UNITED STATES REPORTS

VOLUME 321

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1943

FROM JANUARY 11 TO AND INCLUDING (IN PART) APRIL 10, 1944

ERNEST KNAEBEL
REPORTER

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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

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SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1943.

SNOWDEN *v.* HUGHES ET AL.

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

No. 57. Argued December 13, 1943.—Decided January 17, 1944.

1. Allegations of a complaint in the federal district court, in substance that the defendants, members of a state board acting as such but in violation of state law, by their failure and refusal to certify correctly the results of a primary, deprived the complainant of nomination and election as a representative in the state assembly, *held* insufficient to state a cause of action under the Fourteenth Amendment or the Civil Rights Act of 1871. Pp. 5, 13.
2. The privileges and immunities clause of the Fourteenth Amendment does not protect rights derived solely from the relationship of the citizen and his State established by state law. P. 6.
3. The right to become a candidate for state office is not a right or privilege protected by the privileges and immunities clause. P. 7.
4. The unlawful denial by state action of a right to a state political office is not a denial of a right of property or of liberty secured by the due process clause of the Fourteenth Amendment. P. 7.
5. The action of the state board, though it be regarded as state action, did not deny the equal protection of the laws in violation of the Fourteenth Amendment. P. 7.

   (a) Where a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection, since the distinction be-

tween the successful and the unsuccessful candidate is based on a permissible classification. P. 8.

(b) The unlawful administration of a state statute fair on its face, resulting in its unequal application to those entitled to be treated alike, is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination. P. 8.

(c) The illegality under state law of the action taken neither adds to nor subtracts from its validity under the Fourteenth Amendment. P. 11.

6. Whether the action of the state board in this case was state action within the meaning of the Fourteenth Amendment is not decided. P. 13.

132 F. 2d 476, affirmed.

CERTIORARI, 319 U. S. 738, to review the affirmance of a judgment dismissing the complaint in a suit to recover damages for infringement of civil rights.

Mr. William R. Ming, Jr., with whom *Mr. Joseph E. Snowden* was on the brief, for petitioner.

Mr. William C. Wines, Assistant Attorney General of Illinois, with whom *Mr. George F. Barrett*, Attorney General, was on the brief, for Edward J. Hughes et al.; and *Messrs. Isaac E. Ferguson* and *Herbert M. Lautmann* submitted for Robert E. Straus et al.,—respondents.

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

Petitioner, a citizen of Illinois, brought this suit at law in the District Court for Northern Illinois against respondents, citizens of Illinois, to recover damages for infringement of his civil rights in violation of the Fourteenth Amendment and 8 U. S. C. §§ 41, 43, and 47 (3). He alleged that the suit was within the jurisdiction of the court as a suit arising under the Constitution and laws of the United States, 28 U. S. C. § 41 (1), a suit for the recovery of damages for injury to property and for deprivation of

a right or privilege of a citizen of the United States, 28 U. S. C. § 41 (12), and a suit for the recovery of damages for deprivation, under color of state law, custom, regulation or usage, of a right or privilege secured by the Fourteenth Amendment, 28 U. S. C. § 41 (14).

The complaint makes the following allegations. Petitioner was one of several candidates at the April 9, 1940, Republican primary election held in the Third Senatorial District of Illinois pursuant to Ill. Rev. Stat. (State Bar Assn. Ed.), Ch. 46, Art. 8 for nominees for the office of representative in the Illinois General Assembly. By reason of appropriate action taken respectively by the Republican and Democratic Senatorial Committees of the Third Senatorial District in conformity to the scheme of proportional representation authorized by Ill. Rev. Stat., Ch. 46, § 8–13, two candidates for representative in the General Assembly were to be nominated on the Republican ticket and one on the Democratic ticket. Since three representatives were to be elected, Ill. Const., Art. IV, §§ 7 and 8, and only three were to be nominated by the primary election, election at the primary as one of the two Republican nominees was, so the complaint alleges, tantamount to election to the office of representative.

The votes cast at the primary election were duly canvassed by the Canvassing Board of Cook County, which, as required by Ill. Rev. Stat., Ch. 46, § 8–15, certified and forwarded to the Secretary of State a tabulation showing the results of the primary election in the Third Senatorial District. By this tabulation the Board certified that petitioner and another had received respectively the second highest and highest number of votes for the Republican nominations. Ill. Rev. Stat., Ch. 46, § 8–13 requires that the candidates receiving the highest votes shall be declared nominated.

Respondents Hughes and Lewis, and Henry Horner whose executors were joined as defendants and are re-

spondents here, constituted the State Primary Canvassing Board for the election year 1940. By Ill. Rev. Stat., Ch. 46, § 8–15 it was made their duty to receive the certified tabulated statements of votes cast, including that prepared by the Canvassing Board of Cook County, to canvass the returns, to proclaim the results and to issue certificates of nomination to the successful candidates. Such a certificate is a prerequisite to the inclusion of a candidate's name on the ballot. Ill. Rev. Stat., Ch. 46, § 10–14. Acting in their official capacity as State Primary Canvassing Board they issued, on April 29, 1940, their official proclamation which designated only one nominee for the office of representative in the General Assembly from the Third Senatorial District on the Republican ticket and excluded from the nomination petitioner, who had received the second highest number of votes for the Republican nomination.

After setting out these facts the complaint alleges that Horner and respondents Hughes and Lewis, "willfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate showing that petitioner was one of the Republican nominees, that they conspired and confederated together for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the laws of Illinois. It alleges that Horner, Hughes and Lewis, acting as state officials under color of the laws of Illinois, thereby deprived petitioner of the Republican nomination for representative in the General Assembly and of election to that office, to his damage in the amount of $50,000, and by so doing deprived petitioner, in contravention of 8 U. S. C. §§ 41, 43 and 47 (3), of rights, privileges and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, both guaranteed to him by the Fourteenth Amendment.

The District Court granted motions by respondents to strike the complaint and dismiss the suit upon the grounds, among others, that the facts alleged did not show that the plaintiff had been deprived of any right, privilege or immunity secured to him by the Constitution or laws of the United States, and that, the alleged cause of action being predicated solely upon a claim that state officers had failed to perform duties imposed upon them by state law, their failure was not state action to which the prohibitions of the Fourteenth Amendment are alone directed, and hence was not sufficient to establish an infringement of rights secured to petitioner by the Fourteenth Amendment. The Court of Appeals for the Seventh Circuit affirmed, 132 F. 2d 476, holding on authority of *Barney* v. *City of New York,* 193 U. S. 430, that the action of the members of the State Board, being contrary to state law, was not state action and was therefore not within the prohibitions of the Fourteenth Amendment.

In substance petitioner's alleged cause of action is that the members of the State Primary Canvassing Board, acting as such but in violation of state law, have by their false certificate or proclamation and by their refusal to file a true certificate deprived petitioner of nomination and election as representative in the state assembly. To establish a cause of action arising under the Constitution and laws of the United States within the jurisdiction of the District Court as prescribed by 28 U. S. C. § 41 (1), (12) and (14), he relies particularly on the provisions of the Fourteenth Amendment supplemented by two sections of the Civil Rights Act of 1871, 8 U. S. C. §§ 43, 47 (3).[1]

[1] 8 U. S. C. § 41, on which petitioner also relies, guaranties to all persons within the United States "the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." As pointed out later in this opinion, no claim of discrimination based on race is made.

Section 43 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of and State . . ., subjects, or causes to be subjected, any citizen of the United States or other person . . . 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 . . . for redress." Section 47 (3), so far as now relevant, gives an action for damages to any person "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States," by reason of a conspiracy of two or more persons entered into "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws." It is the contention of petitioner that the right conferred on him by state law to become a candidate for and to be elected to the office of representative upon receipt of the requisite number of votes in the primary and general elections, is a right secured to him by the Fourteenth Amendment, and that the action of the State Primary Canvassing Board deprived him of that right and of the equal protection of the laws for which deprivation the Civil Rights Act authorizes his suit for damages.

Three distinct provisions of the Fourteenth Amendment guarantee rights of persons and property. It declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining

to state citizenship and derived solely from the relationship of the citizen and his state established by state law. *Slaughter-House Cases,* 16 Wall. 36, 74, 79; *Maxwell* v. *Bugbee,* 250 U. S. 525, 538; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 539; *Madden* v. *Kentucky,* 309 U. S. 83, 90–93. The right to become a candidate for state office, like the right to vote for the election of state officers, *Minor* v. *Happersett,* 21 Wall. 162, 170–78; *Pope* v. *Williams,* 193 U. S. 621, 632; *Breedlove* v. *Suttles,* 302 U. S. 277, 283, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.

More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall* v. *Beckham,* 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave* v. *Newell,* 246 U. S. 650, as we reaffirm it now.

Nor can we conclude that the action of the State Primary Canvassing Board, even though it be regarded as state action within the prohibitions of the Fourteenth Amendment, was a denial of the equal protection of the laws. The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely from the Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes. On the argument before us petitioner

disclaimed any contention that class or racial discrimination is involved. The insistence is rather that the Board, merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law and has thereby denied to him the equal protection of the laws secured by the Fourteenth Amendment.

But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86–7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–4. But a discriminatory purpose is not presumed, *Tarrance* v. *Florida*, 188 U. S. 519, 520; there must be a showing of "clear and intentional discrimination," *Gundling* v. *Chicago*, 177 U. S. 183, 186; see *Ah Sin* v. *Wittman*, 198 U. S. 500, 507–8; *Bailey* v. *Alabama*, 219 U. S. 219, 231. Thus the denial of equal protection by

the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal* v. *Delaware,* 103 U. S. 370, 394, 397; *Norris* v. *Alabama,* 294 U. S. 587, 589; *Pierre* v. *Louisiana,* 306 U. S. 354, 357; *Smith* v. *Texas,* 311 U. S. 128, 130–31; *Hill* v. *Texas,* 316 U. S. 400, 404. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia* v. *Rives,* 100 U. S. 313, 322–3; *Martin* v. *Texas,* 200 U. S. 316, 320–21; *Thomas* v. *Texas,* 212 U. S. 278, 282; cf. *Williams* v. *Mississippi,* 170 U. S. 213, 225.

Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter* v. *Louisville & Nashville R. Co.,* 196 U. S. 599, 607, 609–10; *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 526.[2] Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither sys-

[2] See also *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 36; *Sioux City Bridge Co.* v. *Dakota Co.,* 260 U. S. 441, 447; *Bohler* v. *Calloway,* 267 U. S. 479, 489; *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, 25, 28; cf. *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 139.

tematic nor long-continued. Cf. *McFarland* v. *American Sugar Co., supra.*

The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "willful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 243. So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee. Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged. Indeed on the allegations of the complaint, the one Republican nominee certified by the Board was entitled to be certified as the nominee receiving the highest number of votes, and the Board's failure to certify petitioner, so far as appears, was unaffected by and unrelated to the certification of the other, successful nominee. While the failure to certify petitioner for one nomination and the certification of another for a different nomination may have involved a violation of state law, we fail to see in this a denial of the equal protection of the laws more than if the Illinois statutes themselves had provided that one candidate should be certified and no other.

If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. Compare *Owensboro Waterworks Co.* v. *Owensboro,* 200 U. S. 38, 47. And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature. *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 369–70. See also *Coulter* v. *Louisville & Nashville R. Co., supra,* 608–9; *Hayman* v. *Galveston,* 273 U. S. 414, 416; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 244. A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory. Compare *Missouri* v. *Lewis,* 101 U. S. 22, 30, 32; *Yick Wo* v. *Hopkins, supra.*

Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. *McPherson* v. *Blacker,* 146 U. S. 1, 23–4; *Nixon* v. *Herndon,* 273 U. S. 536, 538; *Nixon* v. *Condon,* 286 U. S. 73; see *Pope* v. *Williams, supra,* 634. But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

A construction of the equal protection clause which would find a violation of federal right in every departure

by state officers from state law is not to be favored. And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment. See *Taylor & Marshall* v. *Beckham, supra,* and authorities cited; *Cave* v. *Newell, supra.* Only once has it been contended here that an unlawful denial by state executive, administrative or legislative authority of the right to state office is for that reason alone a denial of equal protection. *Wilson* v. *North Carolina,* 169 U. S. 586.[3] In rejecting that contention this Court said at pages 594–5:

"In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. . . .

