mr. William T. Boyle* for respondent. Reported below: 132 F. 2d 114.

No. 788. STANDARD OIL CO. OF KANSAS *v.* UNITED STATES. May 10, 1943. Petition for writ of certiorari to the Court of Claims denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. J. Gilmer Korner, Jr.* for petitioner. *Solici-*

tor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., and *Messrs. Sewall Key* and *Samuel H. Levy* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 98 Ct. Cls. 201.

No. 897. OSAGE TRIBE OF INDIANS ET AL. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL. May 10, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Thomas P. Gore* and *Leslie C. Garnett* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* for Harold L. Ickes, Secretary of the Interior; and *Messrs. Roy St. Lewis* and *Peter Q. Nyce* for Tom H. Fraley, County Treasurer,—respondents. Reported below: 133 F. 2d 47.

No. 959. J. A. KENNEDY REALTY CORP. ET AL. *v.* NEW YORK CITY. May 10, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350; *Department of Banking* v. *Pink,* 317 U. S. 264. *Mr. Jesse Rothman* for petitioners. *Messrs. Thomas D. Thacher* and *Paxton Blair* for respondent. Reported below: 289 N. Y. 766, 46 N. E. 2d 363.

No. 752. POLAKOW'S REALTY EXPERTS, INC. *v.* ALABAMA; and

No. 753. STRUMPF *v.* ALABAMA. May 10, 1943. Petition for writs of certiorari to the Supreme Court of Ala-

bama denied for want of final judgments. *Rankin* v. *State,* 11 Wall. 380; *Heike* v. *United States,* 217 U. S. 423; *Brown* v. *South Carolina,* 298 U. S. 639; *Eastman* v. *Ohio,* 299 U. S. 505. *Mr. Horace C. Wilkinson* for petitioners. *Mr. William N. McQueen,* Attorney General of Alabama, for respondent. Reported below: 243 Ala. 441, 10 So. 2d 461.

No. 993. JOYCE *v.* STATE BANK OF MADISON. May 10, 1943. Petition for writ of certiorari to the Supreme Court of Minnesota denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *A. M. Joyce, pro se.* Reported below: 213 Minn. 380, 7 N. W. 2d 385.

No. 710. WHEAT ET AL. *v.* TEXAS LAND & MORTGAGE CO., LTD. ET AL. May 17, 1943. Petition for writ of certiorari to the Supreme Court of Texas denied. *J. B. Wheat, pro se.* Reported below: 139 Tex. 679, 163 S. W. 2d 880.

No. 884. STIMSON ET AL. *v.* TARRANT ET AL. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. M. S. Gunn, Bradford M. Melvin,* and *Harold C. Faulkner* for petitioners. *Mr. Geo. E. Hurd* for respondents. Reported below: 132 F. 2d 363.

Nos. 887 and 888. BOTANY WORSTED MILLS *v.* NATIONAL LABOR RELATIONS BOARD. May 17, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for

the Third Circuit denied. *Mr. Frederic R. Sanborn* for petitioner. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Ernest A. Gross,* and *Miss Ruth Weyand* for respondent. Reported below: 133 F. 2d 876.

No. 902. PUERTO RICO *v.* UNITED STATES ET AL. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William Cattron Rigby* for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Dwight D. Doty* for respondents. Reported below: 132 F. 2d 220.

No. 916. EDISON BROTHERS STORES, INC. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. Sydney Salkey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 133 F. 2d 575.

No. 917. LINDER *v.* MERLE-SMITH ET AL. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Maxwell C. Katz* and *Otto C. Sommerich* for petitioner. *Messrs. Paxton Blair, Clifton Murphy, Edwin S. S. Sunderland, Philip A. Carroll,* and *Leo Brown* for respondents.

No. 921. PACIFIC STEAMSHIP LINES, INC. *v.* CROSBY. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Keith*

R. Ferguson for petitioner. *Mr. Sidney M. Ehrman* for respondent. Reported below: 133 F. 2d 470.

No. 938. FLENIKEN ET UX. *v.* GREAT AMERICAN INDEMNITY CO. ET AL. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Becker* for petitioners. *Mr. Benj. B. Taylor* for respondents. Reported below: 134 F. 2d 208.

No. 986. REGAN *v.* KING, REGISTRAR. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. U. S. Webb* and *Hester Webb* for petitioner. Reported below: 134 F. 2d 413.

No. 781. SOUTH MERCUR MINING CO. *v.* NEW MERCUR MINING CO. ET AL. May 17, 1943. Petition for writ of certiorari to the Supreme Court of Utah denied. *Messrs. W. Q. Van Cott, Clair M. Senior,* and *Raymond T. Senior* for petitioner. *Messrs. Grover A. Giles* and *J. H. Morgan* for respondents. Reported below: 102 Utah 131, 128 P. 2d 269.

No. 898. LOCHMANN *v.* SYKES. May 17, 1943. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Fred Hinkle* for petitioner. *Mr. Joe T. Rogers* for respondent. Reported below: 156 Kan. 223, 132 P. 2d 620.