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does

[3] In *United States* v. *Classic,* 313 U. S. 299, this Court refused to pass on a similar contention as to a refusal to count ballots cast in an election for federal officers. The holding in that case that a refusal to count votes cast, and the consequent false certification of candidates, was a denial of a right or privilege "secured . . . by the Constitution . . . of the United States" was rested on the ground that the right to vote for a federal officer, whether or not it be deemed a privilege of citizens of the United States, see *Twining* v. *New Jersey,* 211 U. S. 78, 97, is a right secured by Art. 1, §§ 2 and 4 of the Constitution. See 313 U. S. at 314–5 and cases cited; *United States* v. *Mosley,* 238 U. S. 383. The Court pointed out that "the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates," 313 U. S. at 329, and declined to consider whether the facts alleged could constitute such a denial.

not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

As we conclude that the right asserted by petitioner is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon, we find it unnecessary to consider whether the action by the State Board of which petitioner complains is state action within the meaning of the Fourteenth Amendment. The authority of *Barney* v. *City of New York, supra,* on which the court below relied, has been so restricted by our later decisions, see *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 37; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 294; *Iowa-Des Moines Bank* v. *Bennett, supra,* 246–7; cf. *United States* v. *Classic,* 313 U. S. 299, 326, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action.

The judgment is accordingly affirmed for failure of the complaint to state a cause of action within the jurisdiction of the District Court.

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE FRANKFURTER, concurring:

The plaintiff brought this action in a district court to recover damages claimed to have been suffered at the hands of the defendants as members of the State Primary Canvassing Board of Illinois. The theory of his claim is that the defendants, being in legal effect the State of Illinois, denied to the plaintiff the equal protection of its laws.

The crucial allegations charging such a denial are in the following paragraph of the complaint:

"11. That notwithstanding the clear and plain mandates of section 454 and section 456, chapter 46, Illinois Revised Statutes, the defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner, acting as the State Primary Canvassing Board of Illinois, entered into an understanding and agreement and combined, conspired and confederated together to willfully, maliciously and arbitrarily refuse to designate plaintiff as one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois and to issue their Official Proclamation designating plaintiff as one of the said nominees and to file their proper and correct certificate in the office of the Secretary of State of Illinois showing that plaintiff was one of the nominees of the Republican Party for the Office of Representative in the General Assembly from the Third Senatorial District of Illinois."

I should be silent were the Court merely to hold that as a matter of pleading these allegations are not sufficiently explicit to charge as an arbitrary act of discrimination the concerted and purposeful use by the defendants of their official authority over the election machinery of the State so as to withhold from the plaintiff the opportunity to present himself to the voters of that State "as one of the nominees of the Republican Party" for election to the General Assembly of Illinois. I should be silent even though it were avowed that such a constrained reading of the complaint reflected the most exacting attitude against drawing into the federal courts controversies over state elections. Unless I mistake the tenor of the Court's opinion, the decision is broader than mere inadequacy of pleading.

All questions pertaining to the political arrangements of state governments are, no doubt, peculiarly outside the

domain of federal authority. The disposition of state offices, the manner in which they should be filled and contests concerning them, are solely for state determination, always provided that the equality of treatment required by the Civil War Amendments is respected. And so I appreciate that there are strong considerations of policy which should make federal courts inhospitable toward litigation involving the enforcement of state election laws. But I do not think that the criteria for establishing a denial of the equal protection of the laws are any different in cases of discrimination in granting opportunities for presenting oneself as a candidate for office "as one of the nominees of the Republican Party" than those that are relevant when claim is made that a state has discriminated in regulating the pursuit of a private calling. It appears extremely unlikely that the plaintiff could establish his case. The sole question now is whether, assuming he can make good his allegations, he should be denied the opportunity of a trial to do so.

The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state. See *McGovern* v. *New York,* 229 U. S. 363, 370–1. However, in forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws," the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment. Speaking of a situation in which conscious discrimination by a state touches "the plaintiff alone," this Court tersely expressed the governing principle by observing that "we suppose that no one would contend that the plaintiff was given the

equal protection of the laws." *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86, 87. And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws? See *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 571.

But to constitute such unjust discrimination the action must be that of the state. Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit in the federal courts on the basis of illegal state action. The problem is beset with inherent difficulties and not unnaturally has had a fluctuating history in the decisions of the Court. Compare *Barney* v. *City of New York*, 193 U. S. 430, with *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, *Memphis* v. *Cumberland Telephone Co.*, 218 U. S. 624, with *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278. It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is *pro tanto* the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court.

Our question is not whether a remedy is available for such an illegality, but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts to the states, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials. See, *e. g.*, *Ex parte Royall*, 117 U. S. 241, 251. Take the present case. The plaintiff complains that he has been denied the equal

protection of the laws of Illinois precisely because the defendants, constituting the State Canvassing Board, have willfully, with set purpose to withdraw from him the privileges afforded by Illinois, disobeyed those laws. To adapt the language of an earlier opinion, I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State. Holmes, J., dissenting, in *Raymond* v. *Chicago Traction Co., supra* at p. 41.

I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State, certainly not until the highest court of the State confirms such action and thereby makes it the law of the State. I agree, in a word, with the court below that *Barney* v. *City of New York,* 193 U. S. 430, is controlling. See Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials,* 40 Harv. L. Rev. 969. Neither the wisdom of its reasoning nor its holding has been impaired by subsequent decisions. A different problem is presented when a case comes here on review from a decision of a state court as the ultimate voice of state law. See for instance *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239. And the case is wholly unlike *Lane* v. *Wilson,* 307 U. S. 268, in which the election officials acted not in defiance of a statute of a state but under its authority.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY concurs, dissenting:

My disagreement with the majority of the Court is on a narrow ground. I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the state elec-

tions. That would place the federal judiciary in a position "to supervise and review the political administration of a state government by its own officials and through its own courts" (*Wilson* v. *North Carolina,* 169 U. S. 586, 596)—matters on which each State has the final say. I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination. But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He charges a conspiracy to wilfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an "unequal" administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose. While the complaint could have drawn the issue more sharply, I think it defines it sufficiently to survive the motion to dismiss.

No doubt unconstitutional discriminations against a class, such as those which we have recently condemned in *Lane* v. *Wilson,* 307 U. S. 268, and *Skinner* v. *Oklahoma,* 316 U. S. 535, may be more readily established than a discrimination against an individual *per se.* But though the proof is exacting, the latter may be shown as in *Cochran* v. *Kansas,* 316 U. S. 255, where a prisoner was prevented from perfecting an appeal. The criteria are the same whether one has been denied the opportunity to be a candidate for public office, to enter private business, or to have the protection of the courts. If the law is "applied and administered by public authority with an evil eye and an unequal

hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 373–374), it is the same as if the invidious discrimination were incorporated in the law itself. If the action of the Illinois Board in effect were the same as an Illinois law that Snowden could not run for office, it would run afoul of the equal protection clause whether that discrimination were based on the fact that Snowden was a Negro, Catholic, Presbyterian, Free Mason, or had some other characteristic or belief which the authorities did not like. Snowden should be allowed the opportunity to make that showing no matter how thin his chances of success may seem.

THOMSON, TRUSTEE OF THE PROPERTY OF THE CHICAGO & NORTH WESTERN RAILWAY CO., *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 70. Argued December 7, 1943.—Decided January 17, 1944.

1. In respect of operations by motor vehicle in a coordinated rail-motor freight service—the motor vehicles being operated by contractors under arrangements described in the opinion—only the railroad was a "common carrier by motor vehicle" entitled to "grandfather" rights under § 206 (a) of Part II of the Interstate Commerce Act, since it alone held itself out to the general public to engage in such service. P. 23.
2. The Commission's so-called "control and responsibility" test, so far as it leads to a different result, is disapproved. P. 26.

Reversed.

APPEAL from a decree of a District Court of three judges, dismissing the complaint in a suit to set aside an order of the Interstate Commerce Commission, 31 M. C. C. 299.

Mr. Nye F. Morehouse, with whom *Messrs. William T. Faricy* and *P. F. Gault* were on the brief, for appellant.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Edward Dumbauld, Walter J. Cummings, Jr., Daniel W. Knowlton,* and *Allen Crenshaw* were on the brief, for appellees.

Mr. Justice Murphy delivered the opinion of the Court.

This direct appeal from a statutory three-judge district court involves important problems relating to "grandfather" rights to a certificate as a common carrier by motor vehicle in a single coordinated rail-motor freight service. The final decree of that court dismissed appellant's petition to set aside an order of the Interstate Commerce Commission, 31 M. C. C. 299. The Commission's order had denied to the Chicago and North Western Railway Company, of which appellant is trustee, a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" of § 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. § 306 (a).

The essential facts are clear. The Chicago and North Western Railway Company, hereinafter referred to as the railroad, has extensive mileage in nine western states and is a large carrier of freight in less than carload lots. Prior to and since the statutory "grandfather" date of June 1, 1935, it has supplemented its rail freight service by providing motor vehicle service between various freight stations on its rail lines. There are twenty-three such motor vehicle routes on highways parallel with and roughly adjacent to the railroad's lines. The motor trucks transport less than carload lots of freight in complete coordination with the rail service. The railroad instituted

this additional method of transportation in order to furnish an improved and more convenient freight service to the public in certain areas of light traffic and in order to curtail car mileage and way-freight service. Motor vehicle transportation, in other words, is merely a new method of carrying on part of its all-rail freight business in which it had been engaged for many years.

The railroad has consistently held itself out to the general public and to shippers as being engaged in this coordinated rail-motor freight service. It solicits all the freight transported by the trucks operating as part of this unified service and its bills of lading and tariffs are used throughout. The shipper does not know in a specific instance whether his freight will be shipped entirely by rail or partly by motor vehicle. But he is informed by the railroad's tariffs that the railroad at its option may substitute motor vehicle service for rail service between stations on its lines and that the charges in such a case are the same as would be applicable for all-rail service.

In so substituting motor vehicle service, the railroad has not deemed it advisable to purchase or lease motor trucks or employ its own personnel in such operations. Instead it has entered into written contracts for this service with motor vehicle operators who also serve customers other than the railroad. But the railroad at all times maintains direct and complete control of the movement and handling of its freight by these operators. It fixes the truck schedules so as to coordinate them with the rail schedules and designates the amount and particular shipments of freight to be moved. The motor vehicle operators issue no billing of any kind and solicit none of the freight transported for the railroad. They have no contractual or other relationships with either the shippers or the receivers of the freight. Their trucks are loaded at the freight stations by railroad employees, sometimes assisted by the truck drivers. After a truck is loaded a manifest

is issued by the railroad's agent, which is signed by the truck driver; upon delivery of the freight to the other railroad freight station the manifest is signed by another railroad agent, thus releasing the motor vehicle operator.

The written contracts describe the operators as "independent contractors" and state that "nothing herein contained shall be construed as inconsistent with that status." The contractors are bound by these contracts to provide vehicles of a type satisfactory to the railroad for the purpose of transporting freight between certain specified freight stations in accordance with such schedules and instructions as shall be given by the railroad. The contractors agree to transport such freight as the railroad designates in a manner satisfactory to the railroad. All persons operating the motor vehicles are under the employment and direction of the contractors and are not considered railroad employees. The operations are conducted under the contractors' own names and the vehicles do not display the railroad's name. The contractors further agree to comply with state, federal and municipal laws and to indemnify the railroad against any failure or default in this respect. They also agree to indemnify the railroad against all loss or damage of any kind resulting from the operation of the motor vehicles. The railroad is authorized to maintain for its own protection public liability and property damage insurance on all the vehicles at the contractors' expense up to a specified amount. Finally, the contracts provide that in the event that the highways between any of the stations become impassable the contractors shall immediately notify the railroad so that it can arrange and substitute other service if it desires.