No. 903. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* ANGELOS ET AL.; and

No. 904. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* TSAKIRES ET AL. May 17, 1943. Petition for writ

of certiorari to the Court of Appeals of New York in each case denied on the ground that it does not appear from the record that the federal question presented by the petition was properly presented to or expressly passed on by the New York Court of Appeals. *Mr. Louis B. Boudin* for petitioners. *Mr. Abraham Michael Katz* for respondents. See *post*, p. 778. Reported below: 289 N. Y. 498, 507, 46 N. E. 2d 903, 908.

No. 929. Di Marzo *v.* United States. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morris Lavine* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States.

No. 924. Wabash Valley Coach Co. *v.* Sale et al.; and

No. 925. Turner *v.* Wabash Valley Coach Co. et al. May 17, 1943. The petition for writ of certiorari to the Supreme Court of Indiana in each case is denied. *Mr. Thomas F. O'Mara* for petitioner in No. 924. *Mr. Royal T. McKenna* for petitioner in No. 925. Reported below: 46 N. E. 2d 212.

No. 980. Cress *v.* State of Washington. On petition for writ of certiorari to the Supreme Court of Washington; and

No. 982. Cole et al. *v.* Mayo, Custodian of the Florida State Prison. On petition for writ of certiorari to the Supreme Court of Florida. May 17, 1943. The petitions for writs of certiorari are denied. *Joseph W. Cress, Walter F. Cole,* and *Fann Cole, pro se.* Reported below: No. 980, 15 Wash. 2d 661, 131 P. 2d 955; No. 982, 12 So. 2d 907.

No. 869. FLETCHER *v.* EVENING STAR NEWSPAPER CO.; and

No. 901. FLETCHER *v.* STEPHENS ET AL. May 17, 1943. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. The CHIEF JUSTICE is of the opinion that the petitions should be granted. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. *Edmond C. Fletcher, pro se. Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondents in No. 901. Reported below: 133 F. 2d 394, 395.

No. 873. UNITED STATES EX REL. INNES *v.* CRYSTAL, COMMANDING OFFICER. May 17, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied on the ground that the cause is moot, it appearing that petitioner no longer is in respondent's custody, *Zimmerman* v. *Walker, ante,* p. 744, and cases cited. *Peter J. Innes, Jr., pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 131 F. 2d 576.

No. 1011. ROBINSON *v.* ALABAMA; and

No. 1012. DANIELS *v.* ALABAMA. May 17, 1943. The petitions for writs of certiorari to the Supreme Court of Alabama are denied. The stay orders heretofore entered are vacated. *Mr. Leon Ransom* for petitioners. Reported below: 243 Ala. 675, 684, 11 So. 2d 732, 756.

Nos. 893 and 894. EDDY ET AL. *v.* KELBY ET AL., TRUSTEES, ET AL. May 24, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Silbiger* for petitioners. *Messrs.*

Charles H. Kelby and *Charles M. McCarty* for respondents.

No. 909. CONTERNO *v.* ROGAN, COLLECTOR OF INTERNAL REVENUE. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harold C. Morton* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. Reported below: 132 F. 2d 726.

No. 920. WIRRICK *v.* BLOOMINGTON. May 24, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Ode L. Rankin* for petitioner. *Mr. Bernard Edwin Wall* for respondent. Reported below: 381 Ill. 347, 45 N. E. 2d 852.

No. 922. TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD *v.* EVENS. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Leonard B. Levy, Wm. C. Dufour,* and *John St. Paul, Jr.* for petitioner. Reported below: 134 F. 2d 275.

No. 928. GLENS FALLS INDEMNITY CO. ET AL. *v.* HENDERSON, DEPUTY COMMISSIONER. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank S. Normann* for petitioners. *Solicitor General Fahy* and *Assistant Attorney General Shea* for respondent. Reported below: 134 F. 2d 320.

No. 939. WATSON ET AL. *v.* CASPERS. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Weightstill Woods* for petitioners. *Mr. Emmet J. Cleary* for respondent. Reported below: 132 F. 2d 614.

No. 941. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* CASEY, TRUSTEE. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. G. K. Richardson* for petitioner. *Thomas J. Casey, pro se.* Reported below: 134 F. 2d 162.

No. 944. RAINES *v.* UNEMPLOYMENT COMPENSATION COMMISSION. May 24, 1943. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Louis B. LeDuc* for petitioner. *Mr. Herman D. Ringle* for respondent. Reported below: 129 N. J. L. 387, 30 A. 2d 31.

No. 952. GREAT LAKES COCA-COLA BOTTLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John May* and *Ednyfed H. Williams* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *F. E. Youngman* for respondent. Reported below: 133 F. 2d 953.

No. 978. HOWARD NATIONAL BANK & TRUST CO. *v.* MORGAN ET AL. May 24, 1943. Petition for writ of certiorari to the Supreme Court of Vermont denied. *Mr.*

Guy M. Page for petitioner. *Mr. Edwin W. Lawrence* for respondents. Reported below: 113 Vt. 126, 30 A. 2d 305.

No. 984. HADESMAN *v.* MICHIGAN. May 24, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. James A. Cobb* for petitioner. Reported below: 304 Mich. 481, 8 N. W. 2d 145.