With respect to these operations, the Commission found that the railroad did not operate motor vehicles "either as owner or under lease or any other equivalent arrangement." The contract provisions were found to "establish

that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant." The Commission accordingly denied the railroad's "grandfather" application. The district court dismissed without opinion the railroad's suit to set aside and enjoin the Commission's order, after finding that the order was lawful and was supported by substantial evidence.

In light of these undisputed facts, however, we hold that the Commission erred in finding that the railroad was not entitled to a certificate as a common carrier by motor vehicle. This error arises not from a lack of substantial evidence to support its conclusion or from an improper exercise of its discretion. Rather it is due to an incorrect application to these facts of the statutory provisions and Congressional intention relating to "grandfather" rights of common carriers by motor vehicle.

Under the "grandfather" clause of § 206 (a) of Part II of the Interstate Commerce Act, a certificate of public convenience and necessity can be awarded only to one who is a "common carrier by motor vehicle" within the meaning of the Act. Originally the term "common carrier by motor vehicle" was defined to include any person who undertakes, "whether directly or by a lease or any other arrangement," to transport passengers or property for the general public by motor vehicle.[1] For purposes of clarity, however, this language was stricken and the term was redefined by Congress in 1940 to include any person "which holds itself out to the general public to engage

[1] § 203 (a) (14) of the Motor Carrier Act of 1935, 49 Stat. 543, 544.

in the transportation by motor vehicle" of passengers or property.[2]

In addition, as we pointed out in *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 53, 54, "We think it clear that Congress did not intend to grant multiple 'grandfather' rights on the basis of a single transportation service." Thus where a person holds himself out to the general public to engage in a single transportation service, consisting entirely or partly of motor vehicle operations, he is a "common carrier by motor vehicle" within the contemplation of the statute. And Congress intended that he alone should receive "grandfather" rights on the basis of that single service under § 206 (a) of the Act.

The undisputed facts here disclose that only the railroad holds itself out to the general public to engage in a single complete freight transportation service to and from all points on its lines. As an integral and essential part of this service tendered by the railroad, motor vehicle transportation between certain stations is provided. It is completely synchronized with the rail service and has none of the elements of an independent service offered on behalf of the motor vehicle operators. Their operations are the operations offered by the railroad as component parts, not as separate or distinct segments, of its single service. They may be replaced or eliminated at the sole discretion of the railroad.

The railroad, furthermore, is actively engaged in providing this single coordinated service. As to the motor vehicle operations supplementing its rail service, it is not a mere freight broker or forwarder. Cf. *Acme Fast Freight* v. *United States,* 30 F. Supp. 968, affirmed 309

[2] § 203 (a) (14) as amended by the Transportation Act of 1940, 54 Stat. 898, 920. No change in the legislative intent with respect to the definition of common carriers by motor vehicle of the type involved in this case was evidenced by this amendment. See 86 Cong. Rec. 11546.

U. S. 638; *O'Malley* v. *United States,* 38 F. Supp. 1; *Moore* v. *United States,* 41 F. Supp. 786, affirmed 316 U. S. 642. Nor can it be described as the consignor or consignee of the freight so transported by motor vehicle. Cf. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444. The provisions and actual operation of the contracts with the operators demonstrate the railroad's rigid control over the movement of the freight and its retention of full responsibility to the shippers. The operators are "independent" only by grace of contract nomenclature. By any realistic test they are mere aids in carrying out a part of the railroad's coordinated rail-motor freight service.

Thus the railroad clearly is undertaking to transport freight by an "other arrangement," as those words are used in the original statutory definition of "common carrier by motor vehicle." Cf. Chairman Eastman's concurring opinion in Missouri Pacific R. Co. Common Carrier Application, 22 M. C. C. 321, 333. Even more clearly, under the amended definition, the railroad is holding itself out to the general public to engage in the transportation of freight by motor vehicle as part of its coordinated rail-motor freight service. In short, it is a common carrier by motor vehicle within the meaning of the Act. And the application of the Congressional intention not to grant multiple "grandfather" rights in such a situation becomes clear. The railroad alone is entitled to common carrier "grandfather" rights as to the motor vehicle service forming an integral part of its unified freight service. Any other conclusion would authorize the wholesale granting of twenty-three "grandfather" permits to the various motor vehicle operators on the basis of this single transportation service offered by the railroad—a result which ascribes to Congress "an intent incompatible with its purpose of regulation." *United States* v. *Rosenblum Truck Lines, supra,* 54. We need not decide whether these operators are entitled to "grandfather" permits as

to other freight transported over their routes. But only the railroad acquired "grandfather" rights as to the freight which they transport as an integral part of the railroad's coordinated rail-motor service.

The Commission has taken the view that only one certificate can be granted on the basis of a single transportation service and that the "common carrier by motor vehicle" entitled to the certificate is the one who exercises direction and control of the motor vehicle operations and assumes full responsibility therefor both to shippers and the general public. This so-called "control and responsibility" test, however, is applicable in this case only insofar as it aids in determining the person offering and engaging in the single coordinated rail-motor freight service. To the extent that it leads to a result different from that reached by the application of the statutory provisions and the Congressional intent which we have indicated, it must be disapproved.

The judgment of the court below is reversed. The case is remanded to that court with directions to remand it to the Commission for such further proceedings, consistent with this opinion, as may be appropriate.

Reversed.

MR. JUSTICE JACKSON is of the opinion that the judgment should be affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting:

One who arranges for another to do some hauling for him may or may not enter the hauling business. The question whether the one or the other is the entrepreneur has occupied the courts from an early day. Holmes, Agency (1891), 5 Harv. L. Rev. 1, 15–16. The Commission has drawn upon that body of law concerning independent contractors for the purpose of determining

whether in case of line-haul transportation the carrier dealing directly with the shipper or the one performing the actual motor transportation was the common carrier entitled to grandfather rights under the Act. That is to say it has held, and consistently so, that the carrier which exercised direction and control of the actual motor-vehicle operations and assumed responsibility therefor to shippers and to the general public was the one who was in "operation" during the specified period as a "common carrier by motor vehicle" within the meaning of the grandfather clause. § 206 (a). That test has been applied whether the carrier dealing directly with the shippers was a common carrier by motor vehicle (Dixie Ohio Express Co., 17 M. C. C. 735, 738–741; J. T. O'Malley, 23 M. C. C. 276, 279) or a common carrier by rail. Willett Company of Indiana, Inc., 21 M. C. C. 405, 408; Missouri Pacific R. Co., 22 M. C. C. 321, 326–327. It has been applied after as well as before the 1940 amendment.[1] Boston & Maine Transportation Co., 30 M. C. C. 697, 704–705. And in applying the test to railroad applicants it has placed them on a parity with motor vehicle applicants. Boston & Maine Transportation Co., *supra.* And see Crooks Terminal Warehouse, 34 M. C. C. 679. There have been disagreements within the Commission whether particular applicants satisfy the test. Missouri Pacific R. Co., *supra;* Boston & Maine Transportation Co., *supra.* But there has been no disagreement over the propriety of the control and responsibility test itself.

The control and responsibility test provides a fair measure of the grandfather rights. He who shows that he has been and is an independent contractor has established his claim to the transportation business as clearly as any connecting carrier. The fact that the transportation service offered is closely integrated and held out to the public

[1] See note 2, *infra.*

as such does not mean that segments of the line-haul operation may not comprise separate enterprises. To attach grandfather rights to the separate segments is not to grant multiple rights. It is to allow those rights to follow ownership of the enterprise. I see no other way to effectuate the Congressional policy of preserving through the grandfather clause the position which motor vehicle operators "struggled to obtain in our national transportation system." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488. To conclude that the present arrangement is a mere agency is to disagree with the Commission in its application of the control and responsibility test. To rest grandfather rights on the integrated rail-motor service which appellant offers the public is to grant it rights based on another man's business. To grant appellant these grandfather rights on the basis of a holding out is to give to the 1940 amendment an effect which Congress concededly did not intend.[2] I do not believe that

[2] Prior to 1940 the Act defined "common carrier by motor vehicle" as one who "undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property," etc. § 203 (a) (14). The Transportation Act of 1940 amended that definition. It provided, so far as material here, that a "common carrier by motor vehicle" was "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property." As the opinion of the Court states, that amendment made no change as respects common carriers of the type involved in this case. It had the "sole purpose of eliminating carriers performing pick-up, delivery, and transfer service." 86 Cong. Rec. 11546. And see Boston & Maine Transportation Co., *supra*, 703–705. The grandfather clause contained in § 206 (a) provides for the issuance of a certificate without proof of public convenience and necessity, if the carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time."

Thus after as well as before the 1940 amendment the basic question in this type of case was whether the connecting carrier was in

Congress intended to put applicants such as appellant in a preferred position.

Since there is concededly sufficient evidence to support the findings of the Commission on the control and responsibility test, I would affirm the judgment below.

TENNANT, ADMINISTRATRIX, *v.* PEORIA & PEKIN UNION RAILWAY CO.

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

No. 94. Argued December 15, 1943.—Decided January 17, 1944.

1. In this suit under the Federal Employers' Liability Act to recover for the death of an employee, there was evidence from which the jury could reasonably infer that failure to ring the bell before starting the locomotive was negligence of the defendant and that that negligence was the proximate cause of the death; and a judgment for the defendant notwithstanding a verdict for the plaintiff deprived the latter of the right to trial by jury. P. 33.
2. A court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. P. 35.

134 F. 2d 860, reversed.

CERTIORARI, 320 U. S. 721, to review the reversal of a judgment for the plaintiff in an action under the Federal Employers' Liability Act.

Mr. William H. Allen, with whom *Mr. Mark D. Eagleton* was on the brief, for petitioner.

Mr. Eugene E. Horton for respondent.

"*bona fide* operation" as such a carrier. If it was an independent contractor it was engaged in such "operation"; if it was performing a transportation service as a mere agent for the carrier with whom the shipper dealt, it was not. Boston & Maine Transportation Co., *supra.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This action was instituted by petitioner, who is the administratrix of the estate and the widow of the deceased Harold C. Tennant, under the Federal Employers' Liability Act.[1] Recovery was sought for the alleged wrongful death of Tennant during the course of his employment as a member of a switching crew in one of respondent's railroad switching yards. The case was submitted to a jury, which returned a verdict in favor of petitioner and awarded her damages of $26,250. The District Court entered judgment accordingly. On appeal by respondent, the court below reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no substantial proof that this negligence was the proximate cause of Tennant's death. 134 F. 2d 860. It held that the District Court should have directed a verdict in favor of respondent or allowed its motion for judgment notwithstanding the verdict. We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation.

Tennant was employed as a switchman in the "B" yard of respondent's switching yards in East Peoria, Illinois. He had worked there for several years and had been attached to the particular five-man switching crew for several months prior to the fatal accident. On the night of July 12, 1940, this crew was engaged in one of its nightly tasks of coupling freight cars and removing them from track B–28. The electric Diesel engine used by the crew was brought down from the north through divide switch B–28 and onto track B–28, which extended straight north and south. The front or pilot end of the engine was headed south. There were about twenty cars in various

[1] 35 Stat. 65, as amended; 36 Stat. 291; 53 Stat. 1404; 45 U. S. C. § 51.

groups on track B–28 at that time; they were to be coupled together and moved northward out of track B–28 to other locations.

In the course of these coupling operations, the engine stopped and started six or eight times, gradually moving southward. After all twenty cars had been coupled, the engine remained stationary for five or ten minutes before the engineer received the back-up signal from Harkless, the foreman. The engineer testified that the engine at this point was standing about five or six car lengths south of switch B–28, a car length approximating forty feet. There was other testimony, however, indicating that the engine was seven or eight car lengths south of the switch. While thus waiting for the back-up signal, the engineer saw Tennant on the west side of the engine placing his raincoat in a clothes compartment beneath the cab window. After putting on a cap and jacket he walked around the north or rear end of the engine and was never seen alive after that.

There was no direct evidence as to Tennant's precise location at the moment he was killed. There was some evidence to indicate that he never walked back on either side of the engine. It was his duty as a switchman or pin-puller to stay ahead of the engine as it moved back out of track B–28, protect it from other train movements, and attend to the switches.

The engine then pulled the twenty cars out of track B–28. The fact that Tennant was missing was first noticed when the engine reached a point some distance north of switch B–28. An investigation revealed blood marks on the west rail of track B–28 some 315 feet, or about seven or eight car lengths, south of switch B–28. There was a pool of blood a foot and a half north of those marks; near by, between the rails, were Tennant's right hand, his cap and his lighted lantern. His body was found at switch B–28, while his head was discovered

about fourteen car lengths north and west of that switch. An examination of the engine and cars disclosed only a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine. There was no evidence of his having slipped or fallen from any part of the engine or cars.

The case was submitted to the jury on the allegation that Tennant's death resulted from respondent's negligence, in that its engineer backed the engine and cars northward out of track B–28 without first ringing the engine bell. The failure to ring the bell, which was not disputed, was alleged to be in violation of Rule 30 of respondent's rules for its employees. This rule provides that "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents." There was conflicting evidence as to whether this rule was for the benefit of crew members who presumably were aware of switching operations and as to whether it was a customary practice for the bell to be rung under such circumstances. In addition, respondent placed great reliance on the provision of Rule 32 that "The unnecessary use of either the whistle or the bell is prohibited." This was said to demonstrate that the bell should not have been rung on this occasion.

In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "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." *Galloway* v. *United States,* 319 U. S. 372, 395; *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors.

As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung "when an engine is about to move," it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. This was not an operation where bell ringing might be termed unnecessary or indiscriminate as a matter of law. Cf. *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 420; *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 171. The engine had remained stationary for several minutes, during which the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement. Such a movement, without a warning, was clearly dangerous to life and limb. *New York Central R. Co.* v. *Marcone,* 281 U. S. 345, 349. There was ample though conflicting evidence that respondent's written rule, as well as the practice and custom, required the ringing of the engine bell in just such a situation. We cannot say, therefore, that the jury's concurrence in that view was unjustified.

The court below erred, however, in holding that there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was the proximate cause of Tennant's death. The absence of eye witnesses was not decisive. There was testimony that

his duties included staying near the north or rear end of the engine as it made its backward movement out of track B–28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488; *Atchison, T. & S. F. Ry. Co.* v. *Toops, supra*, 356; *New Aetna Portland Cement Co.* v. *Hatt*, 231 F. 611, 617. In addition, the evidence relating to the rule and custom of ringing a bell "when an engine is about to move" warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable "for . . . death resulting in whole or in part from the negligence of any of the . . . employees." [2]

In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities sug-

[2] See note 1, *supra*.

gested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co., supra,* 68; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this

case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result.

MR. CHIEF JUSTICE STONE and MR. JUSTICE ROBERTS are of opinion that the judgment should be affirmed.

DEMOREST ET AL. *v.* CITY BANK FARMERS TRUST CO., TRUSTEE, ET AL.

NO. 52. APPEAL FROM THE SURROGATE'S COURT OF NEW YORK COUNTY, NEW YORK.*

Argued December 10, 1943.—Decided January 17, 1944.

1. Subdivision 2 of § 17-c of the Personal Property Law of the State of New York which, where there is no express provision in the will or trust, in respect of salvage operations (uncompleted at the date of the enactment) of mortgaged properties acquired by a trustee by foreclosure or by deed in lieu of foreclosure, prescribes a rule for apportionment of the proceeds between life tenant and remainderman, *held*—as against the claim of remaindermen that the statute deprives them of property without due process of law, in that the statutory rule is less favorable to remainder interests than were rules theretofore existing—not violative of the Fourteenth Amendment of the Federal Constitution. P. 48.
2. Decisions of the New York Court of Appeals prior to the enactment of subdivision 2 of § 17-c, *held* not to have established a rule of property whereby the remaindermen here acquired any vested rights. P. 42.

289 N. Y. 423, 46 N. E. 2d 501, affirmed.
290 N. Y. 885, 50 N. E. 2d 293, affirmed.

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*Together with No. 227, *Dyett, Special Guardian,* v. *Title Guarantee & Trust Co. et al.,* also on appeal from the Surrogate's Court of New York County, New York.

APPEALS from decrees, entered on remittitur from the Court of Appeals of New York, which sustained the constitutionality of subdivision 2 of § 17–c of the Personal Property Law of the State of New York.

Mr. Francis J. Mahoney, with whom *Mr. Gerald P. Culkin* was of counsel, for appellants in No. 52; and *Mr. James N. Vaughan,* with whom *Mr. Thomas B. Dyett* was on the brief, and *Mr. Edward G. Griffin* was of counsel, for appellant in No. 227.

Mr. C. Alexander Capron, with whom *Mr. Charles Angulo* was of counsel, for the City Bank Farmers Trust Co., Trustee; and *Mr. Albert Stickney* for Emma M. West,—appellees in No. 52. *Mr. Louis J. Merrell* for appellees in No. 227.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellants in these two cases challenge the constitutionality of Subdivision 2 of § 17–c of the Personal Property Law of the State of New York, approved April 13, 1940.[1]

[1] N. Y. Laws 1940, c. 452, p. 1182. The subsection provides:

"2. The existing rules of procedure applying to salvage operations respecting existing mortgage investments are continued except as modified by the subparagraphs hereinafter set forth. The terms and rules of procedure of this subdivision shall apply specifically (a) to the estates of persons dying before its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed before the date of its enactment and (c) to real property acquired by foreclosure of mortgage or real property acquired in lieu of foreclosure before or after the date of its enactment in trusts created or mortgage investments made prior thereto, and (d) to any pending proceeding or action for an accounting of the transactions of an executor or trustee.

"(a) Net income during the salvage operation up to three per centum per annum upon the principal amount of the mortgage shall be paid to the life tenant, regardless of principal advances for the expenses of foreclosure or of conveyance in lieu of foreclosure and

Because of retroactivity it is said to offend the Due Process Clause of the Fourteenth Amendment to the Federal Constitution by taking for benefit of income beneficiaries property to which the appellants as beneficiaries of principal

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arrears of taxes and other liens which occurred prior to such foreclosure or conveyance and the cost of all capital improvements. Any payment of net income heretofore or hereafter made to the life tenant up to such three per centum per annum shall be final and shall be not subject to recoupment from the life tenant or as a surcharge against the trustee or executor. The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.

"(b) The foregoing principal advances shall be repaid out of excess net income above such three per centum per annum. When principal advances have been satisfied, any excess income shall be impounded (subject to reinvestment under the terms of the will or deed) to await sale and apportionment.

"(c) The unpaid principal advances shall be a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale.

"(d) The purpose of the enactment of this subdivision is declared to be the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant, who is usually the principal object of the testator's or settlor's bounty, by depriving him of a fixed right to the actual payment of any net income earned by the property. Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant. The general rules of the apportionment of the proceeds of sale between life tenant and remainderman are retained subject to the express modifications made herein. Only equitable adjustments and balances as between the parties are intended to be effectuated by the provisions of this subdivision. If any provision of this subdivision or the application thereof to any mortgage or acquired property by foreclosure or conveyance, or to any trust is held invalid, the remainder of the subdivision and the application of such provision to any other mortgage or property acquired by foreclosure or conveyance or other trust shall not be affected thereby."

claim vested rights. It is asserted, also, to deny equal protection of the laws.

The facts in No. 52 are these: Henry West died in 1934. His will, so far as concerns us, left a residuary estate in trust. Net income less certain payments to a brother was given to his wife during her life or widowhood. Thereafter, subject to certain further trusts, the residue was to go to contingent remaindermen, among whom are the appellants.

At death West owned a number of mortgages. Owing to defaults, titles to nine of the underlying properties were acquired either by foreclosure sale or by deed in lieu thereof, and held in separate accounts as assets of the trust. The trustee's accounting disclosed that two such salvage operations were completed by sale of the properties prior to the enactment of § 17–c of the Personal Property Law. No distribution had been made of the proceeds. Objections on behalf of remaindermen questioned the validity of the statute as applied to apportioning such proceeds between income and principal. Surrogate Foley, however, upheld the statute and resolved the apportionment under its terms. His decree was unanimously affirmed by the Appellate Division of the Supreme Court for the First Judicial Department and thereafter was affirmed by the Court of Appeals, two judges dissenting. *Matter of West,* 289 N. Y. 423, 46 N. E. 2d 501. The case is brought here by appeal.

In No. 227, Auguste Schnitzler died in 1930, leaving a will which put her residuary estate in trust with the income payable to a sister for life. The income beneficiary died in 1939. Salvage operations had begun in the lifetime of the beneficiary and were completed after her death. Surrogate Delehanty found that operation of the statute "resulted over the whole salvage period in taking for income account more than the whole of what the property earned in that period. The deficit in so-called

'income' was made up by taking principal, of course." He considered the result "startling" but settled the accounts under the statute, leaving its validity to be determined by appellate courts. The Court of Appeals affirmed without opinion on the authority of *Matter of West* and the case comes here by appeal.

The grievance of remaindermen in these cases is not that they have suffered loss or deprivation of any specific property to which they had legal title. Under the law of New York the whole legal estate vests in the trustee for purposes of the trust,[2] including title to mortgages and to real estate acquired upon or in lieu of their foreclosure, which becomes personalty for the purposes of the trust.[3] Where the instrument creating the trust directs payment of income to one set of beneficiaries and corpus to another, allocation of receipts and disbursements as between capital and income is sometimes attended with difficulty. Mortgage investments may be imperiled by default in interest only, or payments of principal alone, or of both, but in either event both income and capital interests require protection. Advancements often must be made to remove tax liens or other prior charges, pay costs of foreclosure, make property tenantable, or take care of operating losses, watchmen, or insurance. On final sale the price, together with rentals, may leave either a loss or a profit, and to forego income for a period may result in a better sale of the capital asset. The variety of circumstances under which trustees are called upon to allocate items between capital and income are innumerable in salvage operations, the will rarely provides guidance, and the wisest and most faithful trustee is unable to draw the line with any great assurance. Either the income beneficiary

[2] *Knox* v. *Jones*, 47 N. Y. 389; *Bennett* v. *Garlock*, 79 N. Y. 302. Cf. 1 Scott on Trusts, p. 3.

[3] *Lockman* v. *Reilly*, 95 N. Y. 64.

or the remaindermen may challenge his accounts, for they have equitable interests which chancery will enforce that the trust be administered diligently and faithfully according to the will and the law. The flood of issues as to allotment of receipts and disbursements to capital or income account, following the depression, led the Court of Appeals to attempt to clarify the chancery rules on the subject for better guidance of trustees and the courts that supervise them.[4] When this was only partially successful, the problem of clarification was carried further by legislation. The remaindermen claim an unconstitutional taking of their property results from this legislative enactment of rules for distribution as between income and capital beneficiaries of trust property involved in salvage operations, because they are less favorable to the remainder interests in these cases than the rules they claim otherwise would have applied.