No. 1016. MILK WAGON DRIVERS' UNION, LOCAL 753, ET AL. *v.* FICHTER. May 24, 1943. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Joseph A. Padway* and *David A. Riskind* for petitioners. *Mr. Russell J. Topper* for respondent. Reported below: 382 Ill. 91, 46 N. E. 2d 921.

Nos. 907 and 908. COLGATE-PALMOLIVE-PEET CO. *v.* UNITED STATES. May 24, 1943. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. E. Ennalls Berl, Albert C. Wall, Mason Trowbridge,* and *Edward J. O'Mara* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Alvin J. Rockwell* for the United States. Reported below: 130 F. 2d 913.

No. 965. JOHNSTON *v.* BOARD OF DENTAL EXAMINERS ET AL. May 24, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Alvin L. Newmyer* for petitioner. *Messrs. Richmond B.*

Keech and *Vernon E. West* for respondents. Reported below: 134 F. 2d 9.

No. 843. PLENTY ET AL. *v.* UNITED STATES. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Antoine Kills Plenty* and *Leonard Jack, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 133 F. 2d 292.

No. 976. THOMPSON, TRUSTEE, *v.* LAWSON ET AL. May 24, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Garfield C. Thompson, pro se.* Reported below: 132 F. 2d 21.

No. 962. MESCALL *v.* W. T. GRANT CO. May 24, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clair McTurnan* for petitioner. *Mr. Alan W. Boyd* for respondent. Reported below: 133 F. 2d 209.

No. 895. RUMBERGER *v.* WELSH ET AL. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill,* and *R. Aubrey Bogley* for petitioner. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* for respondents. Reported below: 131 F. 2d 384.

No. 905. J. W. SANDERS COTTON MILL, INC. *v.* MOODY. June 1, 1943. Petition for writ of certiorari to

the Supreme Court of Mississippi denied. *Mr. Ben F. Cameron* for petitioner. *Mr. Marion W. Reily* for respondent. Reported below: 10 So. 2d 544.

No. 936. LAYTON *v.* THAYNE. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. J. D. Skeen* and *E. J. Skeen* for petitioner. Reported below: 133 F. 2d 287.

No. 947. HENJES *v.* AETNA INSURANCE CO. ET AL. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Morris Ehrlich* for petitioner. *Mr. George S. Brengle* for respondents. Reported below: 132 F. 2d 715.

No. 948. UNITED STATES GYPSUM CO. *v.* STORNELLI. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. T. Carl Nixon* and *E. Willoughby Middleton* for petitioner. *Mr. William L. Clay* for respondent. Reported below: 134 F. 2d 461.

No. 951. SCORUP-SOMERVILLE CATTLE CO. *v.* MERRION ET AL., COPARTNERS. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Waldemar Q. Van Cott* for petitioner. *Messrs. Robert L. Judd, Paul H. Ray,* and *S. J. Quinney* for respondents. Reported below: 134 F. 2d 473.

No. 953. ILLINOIS EX REL. DAVIDSON ET AL. *v.* BRADLEY ET AL. June 1, 1943. Petition for writ of certiorari to

the Supreme Court of Illinois denied. *Mr. Urban A. Lavery* for petitioners. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondents. Reported below: 382 Ill. 383, 47 N. E. 2d 93.

No. 955. VALENTI *v.* UNITED STATES. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. I. Maurice Wormser* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for the United States. Reported below: 134 F. 2d 362.

No. 960. PATTERSON ET AL. *v.* TEXAS COMPANY. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. I. Kilpatrick* and *Jack M. Randal* for petitioners. *Mr. Herbert S. Garrett* for respondent. Reported below: 131 F. 2d 998.

No. 964. STANDARD DREDGING CORP. *v.* WALLING, ADMINISTRATOR. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roger Siddall, A. V. Cherbonnier,* and *Robert A. Lilly* for petitioner. *Solicitor General Fahy* and *Mr. Irving J. Levy* and *Miss Bessie Margolin* for respondent. Reported below: 132 F. 2d 322.

No. 985. KRESGE DEPARTMENT STORES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ward J. Herbert* for

petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *Morton K. Rothschild* and *Miss Helen R. Carloss* for respondent. Reported below: 134 F. 2d 76.

No. 1013. KELLEY, GLOVER & VALE, INC. ET AL. *v.* HEITMAN, RECEIVER, ET AL. June 1, 1943. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Messrs. Walter Myers* and *Jay E. Darlington* for petitioners. *Mr. John F. Anderson* for respondents. Reported below: 220 Ind. 625, 44 N. E. 2d 981.

No. 940. POTTS, TRADING AS SOUTHERN PROGRESS PUBLISHING CO., *v.* DIES. June 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *J. S. Potts, pro se.* Reported below: 132 F. 2d 734.

No. 979. BOONE *v.* BOONE. June 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Stuart H. Robeson* for petitioner. *Messrs. M. Ryan McCown* and *Louis M. Denit* for respondent. Reported below: 132 F. 2d 14.

No. 966. GENERAL MOTORS CORP. *v.* LARSON ET AL. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE and MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr.*

Drury W. Cooper for petitioner. *Messrs. Edward Vogel* and *Murray M. Cowen* for respondents. Reported below: 134 F. 2d 450.