Appellants' contention is that the New York Court of Appeals established a rule of apportionment of proceeds of salvage operations of mortgaged property as between income and principal which became a settled rule of property under which property rights vested in them prior to accounting by the trustees. This, they say, was accomplished by the decisions in *Matter of Chapal,* 269 N. Y. 464, 199 N. E. 762 (1936), and *Matter of Otis,* 276 N. Y. 101, 11 N. E. 2d 556 (1937). The Court of Appeals, however, in one of the present cases holds to the contrary, saying that those opinions represent tentative judicial efforts to guide the discretion of trustees; that they did not establish rules of property; and that the legislature appears to have done no more than to direct trustees to do what they already had discretion to do, in which case

[4] In New York, power to "direct and control the conduct, and settle the accounts" of trustees is allotted to the Surrogate's Court. Surrogate's Court Act § 40 (3).

remaindermen could not have insisted upon their being surcharged under the law before the enactment.

In thus rejecting appellants' version of its previous decisions the Court of Appeals disposed of their cases on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case, appellants have no question for us under the Due Process Clause. Decisions of this Court as to its province in such circumstances were summarized in *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540, as follows: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." [5]

Despite difference of opinion within the Court of Appeals as to the effect of its earlier cases, we think that the decision of the majority that they did not amount to a

[5] See same case on rehearing, 282 U. S. 187, and *Sauer* v. *New York,* 206 U. S. 536, 546; *Leathe* v. *Thomas,* 207 U. S. 93; *Vandalia R. Co.* v. *Indiana,* 207 U. S. 359, 367; *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Ward* v. *Love County,* 253 U. S. 17, 22; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651, 655. Compare *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 387.

rule of property does rest on a fair and substantial basis. The opinion in the *Otis* case had indicated a tentative quality in its pronouncements, saying: "Perhaps it should be added that a general rule for such situations cannot be attained at a bound, that no rule can be final for all cases and that any rule must in the end be shaped by considerations of business policy. Accordingly, we have here put aside inadequate legal analogies in the endeavor to express fair, convenient, practical guides that will be largely automatic in their application. Only the sure result of time will tell how far we have succeeded." And the opinion had pointed out that the disbursement of net income during salvage operations was left to the discretion of the trustee with the admonition that the discretion "should be exercised with appropriate regard for the fact that unless a life tenant gets cash he does not get anything in the here and now." 276 N. Y. 101, 115.

The executive committee of the Surrogates' Association of the State of New York, composed of the judicial officers immediately charged with application of these decisions to the instruction of and accountings by trustees held a similar view of the discretion left to trustees. The legislature appears to have been of the same mind in adopting the new legislation.[6] The judicial effort was

[6] When it was introduced into the legislature, the bill proposing § 17-c carried the following explanatory note by the Surrogates' Association:

"This amendment is proposed by the executive committee of the Surrogates' Association of the state of New York. Its general purposes are:

"(1) To simplify the complicated rules restated in Matter of Chapal (269 N. Y. 464) and in Matter of Otis (276 N. Y. 101) relating to mortgage salvage operations (a) in existing trusts as to mortgages hereafter acquired as a trust investment and (b) in testamentary trusts created by the will of decedent dying after its enactment and (c) in *inter vivos* trusts created by an instrument executed after its

to formulate general rules to guide fiduciary discretion. The *Chapal* decision was rendered in response to a trustee's petition for instructions. But while such decisions were useful as precedents, they were felt not adequate to

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enactment. Such simplification is provided in the first subdivision of the new section.

"In recent years section 17–a of the Personal Property law was enacted to avoid the difficult problems of the allocation of stock dividends received during the period of a trust. Under that section they are now allocated wholly to capital. Section 17–b of the Personal Property law was enacted to abolish the intricate rule in Matter of Benson (96 N. Y. 499) under which it was necessary to capitalize the income on monies held within the estate for the payment of administration expenses, debts, taxes and pecuniary legacies. In line with this policy the proposed legislation contained in the first subdivision abolishes, in the instances stated above, the Chapal-Otis rules, and will substitute a simple form of the treatment of the foreclosed real property as a principal asset of the trust. It is to be treated just as a railroad bond upon which default in interest before sale has occurred.

"(2) Further modifications are proposed by the second subdivision of the section as to mortgage investments already made in existing trusts. The present rules for apportionment between life tenant and remainderman under the Chapal-Otis cases are continued as to existing trusts where the investment in a mortgage has been made, with modification thereof in two specific instances.

"(a) The Chapal-Otis rule authorizes the trustee to pay surplus net income in his discretion. Trustees have hesitated to pay such net income because in the case of overpayment to the life tenant, the trustee might be surcharged with that amount. The life tenant of the trust must wait in the majority of cases for a long period of time before he becomes entitled to the payment of any income, because of the present requirement that advances from principal for the expenses of foreclosure and for arrears of taxes and other liens must first be paid from the net income of the property. The amendment provides for the immediate payment of income to the life tenant beginning with the date of the acquisition of the property by the trustee by foreclosure or conveyance in lieu of foreclosure. Under the new provisions net income up to three per centum of the face amount of the mortgage is so payable. Under the Chapal-Otis rules the life tenant is entitled in the final apportionment to the inclusion of interest at the mortgage rate during the period of the salvage opera-

protect trustees against the hazards of litigation in particular cases, and the avowed effort of the court to adapt the law to the situation resulting from the depression failed in practice.[7] Hence the legislature intervened,

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tion. The rate of three per centum in the new section has been recommended as a fair return to the life tenant and at the same time a protection to the remainderman in the event that the property is sold at less than the face amounts of the income and principal shares employed at the ratio of the apportionment. (b) Surplus net income above three per centum is to be applied to the payment of advances from principal until the amount of such advances are satisfied. When the property in the salvage operation is sold, the unpaid balance of principal advances must be satisfied first out of the cash received from the sale. If there be any unpaid balance due for principal advances, it is made a primary lien upon the purchase money mortgage. The amendment further directs that after principal advances have been paid, the surplus net income above three per centum, accruing during the salvage operation, shall be held by the trustee to await sale and apportionment under the Chapal-Otis rules." N. Y. Laws 1940, p. 1181.

[7] Surrogate Foley in the *Demorest* case states the effect of this Act as follows (*Matter of West*, 175 Misc. 1044, 1048, 26 N. Y. S. 2d 622):

"Two relatively simple modifications of the *Chapal-Otis* rules were made in this subdivision. Under those rules and particularly under the language of the opinion of Judge Loughran in *Matter of Otis* (*supra*), a discretionary power was given to a trustee during a mortgage salvage operation to disburse income to the life tenant, after advances made from principal as an incident to the acquisition of the property had been repaid. It was found, however, that trustees hesitated to make any payment to the life tenant or to exercise the judicial discretion given to them by *Matter of Otis*, because of the fear of a possible surcharge in the event of an overpayment to the life tenant. The life tenant in almost every instance was the primary object of the testator's bounty. The beneficiary intended to be most favored was thus deprived, by the trustee's inaction or hesitancy, of receiving income during the entire salvage period and large sums of money were accumulated and frozen. The injustice to the life tenant was aggravated by the fact that because of the lack of a ready market for the resale of the property, the salvage operation was unduly extended for a long period of years. This situation is emphasized by the facts revealed in the present proceeding. Of the seven

adopted a rule which the trustee might have applied before, in its discretion, and prescribed it as a definite standard for setting apart income, protecting trustees against liability to remaindermen if they followed it. What ap-

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mortgages now involved in the salvage operations in which no resale has taken place, the longest period of operation has been six years and two months. The shortest period has been four years and ten months. Thus the average period of operation of all seven mortgages has been approximately five years. In the two completed operations the periods of salvage were two years and six months and two years and eight months. This unhappy situation has been corrected by the new legislation. Trustees are expressly authorized to pay promptly net income derived from the foreclosed or acquired property up to three per centum per annum upon the face amount of the mortgage. From the time of the passage of the new act, it has been the practical experience and observation of the surrogates that hundreds of thousands of dollars which had been theretofore accumulated, were paid out to life tenants upon the authority granted by the statute. Where the trustee had paid the yearly income up to the three per cent maximum to the life tenant, the statute made the payment final. It was specifically stated by the Legislature that such payment up to the maximum was 'not subject to recoupment from the life tenant or as a surcharge against the trustee or executor.' Moreover, under the new statutory rule, net income up to the maximum of three per cent became payable from the very beginning of the salvage operation, that is, from the date of acquisition by foreclosure or by deed in lieu of foreclosure.

"The other amendment to the *Chapal-Otis* rules made by the second subdivision of the new section in the balancing of the equities, furnished protection to the remaindermen interested in the principal of the trust. Excess net income earned in any one year during the salvage operation above the three per cent maximum payable to the life tenant, was directed to be applied to advancements from principal for arrears of taxes and other liens which accrued prior to the foreclosure or acquisition in lieu of foreclosure and to the cost of capital improvements. Where any balance of unpaid principal advances remained due at the close of the salvage operation, such balance was declared to be 'a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale.' "

pears really to have been taken from the remainderman is his right to question the equity of the rule in his individual circumstances, a right which he had while it was a rule of the court. In the case of the *Schnitzler* trusts where the rule results in invasion of the remainderman's principal to make good to the life beneficiary the statutory allowance of income, Surrogate Delehanty implied, and no one has denied, that the flexibility of the former rule would probably have resulted in a surcharge of the trustee's accounts, and hence that the remainderman has been deprived of the value which benefit of the *Chapal-Otis* rule would likely add to his remainder. Of course the very purpose of the statute, as Surrogate Foley points out, is to deprive him of that objection to the accounts, to protect the trustee against that hazard, and to give the remainderman other compensatory advantages. The legislature has furthered certainty at cost of flexibility.

Constitutional validity of this legislation if it had been made applicable to estates of decedents dying after its enactment is not questioned. It is objected only that application to an estate whose administration began before the Act so as to take away the remainderman's right to judicial examination of the trustee's computation of income makes it void for retroactivity.

It may be observed that insofar as appellants stand on the *Chapal-Otis* rule it can benefit them only if it may be retroactive. Both of these decedents died several years before either of those decisions. If a property right to some particular rule of income allotment in salvage proceeds vested at all, it would seem to have done so at death of the testator. If so, remaindermen would have to show that their property right was established by decisions then in existence, or else that advantages derived from a later judicial decision may not be repealed. The case comes to this: Appellants took remainders at a time when the rules by which to sequester their interests in proceeds from

complicated operations to salvage property were so indefinite that several years later the Court made an effort to devise more definitive rules for the purpose. They were but partly successful, and a few years later the legislature made further and perhaps more authoritative and final rules. Comparing the later with the earlier effort, the remainderman in these particular cases finds himself prejudiced. He says we must confirm him in the earlier by striking down the later of two retroactive rules of law.

This statute does not purport to open accountings already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements pending at or instituted after its enactment. Rights to succession by will are created by the state and may be limited, conditioned, or abolished by it. *Irving Trust Co.* v. *Day,* 314 U. S. 556. The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities, and testamentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity. The state may extend the testamentary privilege on terms which permit tying up of property in trust for possibly long periods. But the state on creation of such a trust does not lose power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration, such as the depression presented to trusts holding mortgages. Cf. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398. Nothing in the Federal Constitution would warrant us in holding that judicial rules tentatively put forward and leaving much to discretion will deprive the legislature of power to make further reasonable rules which in its opinion will expedite and make more equi-

table the distribution of millions of dollars of property locked in testamentary trusts, even if they do affect the values of various interests and expectancies under the trust. The Fourteenth Amendment does not invalidate the Act in question.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs:

The New York Court of Appeals stated that in formulating the statutory rule in question the state legislature did no more "than direct a trustee to do what under the decisions of this court he has discretionary power to do." 289 N. Y. 423, 430, 46 N. E. 2d 501. And it went on to say, "Before the enactment of this statute, the life tenant could not have demanded as of right the payment to him during liquidation of more of the surplus income than he will receive under the statute. Neither does it appear that the remaindermen could properly have insisted that the trustee should be surcharged if in the exercise of his discretion he had paid to the life tenant the amount which the statute now directs." *Id.* That is a question of New York law on which the New York court has the final say. It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. *Sauer* v. *New York,* 206 U. S. 536, 545–548. And there is no suggestion here that state law has been manipulated in evasion of a federal constitutional right. *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651, 657; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540. Consequently I can see no possible claim to substantiality of any federal question, whatever view may be taken of the due process clause. I would therefore dismiss the appeal.

BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE, NO. 27, ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD.

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

No. 28. Argued November 9, 10, 1943.—Decided January 17, 1944.

1. A railroad company which refused to submit a labor dispute to arbitration in accordance with provisions of the Railway Labor Act—although it had sought to settle the dispute by negotiation and by mediation—has not made "every reasonable effort" to settle the dispute, within the meaning of § 8 of the Norris-LaGuardia Act, and is thereby barred from injunctive relief in the federal courts. P. 56.
2. Section 8 of the Norris-LaGuardia Act extends to railway labor disputes. P. 58.
3. The requirement of § 8 of the Norris-LaGuardia Act that a complainant must make "every reasonable effort"—"either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration"—to settle the labor dispute before he may have injunctive relief in the federal courts, is not satisfied by his having resorted to one or two of the three prescribed methods of conciliation. P. 60.
4. That under § 8 of the Norris-LaGuardia Act a complainant may not have injunctive relief if he has not submitted the labor dispute to arbitration does not make arbitration compulsory. P. 62.
5. Failure to satisfy the requirements of § 8 of the Norris-LaGuardia Act does not leave the complainant without legal protection but deprives him only of one form of remedy which Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold. P. 63.
6. The court is not concerned with the wisdom of Acts of Congress. P. 64.
7. Where a complainant has steadfastly refused to submit a labor dispute to arbitration, § 8 of the Norris-LaGuardia Act is not necessarily rendered inapplicable by the fact that some violence is involved. P. 65.

132 F. 2d 265, reversed.

CERTIORARI, 318 U. S. 755, to review the affirmance of an order granting a temporary injunction in a suit arising out of a labor dispute.

Mr. John E. Cassidy for petitioners.

Mr. Clarence W. Heyl, with whom *Mr. John M. Elliott* was on the brief, for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The important question is whether the District Court properly issued an injunction which restrained respondent's employees, conductors, yardmen, enginemen and firemen, from interfering by violence or threats of violence with its property and interstate railroad operations. The sole issues that concern us are the existence of federal jurisdiction and whether the requirements of the Norris-LaGuardia Act (29 U. S. C. §§ 107, 108, 47 Stat. 71, 72) were satisfied.

The case arises out of a long-continued labor dispute relating to working conditions and rates of pay. Negotiations between the parties, beginning in October, 1940, failed. A long course of mediation, with the aid of the National Mediation Board, resulted likewise. Accordingly, on November 7, 1941, the mediator proposed arbitration pursuant to the Railway Labor Act's provisions. 45 U. S. C. § 155, First (b), 48 Stat. 1195. Both parties refused. Thereupon, as the Act requires, the Board terminated its services. *Ibid.* This occurred November 21, 1941. Under the statute, no change in rates of pay, rules, working conditions or established practices can be made for thirty days, unless in that time the parties agree to arbitration or an emergency board is created under § 10. *Ibid.* Anticipating respondent would put into effect its proposed schedules at the end of the period, the employees voted

to strike. The time for stopping work was set for December 9 at 11:00 a. m. Respondent knew of the voting on or before December 6, but did not receive formal notice of the strike until about noon of December 8.

With the bombing of Pearl Harbor on December 7, the Mediation Board again intervened, strongly urging both sides to settle the dispute in view of the national emergency. At the Board's request the employees had postponed the strike indefinitely.[1] Further conferences failed to bring agreement and on December 17 the Board again urged that the disputants agree to arbitration under the statute. This time the employees accepted.[2] But respondent continued its refusal, though it also continued to urge the appointment of an emergency board. And, while the record does not show that respondent was notified formally of the employees' agreement to arbitrate until December 28, neither does it appear that respondent did not know of this fact before that time.

On December 21, exactly the expiration of the thirty-day period, respondent by letter notified the employees and their representatives that its proposed schedules would become effective at 12:01 a. m., December 29. By letter dated December 27 and received by respondent before noon on December 28, the employees served notice that a strike would take effect December 28 at six o'clock in the evening. By wire which respondent received that day, the Board

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[1] Petitioners' brief characterizes their action as agreement "to an indefinite postponement." Respondent says "the strike notice was at no time withdrawn, although it was temporarily withheld" until December 28.

[2] The record does not disclose the exact time or manner of petitioners' agreement, but clearly indicates it was in response to this proposal of the Board, not the later one of December 28, which was addressed solely to respondent and recited the employees' previous agreement.

again strongly urged arbitration, pointing out the employees had acceded to the Board's request. Respondent again declined and urged an emergency board be appointed.

The strike took effect at the appointed time. Picket lines were formed. Respondent undertook to continue operations with other employees. It employed "special agents" to protect its trains and property.[3] Clashes occurred between them and the working employees, on the one hand, and the striking employees on the other. Various incidents involving violence or threats of violence took place. Some resulted in personal attacks, others in damage to property and interruption of service. The respondent sought the aid of public authorities, including the sheriffs of counties along its right of way and police authorities in cities and towns which it served. Some assistance was offered, but in some instances the authorities replied they had forces inadequate to supply the aid respondent requested and in others no reply was given. The parties are at odds concerning the extent of the violence, the need for public protection, and the adequacy of what was supplied or available. But the findings of the District Court are that the violence was substantial and the protection supplied by the public officials was inadequate. These incidents took place through the period extending from December 29, 1941, to January 3, 1942.

On the latter date respondent filed its complaint, asking for a temporary restraining order and, after hearing, an injunction restraining petitioners from interfering with its operations and property. The restraining order issued *ex parte* the same day, respondent giving bond as required (29 U. S. C. § 107, 47 Stat. 71–72) for indemnity against loss occasioned by its improvident or erroneous issuance.

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[3] There were twenty-nine of these. The employees involved in the dispute numbered about one hundred.

Hearing on the application for a temporary injunction began January 8 and continued to January 19. Two extensions continued the restraining order in force until the hearing was completed. Petitioners moved to vacate the extensions on January 15 and again at the close of the hearing on January 19, and to dismiss the complaint. These motions were denied, and the court made findings of fact and conclusions of law sustaining respondent's contentions. Thereupon the temporary injunction issued. In due course appeal was perfected from the order for its issuance and the previous orders denying petitioners' various motions to vacate the extensions and to dismiss the complaint. The Circuit Court of Appeals, one judge dissenting, affirmed the judgment. 132 F. 2d 265. We granted certiorari because of the importance of the issues presented. 318 U. S. 755.[4]

Three principal issues have been made in the lower courts and here. Stated in the form of petitioners' contentions, they are: (1) The District Court was without jurisdiction, since there is no claim of diversity of citizenship and, it is said, no federal question is involved;[5] (2) the

[4] It may be added to the background of facts that, between January 19, when the injunction issued, and the time when the appeal was perfected, various individual defendants, petitioners here, were cited to show cause why they should not be punished for contempt for violating the injunction. The court also issued an order on February 9 directing the marshal to enforce the injunction by proper means, including the employment of additional deputies if necessary. The record shows the citations were set for hearing but does not disclose what disposition was made of them. It appears, however, from the briefs that the persons cited were convicted and sentenced for violation of the injunction, sentence later being suspended pending the final determination of this case.

[5] In the lower courts and here this issue was highly controverted. Petitioners say jurisdiction is lacking since the cause of action is one

evidence was not sufficient to show that the public authorities were unwilling or unable to furnish adequate protection for respondent's property;[6] and (3) respondent did not make every reasonable effort to settle the dispute as required by the Norris-LaGuardia Act.[7] Without passing upon the others, we think the last contention must be sustained.

Section 8 of the Norris-LaGuardia Act (29 U. S. C. § 108, 47 Stat. 72) provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by

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merely for exercise of the general police power in the protection of the railroad's property. The complaint, it is said, does not specify any provision of federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act and the statute making criminal specified interferences with interstate railroad property. 18 U. S. C. § 412 (a); cf. *Cohens* v. *Virginia*, 6 Wheat. 264; *Norton* v. *Whiteside*, 239 U. S. 144; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77; *Gully* v. *First National Bank*, 299 U. S. 109.

Respondent and the lower courts find the jurisdictional basis generally in the duties imposed upon carriers by the Interstate Commerce Act and other federal statutes, including the criminal statute referred to above. They rely upon such authorities as *In re Lennon*, 166 U. S. 548; *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 F. 730 (C. C. N. D. Ohio); and *Wabash R. Co.* v. *Hannahan*, 121 F. 563 (C. C. E. D. Mo.).

[6] Cf. the Norris-LaGuardia Act, 29 U. S. C. § 107 (e), 47 Stat. 71.

[7] Petitioners also urge that the temporary restraining order became void on the expiration of five days by the provisions of 29 U. S. C. § 107 (e), and could not be extended beyond that time; hence the orders continuing it in force were nullities; and that the evidence was insufficient to show they had participated in or ratified any act of violence or of interference with respondent's operations or property.

negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The question, broadly stated, is whether respondent made "every reasonable effort" to settle the dispute, as the section requires. On the facts this narrows to whether its steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative. We think it did, with the consequence that the federal courts were deprived of the power to afford injunctive relief and respondent was remitted to other forms of legal remedy which remained available.[8]

Respondent was subject to the Railway Labor Act. Its provisions and machinery for voluntary arbitration were "available." Resort to them would have been a "reasonable effort to settle" the dispute. Clearly arbitration under the Act was a method, both reasonable and available,[9] which respondent refused to employ, not once, but repeatedly and adamantly. If it had been used, it would have averted the strike, the violence which followed, and the need for an injunction.[10]

Section 8 demands this method be exhausted before a complainant to whom it is available may have injunctive relief. Broadly, the section imposes two conditions. If a complainant has failed (1) to comply with any obligation imposed by law or (2) to make every reasonable

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[8] Cf. text *infra* at note 21.

[9] Cf. 45 U. S. C. § 157, 44 Stat. 582–584, 48 Stat. 1197. Each party selects an equal number of arbitrators who select another or others, but in case of failure of the named arbitrators to agree the Mediation Board selects the additional member or members.

[10] The award is made final and conclusive upon the parties, except for possible impeachment of the judgment entered upon it, in judicial proceedings, on grounds specified in the statute. 45 U. S. C. § 158 (l), (m), (n), 44 Stat. 584–586, 48 Stat. 1197; § 159, Second, Third, 44 Stat. 585.

effort to settle the dispute, he is forbidden relief. The latter condition is broader than the former. One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort, at the least by the methods specified if they are available, though none may involve complying with any legal duty. Any other view would make the second condition wholly redundant. It clearly is not the section's purpose, therefore, by that condition, to require only what one is compelled by law to do. Yet, as will appear, this would be the effect of accepting respondent's position.

It is wholly inconsistent with the section's language and purpose to construe it, as have respondent and the lower courts, to require reasonable effort by only one conciliatory device when others are available. The explicit terms demand "*every* reasonable effort" to settle the dispute. Three modes are specified.[11] They were the normal ones for settlement of labor disputes by the efforts of the parties themselves and the aid of agencies adapted specially for the purpose. The Railway Labor Act [12] pro-

[11] It is not necessary to determine whether they are illustrative or exclusive. Respondent's emphasis upon the disjunctive meaning of "either . . . or . . . or" effectually eliminates "every" from the section. It distorts "every reasonable effort" into meaning, in effect, "one of the following reasonable efforts." A similar distortion is its apparent view that the phrase "with the aid of any available governmental machinery" qualifies only "mediation" and not "voluntary arbitration." Cf. the further discussion in the text, *infra* at note 20. And if the section uses "or" only in the disjunctive, it would be enough either to comply with legal obligations or to make reasonable effort, a view so obviously untenable it has not been suggested.

[12] The Norris-LaGuardia Act was adopted March 23, 1932. 47 Stat. 70. At that time the Railway Labor Act of 1926 was in force. 44 Stat. 577. Though it differed in substantial respects from the Railway Labor Act of 1934, now in effect (48 Stat. 1185), it contained provisions for the three procedures of negotiation, mediation and arbitration which, for present purposes, were identical with or substan-

vided for all of them, with the aid of governmental machinery in the stages of mediation and arbitration. Section 8 is not limited to railway labor disputes. But it includes them.[13] And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available. This purpose of Congress is put beyond question when the section's legislative history is considered in the light of the history and the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act.

The policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes. Cf. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338. The over-all policy of the Norris-LaGuardia Act was the same. The latter did not entirely abolish judicial power to impose previous restraint in labor controversies. But its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy.[14] It sought to make injunction a last line

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tially similar to those of the later statute. The 1934 changes related principally to the machinery for making the procedures effective, though in some instances it more definitely crystallized legal obligations.

[13] Much of the debate in Congress related to previous railway labor disputes, including the Pullman controversy of 1894 and the shopcraft strike of 1922, and to decisions relating to injunctions which had been issued in connection with these disputes, e. g., *In re Debs*, 158 U. S. 564; cf. 75 Cong. Rec. 4618–4620, 5472–5479, 5503–5504.

[14] Cf. the debates in Congress, 75 Cong. Rec. 4505–4510, 4618–4626, 5462–5515.

of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. It is dominant and explicit in § 8. In short, the intent evidenced both by words and by policy was to gear the section's requirements squarely into the methods and procedures prescribed by the Railway Labor Act.

Short reference to the legislative history makes this plain. There was extended discussion of the bill in the Congressional debates, a considerable part relating to the Railway Labor Act's provisions and operation.[15] No one suggested that the bill and that Act were not to be meshed in operation or that compliance with only one of the methods prescribed in § 8 would satisfy its requirement of "reasonable effort." On the contrary, it seems to have been taken for granted that exhaustion of all is demanded. Numerous proposals for amendment in other respects were made, but there were none for changing this requirement. And Representative LaGuardia, who sponsored the bill in the House, after quoting and discussing provisions of the Railway Labor Act of 1926, quoted § 8 and said, without challenge to his construction:

"So that *there is the tie-up* between the provisions of the railroad labor act and the necessity of exhausting *every remedy* to adjust any difference which might arise. The workers could not and would not think of going on strike before *all the remedies provided in the law* have been exhausted. *If the railroads have complied,* they would not, as has been suggested [by Representative Beck], be deprived of any relief which they may have in law or equity." (Emphasis added.)[16]

[15] Cf. notes 13, 14 *supra.*

[16] 75 Cong. Rec. 5504. And, at 5508, in response to an inquiry whether or not § 8's requirements would apply where it might be im-

Representative O'Connor, supporting the sponsor's view, characterized § 8 as "the 'clean hands' provision" and said:

"That section provides that a complainant shall not be entitled to an injunction if he has not complied with any contract or obligation on his part or has not made every reasonable effort to settle the dispute by the available methods of arbitration or mediation. Surely, this fundamental principle of equity that 'he who seeks justice must do justice' should apply in labor disputes as well as in other judicial controversies." [17]

To construe the section therefore as requiring but one of the three methods to be used, when the other two are equally available, would emasculate the language and would defeat the purpose and the policy of the statute.

It would do this by inviting semblance of compliance without its substance, motion of settlement without progress toward it. In railway disputes, the first short step in the succession provided by the Railway Labor Act could be taken and the remainder then could be hurdled by injunction. A party always could negotiate, that is, en-

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possible to move for settlement by negotiation, mediation or arbitration, he stated:

"The answer to that is simple. In seeking a restraining order a party believed to be aggrieved comes into court and under a certain state of facts, which are enumerated in the bill itself, asks for a restraining order. *If time has not permitted him* or the corporation *to avail itself of the existing governmental machinery* for the settlement of a labor dispute, he recites that as one of his facts, which is full compliance, of course, with the provisions of section 8, *which makes it a condition precedent that every remedy must be exhausted* to settle the strike before the injunction will issue." (Emphasis added.)

[17] 75 Cong. Rec. 5464. It was partly for fear of the effects of requiring compliance with § 8's provisions, upon interruption of service, that Mr. Beck, who led opposition to the bill, urgently advocated an amendment exempting public utilities. 75 Cong. Rec. 5503–5504.

gage in collective bargaining,[18] and thereby be relieved of the requirements, under § 8, of mediation and arbitration. Thus, in this case, under the construction of the Court of Appeals, when respondent completed negotiations without the aid of mediation, there was no need to go on with mediation. In the court's view compliance with one of the specified methods satisfies the full requirements of § 8.[19] Yet negotiation, in the sense of bargaining collectively, under the Railway Labor Act is an obligation imposed by law. Section 2, Ninth; also First, Second; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 548; cf. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323, 330–332. Obviously, if the view of the Court of Appeals is right, the condition requiring "every reasonable effort to settle" the dispute becomes a dead letter in railway labor disputes, since no more would be required by its terms in that application than is called for by the first condition which demands compliance with legal obligations. Respondent, however, while apparently agreeing with the Court of Appeals that compliance with one method is sufficient, relies not only upon its negotiation, but also upon its participation in mediation. This serves it in no better stead. The section is not disjunctive as to arbitration, but conjunctive as to negotiation and mediation. The case is one, so far as both language and policy go, of one or all.[20]

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[18] It may be assumed that the negotiation must be done in good faith, as is true under the National Labor Relations Act, cf. e. g., *Labor Board* v. *Pilling & Son Co.,* 119 F. 2d 32 (C. C. A.).

[19] "The employer is not compelled to avail himself of all three methods; any one of them will fulfill the requirements. Thus in *Mayo* v. *Dean,* 82 F. 2d 554, 556 [C. C. A.] it was held that the employer is not obliged to propose both mediation and arbitration." 132 F. 2d 265, 271.

[20] Cf. note 11 *supra.*

Respondent's final contention, in this phase of the case, is the most insistent. It is that if "voluntary arbitration," as the term is used in § 8, encompasses arbitration under the Railway Labor Act, by that fact the arbitration ceases to be "voluntary" and the latter Act's requirement that it be so is violated. In short, it is said the effect is to force respondent to submit to compulsory arbitration.

Without question, as respondent says, arbitration under the Railway Labor Act is voluntary. Section 7, First, requires the machinery to be put in motion by agreement of the parties. A proviso also declares, "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." 45 U. S. C. § 157, First. It is clear, therefore, that the Railway Labor Act's purpose is not to impose upon the parties a legal duty to arbitrate, enforceable as is the duty to bargain collectively imposed by § 2, Ninth, discussed above. And if the effect of bringing that form of arbitration within the mandate of § 8 of the Norris-LaGuardia Act were to create such a duty, so enforceable, respondent's contention would be more in point. But it does not do that. And the contention that it does entirely misconceives the effect of § 7, First, of the Railway Labor Act, and confuses "violation" of its terms with failure to comply with those of § 8 of the Norris-LaGuardia Act. The proviso of § 7, First, and the requirement of submission by agreement were in force substantially in their present form under the Railway Labor Act of 1926. 44 Stat. 582. It was exactly in the light of these provisions and with the intent, as has been shown, to make it include arbitration under the Railway Labor Act that § 8 used the term "voluntary arbitration." Obviously there was no purpose in doing so to contradict the terms of both statutes and label "voluntary" what in fact is compulsory. Nor was this the effect. Section 7, First, merely

provides that failure to arbitrate shall not be construed as *a violation* of any legal *obligation* imposed upon the party failing by that Act or otherwise. Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court.

True, this deprives respondent of a protection to which it might have been entitled if the condition had not been imposed. But that is true of each of the section's conditions. And it is hardly more true with respect to one condition than with respect to others. Mediation, or for that matter negotiation, does not become compulsory because without them or either of them injunctive relief cannot be had. Neither does arbitration.

Nor does it follow, as respondent seems to imply, that it is left without remedy. Other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist. Federal statutes supply criminal sanctions, enforceable in the federal courts, against persons who interfere in specified ways with the operation of interstate trains or destroy the property of interstate railroads. Cf. 18 U. S. C. § 412 (a). With these and other remedies that may be available we are concerned no further than to point out that respondent's failure to observe the requirements of § 8 has not left it without legal protection. That failure has deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdic-

tion of the federal courts,[21] has seen fit to withhold. With the wisdom of that action we have no concern. It is enough, for its enforcement, that it is written plain and does not transcend the limits of the legislative power. Cf. *Lauf* v. *Shinner & Co.*, 303 U. S. 323.

The fact is that respondent complied with the requirements of both § 8 and the Railway Labor Act in all but the one essential respect. It recognized the employees' designated representatives, negotiated with them, engaged in mediation until it was terminated by the Board as the statute required. When it came, however, to the final and crucial step of arbitration, it declined to go forward as § 8 requires if, later, injunctive relief is to be had. Whether the refusal was motivated by distrust of the Board,[22] by a desire to escape the binding effect of an award,[23] by preference for some other possible procedure,[24] or merely by re-

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[21] Cf. *Lockerty* v. *Phillips*, 319 U. S. 182, and authorities cited.

[22] Respondent's brief contains the following:

". . . respondent had reached the point where its only recourse was to request *an impartial body*, namely: *an emergency board*, to hear the evidence and decide the issues involved.

"There is no presumption that this governmental agency would be fair, just and impartial, in the conduct of the arbitration, and with the experience which the respondent had had in the mediation, it could not be charged with bad faith in refusing to sign an arbitration agreement, where the arbitration proceedings were to be conducted under the same atmosphere.

"Respondent has always insisted upon a fair and impartial hearing of this labor dispute *before a body which has no connection with either the Brotherhood interests or the railroad interests*, and to this date it has been unsuccessful to have its case presented to a body of that character." (Emphasis added.)

[23] Cf. note 10 *supra*; note 24 *infra*.

[24] When the Mediation Board terminated its services, respondent first suggested submission to "some impartial fact-finding commission," but for advisory action only. Later it repeatedly urged appointment of an emergency board under § 10 of the Railway Labor Act, 45 U. S. C. § 160, 44 Stat. 586–587, 48 Stat. 1197. Under the section, if a

spondent's mistaken view of the section's requirements is not material. Arbitration under the Railway Labor Act was available, afforded a method for settlement Congress itself has provided, and until respondent accepted this method it had not made "every reasonable effort to settle" the dispute, as § 8 requires.

It remains to refute a further basis for the ruling of the Court of Appeals. This was that, in accordance with its previous decisions, § 8 does not apply when violence is involved. The terms of the section offer no support for such a view.[25] And, if exceptions exist, to find one in the circumstances shown by this record would be to invert the statutory order of things. The purpose of the section is to head off strikes and the violence which too often accompanies them, by requiring the statutory steps to be taken before the aid of federal courts is sought in equity. Denial of that assistance is the sanction the statute affords to secure performance of the prescribed preventive measures. To give it, when they have not been taken, not only violates the section's terms. It defeats the purposes they were to accomplish and which, when achieved, make unnecessary invocation of the court's aid.

In general the Act was not intended to interfere with the power to restrain violent acts.[26] And it was contemplated expressly the court might intervene to prevent them, when the particular circumstances show the complainant has had no opportunity to comply with such requirements as those of § 8.[27] But one major purpose of the Act was to prevent the use of injunction improperly as a strikebreaking imple-

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dispute not adjusted threatens in the Board's judgment substantially to interrupt interstate commerce, the Board shall notify the President who, in his discretion, may create a board to investigate and report concerning the dispute.

[25] Frankfurter and Greene, The Labor Injunction (1930) 215.

[26] Cf. 75 Cong. Rec. 5478.