No. 969. AMERICAN GAS & ELECTRIC CO. *v.* SECURITIES & EXCHANGE COMMISSION. June 1, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Frederic L. Ballard* for petitioner. *Solicitor General Fahy* and *Messrs. John F. Davis* and *Theodore L. Thau* for respondent. Reported below: 134 F. 2d 633.

No. 1014. ROOSEVELT STEAMSHIP CO., INC. *v.* BRADY, ADMINISTRATRIX. June 1, 1943. The motion to use the certified record in No. 269 is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is denied. *Messrs. Raymond Parmer* and *Vernon Sims Jones* for petitioner. *Mr. Simone N. Gazan* for respondent. Reported below: 128 F. 2d 169.

No. 927. LINDSAY *v.* UNITED STATES. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Clyde Lindsay, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Valentine Brookes* and *Miss Beatrice Rosenberg* for the United States. Reported below: 134 F. 2d 960.

No. 990. JOHNSON *v.* WARDEN, U. S. PENITENTIARY, MCNEIL ISLAND. June 1, 1943. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Johnnie Johnson, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Beatrice Rosenberg* for respondent. Reported below: 134 F. 2d 166.

No. 1001. BOWEN *v.* UNITED STATES. June 1, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hugh A. Bowen, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for the United States. Reported below: 134 F. 2d 845.

No. 866. INDIANS OF CALIFORNIA *v.* UNITED STATES. June 7, 1943. Petition for writ of certiorari to the Court of Claims denied. *Mr. Hartwell H. Linney,* Assistant Attorney General of California, for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Raymond T. Nagle* and *Vernon L. Wilkinson* for the United States. Reported below: 98 Ct. Cls. 583.

No. 956. MEADE *v.* UNITED STATES. June 7, 1943. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George R. Shields, Herman J. Galloway, John W. Gaskins,* and *Fred W. Shields* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 98 Ct. Cls. 797.

No. 970. BINKLEY MINING CO. *v.* WHEELER, ACTING DIRECTOR, BITUMINOUS COAL DIVISION, ET AL. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry*

Adamson for petitioner. *Solicitor General Fahy* and *Messrs. Warner W. Gardner, Arnold Levy,* and *Jesse B. Messitte* for respondents. Reported below: 133 F. 2d 863.

No. 971. BINKLEY MINING CO. *v.* WHEELER, ACTING DIRECTOR, BITUMINOUS COAL DIVISION, ET AL. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry Adamson* for petitioner. *Solicitor General Fahy* and *Messrs. Warner W. Gardner, Arnold Levy,* and *Jesse B. Messitte* for respondents. Reported below: 133 F. 2d 872.

No. 988. CLEVELAND TRUST CO. ET AL. *v.* STOLLER. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. A. L. Gebhard* and *Kerns Wright* for petitioners. *Mr. Elmer McClain* for respondent. Reported below: 133 F. 2d 180.

No. 989. GORDON FORM LATHE CO. *v.* FORD MOTOR CO. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey* and *B. D. Watts* for petitioner. *Messrs. Drury W. Cooper* and *I. Joseph Farley* for respondent. Reported below: 133 F. 2d 487.

No. 992. N. O. NELSON CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt, Stanley S. Waite,* and *Jacob Chasnoff* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and

J. Louis Monarch and *Mrs. Maryhelen Wigle* for respondent. Reported below: 133 F. 2d 846.

No. 1000. PETTICREW REAL ESTATE CO. *v.* MUFFLER, RECEIVER, ET AL. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sidney G. Kusworm* for petitioner. *Mr. George W. Tehan* for respondents. Reported below: 132 F. 2d 479.

No. 1004. KEAL DRIVEWAY CO. ET AL. *v.* CAR AND GENERAL INSURANCE CORP. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. W. Shackelford* for petitioners. *Mr. K. I. McKay* for respondent. Reported below: 132 F. 2d 834.

No. 1007. WINSTON *v.* MARTIN ET AL., TRADING AS MARTIN BROS. June 7, 1943. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. John S. Barbour* for petitioner. *Mr. Albert V. Bryan* for respondents. Reported below: 181 Va. 94, 23 S. E. 2d 873.

No. 1041. DUBINA *v.* MICHIGAN. June 7, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Harry C. Howard* for petitioner. Reported below: 304 Mich. 363, 8 N. W. 2d 99.

No. 977. S. J. GROVES & SONS CO. *v.* WARREN, COMPTROLLER GENERAL. June 7, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. O. R. McGuire* and *O. R. McGuire, Jr.* for

petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Valentine Brookes* for respondent. Reported below: 135 F. 2d 264.

No. 1003. LUBAR, TRUSTEE, *v.* HARTMAN. June 7, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. William R. Lichtenberg* for petitioner. Reported below: 133 F. 2d 44.

No. 1006. DISTRICT OF COLUMBIA *v.* QUEEN CITY BREWING CO. June 7, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Messrs. Richmond B. Keech, Vernon E. West,* and *Glenn Simmon* for petitioner. *Messrs. E. Barrett Prettyman, F. G. Awalt,* and *Raymond Sparks* for respondent. Reported below: 134 F. 2d 44.

No. 1005. ARCHER ET AL., CO-PARTNERS, *v.* SECURITIES & EXCHANGE COMMISSION. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Carl V. Rice* for petitioners. *Solicitor General Fahy* and *Messrs. John F. Davis, Milton V. Freeman,* and *Theodore L. Thau* for respondent. Reported below: 133 F. 2d 795.

No. 1008. BROOKLYN TRUST CO., TRUSTEE, *v.* KELBY ET AL. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or

decision of this application. *Messrs. Jackson A. Dykman* and *Ralph W. Crolly* for petitioner. *Messrs. Charles H. Kelby* and *Charles M. McCarty* for Prudence-Bonds Corp. et al.; and *Mr. Samuel Silbiger* for George E. Eddy,—respondents. Reported below: 134 F. 2d 105.

No. 910. TAPIA *v.* UNITED STATES. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Pedro E. Sanchez Tapia, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *W. Marvin Smith* and *Miss Melva M. Graney* for the United States. Reported below: 134 F. 2d 279.

No. 981. WHITE ET AL. *v.* UNITED STATES. June 7, 1943. Petition for writ of certiorari to the Court of Claims denied. *Ben White, pro se. Solicitor General Fahy, Assistant Attorney General Littell,* and *Mr. Vernon L. Wilkinson* for the United States. Reported below: 98 Ct. Cls. 804.

No. 987. BURALL *v.* JOHNSTON, WARDEN. June 7, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Louis Burall, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for respondent. Reported below: 134 F. 2d 614.

No. 1032. SLAUGHTER *v.* MADISON ET AL. June 7, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Elwood G. Hubert* for petitioner. Reported below: 135 F. 2d 650.

No. 1053. CASSIDY *v.* MICHIGAN. June 7, 1943. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Charles Cassidy, pro se.*

No. 1066. JONES *v.* BROPHY, WARDEN. June 7, 1943. Petition for writ of certiorari to the Supreme Court of New York denied. *Fred Jones, pro se. Messrs. Nathaniel L. Goldstein,* Attorney General of New York, and *William S. Elder, Jr.* for respondent. Reported below: 290 N. Y. 742.

No. 998. KENDRICK *v.* SANFORD, WARDEN. June 7, 1943. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350. *William Kendrick, pro se.* Reported below: 128 F. 2d 263.

No. 1034. ALLEN *v.* UNITED STATES. June 7, 1943. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–66. *James Allen, pro se.*

No. 1002. WELCH ET AL. *v.* UNITED STATES. June 7, 1943. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. James J. Laughlin* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and

Valentine Brookes and *Miss Beatrice Rosenberg* for the United States. Reported below: 135 F. 2d 465.

No. 713. VELAZQUEZ *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Hugh R. Francis* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Valentine Brookes* for the United States. Reported below: 131 F. 2d 916.

No. 865. THE ESMOND MILLS ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Andrew B. Trudgian* for petitioners. *Solicitor General Fahy* for respondent. Reported below: 132 F. 2d 753.

No. 958. KENNEDY LAUNDRY CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James A. O'Callaghan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *L. W. Post* for respondent. Reported below: 133 F. 2d 660.

No. 983. JOHN M. WHELAN & SONS, INC. *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Court of Claims denied. *Mr. George E. Beechwood* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Valentine Brookes* and *Hubert H. Margolies* for the United States. Reported below: 98 Ct. Cls. 601.

No. 999. CITY AND COUNTY OF SAN FRANCISCO *v.* WILLIAMS ET AL. June 14, 1943. Petition for writ of certiorari to the District Court of Appeals, First Appellate District, of California, denied. *Messrs. John J. O'Toole* and *Dion R. Holm* for petitioner. Reported below: 56 Cal. App. 2d 374, 133 P. 2d 70.

No. 1017. AMTORG TRADING CORP. ET AL. *v.* AMERICAN FOREIGN STEAMSHIP CORP. ET AL. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles Recht* and *Edward G. Dobrin* for petitioners. *Mr. George deForest Lord* for respondents. Reported below: 133 F. 2d 765.

No. 1018. L. A. WELLS CONSTRUCTION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Meyer A. Cook* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Samuel H. Levy* for respondent. Reported below: 134 F. 2d 623.

No. 1019. WALLING, ADMINISTRATOR, *v.* T. BUETTNER & CO. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Fahy* and *Mr. Irving J. Levy* for petitioner. *Mr. Walter Bachrach* for respondent. Reported below: 133 F. 2d 306.

No. 1020. NORTH KANSAS CITY DEVELOPMENT CO. ET AL. *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. June 14, 1943. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Eighth Circuit denied. *Messrs. Godfrey Goldmark* and *Henry N. Ess* for petitioners. *Messrs. John L. Rice, William S. Hogsett, Hale Houts, Andrew C. Scott, J. C. James, Walter McFarland,* and *Eldon Martin* for respondent. Reported below: 134 F. 2d 142.

No. 1022. MAINE *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Frank I. Cowan,* Attorney General of Maine, and *Nathan W. Thompson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. J. Frank Staley* for the United States. Reported below: 134 F. 2d 574.

No. 1023. MALTZ, DOING BUSINESS AS EXCEL MANUFACTURING CO., *v.* SAX ET AL. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Myer N. Rosengard* for petitioner. *Messrs. Claude A. Roth* and *Harry E. Smoot* for respondents. Reported below: 134 F. 2d 2.

No. 1024. BECKER *v.* LOEW'S, INCORPORATED. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Moses Levitan* for petitioner. *Mr. Herbert M. Lautmann* for respondent. Reported below: 133 F. 2d 889.

No. 1025. MONTANA *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. R. V. Bottomly,* Attorney General of Montana, for petitioner. *Solicitor General Fahy, Assistant Attorney General Littell,*

and *Messrs. Vernon L. Wilkinson* and *Dwight D. Doty* for the United States. Reported below: 134 F. 2d 194.

No. 1026. C. P. A. COMPANY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John M. Hudson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, Samuel H. Levy,* and *F. E. Youngman* for respondent. Reported below: 134 F. 2d 616.

No. 1029. KERTESS ET AL. *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph H. Broderick* for petitioners. *Solicitor General Fahy* and *Mr. Robert L. Stern* for the United States.

No. 1031. TRAVELERS INSURANCE CO. *v.* MAGILL, CONSERVATOR. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Jones, Jr.* for petitioner. *Mr. J. L. London* for respondent. Reported below: 134 F. 2d 612.

No. 1033. DOUCHAN *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles A. Meyer* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Oscar A. Provost* and *Valentine Brookes* and *Miss Beatrice Rosenberg* for the United States. Reported below: 136 F. 2d 144.

No. 1037. STEINER *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Warren O. Coleman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* and *Miss Melva M. Graney* for the United States. Reported below: 134 F. 2d 931.

No. 1038. TIEDEMANN ET AL. *v.* ESTODURAS STEAMSHIP CO., INC. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles Recht* for petitioners. *Mr. P. A. Beck* for respondent. Reported below: 133 F. 2d 719.

No. 1042. DAVIS, TREASURER, ET AL. *v.* DINNY & ROBBINS, INC. June 14, 1943. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Simon J. Liebowitz* for petitioners. *Messrs. Samuel J. Robbins* and *Sidney O. Raphael* for respondent. Reported below: 290 N. Y. 101, 48 N. E. 2d 280.

No. 1052. MOLZAHN *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Francis Fisher Kane* and *James W. Carpenter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 135 F. 2d 92.

No. 968. BENGUET CONSOLIDATED MINING CO. *v.* PERKINS ET AL. June 14, 1943. Petition for writ of certiorari to the District Court of Appeals, First Appellate Dis-

trict, of California, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. W. H. Lawrence, Alfred Sutro,* and *Francis R. Kirkham* for petitioner. *Messrs. Hiram W. Johnson, James Farraher,* and *Theodore H. Roche* for respondents. Reported below: 55 Cal. App. 2d 720, 132 P. 2d 70.

No. 637. UNITED STATES *v.* MINSKI. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Fahy* for the United States. *Mr. Harold H. Armstrong* for respondent. Reported below: 131 F. 2d 614.

No. 967. ELLIOTT *v.* BUCHANAN, WARDEN. June 14, 1943. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. S. H. Brown* and *Zeb A. Stewart* for petitioner. Reported below: 292 Ky. 614, 167 S. W. 2d 703.

No. 608. DAVIS *v.* ARIZONA. June 14, 1943. Petition for writ of certiorari to the Supreme Court of Arizona denied on the ground that the judgment below rested on a non-federal ground adequate to support it. See *Brooks* v. *State,* 51 Ariz. 544, 78 P. 2d 498. *Mr. Hayden C. Covington* for petitioner. Reported below: 58 Ariz. 444, 120 P. 2d 808.

No. 996. ELLERBRAKE *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit of Appeals for the Seventh Circuit denied. *Armin Ellerbrake, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Oscar A. Provost* for the United States. Reported below: 134 F. 2d 683.

No. 1009. ARWOOD *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter P. Armstrong* for petitioner. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 134 F. 2d 1007.

No. 1077. FARRELL *v.* LANAGAN, WARDEN. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Joseph A. Farrell, pro se.*

No. 943. HOLMES *v.* UNITED STATES. June 14, 1943. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Leo S. Holmes, pro se. Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Robert S. Erdahl* and *Irvin Goldstein* for the United States. Reported below: 134 F. 2d 125.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.

No. 557. NATIONAL LABOR RELATIONS BOARD *v.* GOODYEAR TIRE & RUBBER CO. ET AL. Certiorari, 317 U. S. 622, to the Circuit Court of Appeals for the Fifth Circuit. May 3, 1943. Dismissed on motion of counsel for the petitioner. *Solicitor General Fahy* and *Mr. Robert B. Watts* for petitioner. *Messrs. O. R. Hood* and *Forney Johnston* for respondents. Reported below: 129 F. 2d 661.

No. 886. SYLVANIA INDUSTRIAL CORP. *v.* VISKING CORPORATION. On petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. May 3, 1943. Dismissed on motion of counsel for the petitioner. *Messrs. Lawrence Bristol* and *Leonard A. Watson* for petitioner. Reported below: 132 F. 2d 947.

No. 963. MISSOURI-KANSAS PIPE LINE CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Delaware. May 3, 1943. Dismissed on motion of counsel for the appellant. *Mr. Arthur G. Logan* for appellant. *Mr. James B. Alley* for appellees. Reported below: 38 F. Supp. 401.

No. 794. GREEN, DOING BUSINESS AS GREEN VACUUM CLEANER CO., *v.* ELECTRIC VACUUM CLEANER CO., INC. Certiorari, 318 U. S. 753, to the Circuit Court of Appeals for the Sixth Circuit. May 17, 1943. Dismissed on motion of counsel for the petitioner. *Messrs. Merritt A. Vickery* and *Earl William Aurelius* for petitioner. *Messrs. John F. Oberlin* and *L. C. Spieth* for respondent. Reported below: 132 F. 2d 312.

DECISIONS GRANTING REHEARING, FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.

No. 830. BRADY, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. May 3, 1943. It appearing that the judgment of the Supreme Court of North Carolina is a final judgment in view of the decisions of that Court called to our attention by the petition for rehearing, *Tussey* v. *Owen*, 147 N. C. 335, 337, 61 S. E. 180; *Hollingsworth* v. *Skelding*, 142 N. C. 246, 253, 55 S. E. 212, the petition for rehearing is granted and the order denying a writ of certiorari, 318

U. S. 792, is vacated. The petition for writ of certiorari to the Supreme Court of North Carolina is granted. *Mr. Julius C. Smith* for petitioner. *Messrs. Russell M. Robinson* and *S. R. Prince* for respondent. Reported below: 222 N. C. 367, 23 S. E. 2d 334.

No. 419. R. SIMPSON & Co., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. June 7, 1943. The motion for leave to file a petition for rehearing is granted, the petition for rehearing is granted and the order denying certiorari, 317 U. S. 677, is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted, limited to the question presented by the second reason relied upon in the petition for writ of certiorari. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Mr. Gerald Donovan* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 128 F. 2d 742.

No. 903. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* ANGELOS ET AL.; and

No. 904. CAFETERIA EMPLOYEES UNION, LOCAL 302, ET AL. *v.* TSAKIRES ET AL. June 14, 1943. Petition for rehearing granted and order denying certiorari, *ante,* p. 753, vacated. Petition for writs of certiorari to the Court of Appeals of New York granted. *Mr. Louis B. Boudin* for petitioners. *Mr. Abraham Michael Katz* for respondents. Reported below: 289 N. Y. 507, 46 N. E. 2d 903, 908.

Nos. 907 and 908. COLGATE-PALMOLIVE-PEET CO. *v.* UNITED STATES. June 14, 1943. Petition for rehearing granted and order denying certiorari, *ante,* p. 758, vacated.

Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. *Mr. E. Ennalls Berl, Albert C. Wall, Mason Trowbridge,* and *Edward J. O'Mara* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Alvin J. Rockwell* for the United States. Reported below: 130 F. 2d 913.

DECISIONS DENYING REHEARING, FROM APRIL 20, 1943, THROUGH JUNE 14, 1943.*

No. 903, October Term, 1941. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. ET AL. May 3, 1943. Fifth petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 802.

No. 517. AJELLO *v.* PAN AMERICAN AIRWAYS CORP. ET AL. May 3, 1943. Second petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 802.

No. 566. LAFUENTE *v.* COUNTY OF LOS ANGELES. May 3, 1943. The motion for leave to file a fourth petition for rehearing is granted, and the fourth petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 802.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 436. DE ZON *v.* AMERICAN PRESIDENT LINES, LTD.; and

No. 459. BUIE *v.* UNITED STATES. May 3, 1943. Petitions for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. 318 U. S. 660, 766.

No. 597. MCSPARRAN *v.* CITY OF PORTLAND. May 3, 1943. 318 U. S. 768.

No. 746. MARKHAM *v.* ILLINOIS EX REL. CROMER ET AL. May 3, 1943. 318 U. S. 783.

No. 764. JONES *v.* BIDDLE, ATTORNEY GENERAL. May 3, 1943. 318 U. S. 784.

No. 767. REGINELLI *v.* UNITED STATES. May 3, 1943. 318 U. S. 783.

No. 797. MASON *v.* PALO VERDE IRRIGATION DISTRICT May 3, 1943. 318 U. S. 785.

No. 801. CORKUM *v.* NEW YORK. May 3, 1943. 318 U. S. 795.

No. 321. CREEK NATION *v.* UNITED STATES; and

No. 322. SEMINOLE NATION *v.* UNITED STATES. May 10, 1943. Petition for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 629.

No. 772. NEW YORK TRUST CO., TRUSTEE, ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. May 10, 1943. 318 U. S. 786.

No. 737. LUKENS *v.* OHIO. May 10, 1943. 318 U. S. 789.

No. 754. REECE *v.* EBERSBACH ET AL. May 10, 1943. 318 U. S. 784.

No. 809. ANDERSON *v.* UNITED STATES. May 10, 1943. 318 U. S. 790.

No. 810. ANDERSON ET UX. *v.* UNITED STATES. May 10, 1943. 318 U. S. 790.

No. 819. FRANKLINVILLE REALTY CO. *v.* ARNOLD CONSTRUCTION CO. May 10, 1943. 318 U. S. 791.

Nos. 34, 35, and 36. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.;

Nos. 37 and 38. SUSMAN ET AL., CONVERTIBLE BOND OWNERS, *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.; and

Nos. 62, 63, and 64. IRVING TRUST CO., SUCCESSOR TRUSTEE, *v.* MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL. May 17, 1943. The petitions for rehearing are denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. 318 U. S. 793.

No. 556. BOARD OF COUNTY COMMISSIONERS ET AL. *v.* SEBER ET AL. May 17, 1943. Petition for rehearing denied. MR. JUSTICE REED took no part in the consideration or decision of this application. 318 U. S. 705.

No. 818. GRAF ET AL. *v.* NEWARK. May 17, 1943. 318 U. S. 790.

No. 520. L. T. BARRINGER & CO. *v.* UNITED STATES ET AL. See *ante*, p. 729.

No. —. KELLY *v.* COUNTY OF VIGO. May 24, 1943.

No. 450. DOUGLAS ET AL. *v.* JEANNETTE (PENNSYLVANIA) ET AL. May 24, 1943.

No. 758. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. May 24, 1943. 318 U. S. 791.

No. 759. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. May 24, 1943. 318 U. S. 792.

No. 982. COLE ET AL. *v.* MAYO, CUSTODIAN OF THE FLORIDA STATE PRISON. May 24, 1943.

No. 354. AKRON, CANTON & YOUNGSTOWN RAILWAY CO. *v.* HAGENBUCH ET AL., TRUSTEES, ET AL.; and

No. 355. CHAMBERLAIN ET AL. *v.* HAGENBUCH ET AL., TRUSTEES, ET AL. May 24, 1943. Petition for rehearing

denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 318 U. S. 794.

No. 873. UNITED STATES EX REL. INNES *v.* CRYSTAL, COMMANDING OFFICER. May 24, 1943.

No. 629. UNITED STATES *v.* LEPOWITCH ET AL.;

No. 765. HOPKINS, U. S. DISTRICT JUDGE, *v.* UNITED STATES; and

No. 844. PEARSON *v.* CALIFORNIA ET AL. May 24, 1943. Petitions for rehearing denied. MR. JUSTICE MURPHY took no part in the consideration or decision of these applications. No. 629, 318 U. S. 702; No. 765, 318 U. S. 786; No. 844, 318 U. S. 745.

No. 792. STEPHAN *v.* UNITED STATES. May 24, 1943. The petition for rehearing is denied. MR. JUSTICE MURPHY is of the opinion that the petition for rehearing and the petition for writ of certiorari should be granted. 318 U. S. 781.

No. 459. BUIE *v.* UNITED STATES. June 1, 1943. The second petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 566. LAFUENTE *v.* COUNTY OF LOS ANGELES. June 1, 1943. The fifth petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 824. METROPOLITAN-COLUMBIA STOCKHOLDERS, INC. ET AL. *v.* NEW YORK CITY. June 1, 1943.

No. 847. UNITED STATES EX REL. JACKSON *v.* BRADY, WARDEN. June 1, 1943.

No. 868. BRADY ET AL. *v.* BEAMS ET AL. June 1, 1943.

No. 877. REED ET AL. *v.* HOUSTON OIL CO. ET AL. June 1, 1943.

No. 25. MCNABB ET AL. *v.* UNITED STATES. June 7, 1943. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied. As the case is for retrial in the district court, it will be open to all parties to adduce all evidence relevant to the admissibility of the confessions, whether adduced in the previous trial or not. MR. JUSTICE RUTLEDGE took no part in the consideration or disposition of this application. 318 U. S. 332.

No. 512. STANDARD OIL CO. (INDIANA) *v.* COMMISSIONER OF INTERNAL REVENUE. June 7, 1943. The motion for leave to file petition for rehearing is granted, and the petition for rehearing is denied. MR. JUSTICE ROBERTS and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. 317 U. S. 688.

No. 517. AJELLO *v.* PAN AMERICAN AIRWAYS CORP. ET AL. June 7, 1943. The third petition for rehearing is denied.

No. 764. JONES *v.* BIDDLE, ATTORNEY GENERAL. June 7, 1943. On consideration of all the papers filed in this case the second petition for rehearing is denied.

No. 961. CAMERON *v.* GORDON. June 7, 1943. The petition for rehearing is denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 589. BOWLES *v.* UNITED STATES. June 7, 1943. *Ante*, p. 33.

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No. 938. FLENIKEN ET AL. *v.* GREAT AMERICAN INDEMNITY CO. ET AL. June 14, 1943.

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No. 869. FLETCHER *v.* EVENING STAR NEWSPAPER CO. June 14, 1943. Petitions for rehearing denied. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications.

No. 764. JONES *v.* BIDDLE, ATTORNEY GENERAL. June 14, 1943. Third petition for rehearing denied.

AMENDMENT OF RULES.

ORDER.

It is ordered that paragraph 1 of rule 36 of the rules of this Court be and the same hereby is amended by adding as the first sentence thereof the following:

"An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the judge or justice who allows it. A prior timely application to another judge or justice does not extend the statutory period. See *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412."

JUNE 7, 1943.

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