[27] Cf. note 16 *supra;* 75 Cong. Rec. 5508.

ment.[28] And the discussion of § 8 in the Congressional debates shows that, while it would not apply if on the facts the complainant could not meet its terms, it was intended to apply when he had had ample opportunity but refused to do so.[29] This is clear not only from Representative O'Connor's "clean hands" characterization of the section,[30] but also from the general character of the discussion regarding it. Most, if not all, of the objection was upon the mistaken view that § 8 would apply even though the complainant might have no notice or knowledge of the facts calling for him to take the conciliatory steps before seeking injunctive relief.[31] What has been said above shows this was not the intent or effect of the section. There was indeed no expression of concern for the complainant who, having full opportunity to comply with the section, might refuse deliberately and steadfastly to do so. On the contrary, it appears to have been understood clearly he would be remitted to other forms of relief not touched by the Act.

In view of the disposition we have made of the case, we have not determined the other issues which were presented. Some are of such importance they should not be decided in advance of necessity for determining them. That necessity is not present in this case. Accordingly, we express no opinion concerning those issues.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

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[28] Cf. 75 Cong. Rec. 5478.

[29] Cf. note 16 *supra;* 75 Cong. Rec. 5508.

[30] Cf. note 17 *supra* and text.

[31] Cf. 75 Cong. Rec. 4688, 5471, 5508, setting forth the objections of opponents to the bill, with the replies of its sponsors at 4760, 5508.

Syllabus.

McLEAN TRUCKING CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 31. Argued November 12, 15, 1943.—Decided January 17, 1944.

1. Orders of the Interstate Commerce Commission authorizing, under § 5 of the Interstate Commerce Act as amended, the consolidation of certain motor carriers; and, under § 214 of the Motor Carrier Act of 1935, the issuance of securities by the consolidated corporation, *sustained* as within the authority of the Commission and supported by the findings and the evidence. P. 88.
2. The Commission having modified its orders by excluding one of the carriers from the consolidation, and the court below having determined the case in that posture, the only questions here considered are those presented by the modified orders. P. 70.
3. In authorizing the consolidation, the Commission did not apply improper standards and did not fail to give due consideration to antitrust laws and policies. P. 77.
4. The authority of the Commission to approve consolidations of motor carriers, which but for the exemption granted by § 5 (11) might violate the antitrust laws, is not restricted to consolidations which are necessary in order to provide adequate service to the public. P. 78.
5. In determining the propriety of motor carrier consolidations, the preservation of competition among carriers, although still a factor, is significant chiefly to the extent that it aids in achieving the objectives of the national transportation policy. P. 85.
6. The Commission's conclusion that the proposed consolidation was "consistent with the public interest" did not go beyond the standards prescribed by Congress. P. 89.
7. Although the Commission should have acceded to the Anti-Trust Division's request for certain information from others bearing on the question of competition, its failure so to do does not on the record here require that its conclusions be set aside. P. 89.
8. The Commission's conclusion that the consolidated corporation would not be "affiliated" with a rail carrier, within the meaning of §§ 5 (2) and 5 (6) of the Act, was supported by the findings and the evidence. P. 91.

9. Only the consolidation as approved is relieved from the operation of the antitrust laws; and any change in the *status quo* may be considered when such change occurs. P. 91.

48 F. Supp. 933, affirmed.

APPEAL from a decree of a district court of three judges, refusing to set aside orders of the Interstate Commerce Commission, 38 M. C. C. 137.

Mr. Arne C. Wiprud, with whom *Messrs. Robert H. Shields* and *Edward Dumbauld* were on the brief, for the Secretary of Agriculture of the United States, appellant. *Mr. E. B. Ussery* submitted for the McLean Trucking Co., and *Messrs. Martin Burns* and *Paul E. Mathias* submitted for the American Farm Bureau Federation,—appellants.

Mr. Daniel W. Knowlton for the Interstate Commerce Commission; and *Mr. Mortimer Allen Sullivan,* with whom *Mr. Hugh M. Joseloff* was on the brief, for Associated Transport, Inc. et al.,—appellees.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This is an appeal from a decree of a statutory three judge court,[1] 48 F. Supp. 933, refusing to set aside certain orders of the Interstate Commerce Commission which had authorized consolidation of seven large motor carriers.

Associated Transport, Inc., was organized in Delaware in March, 1941, to bring about the proposed merger. In July, 1941, it applied to the Interstate Commerce Commission for permission, under § 5 of the Interstate Commerce Act, as amended (49 U. S. C. § 5; 54 Stat. 898, 905), to obtain control of eight motor carriers, through purchase of their capital stock, and to consolidate their operating rights and properties into one unit within a year from the

[1] 28 U. S. C. §§ 44, 47, 47a, 345.

date it acquired stock control. At the same time, Associated applied for permission under § 214 of the Motor Carrier Act of 1935 (49 U. S. C. § 314; 49 Stat. 543, 557, 52 Stat. 1240, 54 Stat. 924) to issue preferred and common stock to be used mainly in exchange for stocks of the eight common carriers and four associated noncarriers.

Before the Commission, approval of the applications was opposed by the Secretary of Agriculture, the Anti-Trust Division of the Department of Justice, the National Grange, four fruit growers associations and Super Service Motor Freight Company, a motor carrier.[2] An examiner held hearings at which evidence was introduced, and the Commission heard argument on objections to his report before finally authorizing the consolidation.[3] 38 M. C. C. 137. McLean Trucking Company, Inc., a motor carrier which claims to compete with some of the carriers included in the merger, brought suit in the District Court to set aside the Commission's orders. The Secretary of Agriculture and the American Farm Bureau Federation intervened as plaintiffs. The United States confessed error. The Interstate Commerce Commission and the parties to the merger defended the Commission's order.

The principal issues, later set forth with particularity, are intertwined. They relate to whether the Commission applied a proper standard in concluding to approve the merger; whether it failed to give due weight to the prohibitions and policies of the anti-trust laws; and whether, upon the evidence and within the meaning of § 5 (2) (b)

[2] Other motor carriers, shippers and shippers' organizations intervened in the proceeding, as did also the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Except for the latter, which at first opposed but ultimately supported the application, they took no position on the question whether the application should be approved.

[3] Three commissioners dissented. Approval of the merger was qualified by the imposition of certain conditions not here relevant.

of the Interstate Commerce Act, the Commission rightly could determine that Associated, upon consummation of the merger, would not be affiliated with any railroad. The Commission resolved all of these questions in favor of the merger, as did the District Court.

In one respect, however, the case as presented to the court was in different posture than as it came to the Commission. This change arose from the elimination of one of the constituent companies, Arrow Carrier Corporation, from the merger between the time the Commission's orders were rendered and the hearing in the District Court. After the suit was begun the Commission, on the applicant's petition, modified its orders to exclude Arrow. Accordingly the Commission also amended its answer to indicate the change, and the case was decided on the orders as modified. They present the only questions for our consideration. It may be noted that the elimination of Arrow has bearing upon the issue relating to anti-trust policy, but more particularly on that relating to railroad affiliation.

The eight carriers originally sought to be merged [4] were Arrow Carrier Corporation, Paterson, N. J.; Barnwell Brothers, Inc., Burlington, N. C.; Consolidated Motor Lines, Inc., Hartford, Conn.; Horton Motor Lines, Inc., Charlotte, N. C.; McCarthy Freight System, Inc., Taunton, Mass.; M. Moran Transportation Lines, Inc., Buffalo, N. Y.; Southeastern Motor Lines, Inc., Bristol Va.; and Transportation, Inc., Atlanta, Ga. The merger embraces some of the principal operators along the Atlantic seaboard from Massachusetts to Florida. Certain of them

[4] The four noncarriers, each associated with one of the carriers, are Barnwell Warehouse & Brokerage Company (associated with Barnwell), Brown Equipment & Manufacturing Company (associated with Horton), Conger Realty Company (associated with Horton), and Southern New England Terminals, Inc. (associated with McCarthy).

serve communities as far west as Cleveland, Ohio, Nashville, Tennessee, and New Orleans, Louisiana. But the most important effect will be to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service. According to evidence before the Commission the total assets of the companies involved, as of April 30, 1941, exceed $8,000,000 and their gross operating revenues for 1940 exceeded $19,000,000. The carriers operate principally as motor vehicle common carriers of general commodities over regular routes totalling 37,884 miles. Over 13,546 miles between important service points one or more competes with others in the group.[5] This competitive mileage will be eliminated by the merger, leaving a single carrier with routes extending over 24,338 miles.

As a result of the proposed merger Associated will be the largest single motor carrier in the United States—at least in terms of its estimated revenues—and no other single motor carrier will compete with it throughout its service area. Nevertheless, after careful consideration and on evidence clearly sufficient to sustain it, the Commission found that on completion of the merger "there would remain ample competitive motor-carrier service throughout the territory involved" and in addition that

[5] The Commission found that Consolidated and McCarthy compete substantially throughout Connecticut, Massachusetts and Rhode Island but Consolidated alone operates between those areas and New York City. Consolidated and Moran compete between the principal points in New York State, but Moran's routes also extend to Cleveland, Ohio, and to several points in northern Pennsylvania. There is some competition among Arrow, Consolidated and Moran in New York, and others of Arrow's routes parallel those of Barnwell and Horton. Barnwell, Horton and Southeastern compete to some extent in parts of the Middle Atlantic States (excluding New York). Barnwell, Horton and Transportation, Inc., compete in portions of the southern region, and Southeastern competes somewhat with them in that area.

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one or more rail carriers would offer substantial competition to Associated at all principal points. It also found that the consolidation would result in improved transportation service. Through movement of freight would be simplified and expedited, equipment would be utilized more efficiently, terminal facilities improved, handling of shipments reduced, relations with shippers and public regulatory bodies simplified, safe operation promoted, and substantial operating economies would be achieved. The Commission concluded that the applicant's assumption of the fixed charges of the carriers would not be inconsistent with the public interest, and consummation of the proposed transaction would not result in substantial injury to the carrier employees affected.

In connection with Arrow's participation, the Commission found that The Transport Company, whose stock was wholly owned by Kuhn, Loeb and Company, had an option to purchase Arrow's common stock and would receive Associated's stock therefor when the merger was effected. The stock thus received, together with 9,000 shares of Associated's common stock already held, would give The Transport Company, and through it Kuhn, Loeb and Company, 6,877 shares of Associated's preferred and 67,167 of Associated's common, a total of 13 per cent and 9.53 per cent, respectively, of the preferred and common stocks expected to be outstanding at the conclusion of the transactions.[6] Kuhn, Loeb and Company is represented on the boards of directors of several railroads

[6] Associated is authorized by its charter to issue 100,000 shares of $100 par value preferred stock drawing six per cent cumulative dividends annually and 1,000,000 shares of $1.00 par value common stock. One of the conditions of the Commission's order here is that no par value be assigned the common stock. The Commission found that in exchange for all the outstanding stock of the merged companies (except a small quantity of the preferred stock of two of the carriers which was to be redeemed for cash) Associated was to issue

and for years has had investment banking connections with the Baltimore and Ohio and the Pennsylvania Railroads, each operating in territory to be served by Associated. A representative of Kuhn, Loeb and Company would be one of Associated's nine directors. After examining the blocks of stock which other persons would hold on completion of the consolidation and other matters bearing on the relationship between the proposed merger and the railroads, the Commission concluded that Associated would not be affiliated with any rail carriers. With the elimination of Arrow, of course, the likelihood of any influence on Associated's policies by Transport, and thus by Kuhn, Loeb and Company and the railroads, was substantially reduced.

I.

The pertinent provisions of the Interstate Commerce Act, which is controlling, are set forth in the margin.[7]

648,643 shares of its common and 39,049 shares of its preferred stock, which on the cancellation of certain shares in connection with the stock of one of the noncarriers would leave outstanding 633,171 shares of common and 37,942 shares of preferred. Another 15,000 shares of preferred were to be offered to the public in order to enable Associated to obtain surplus cash. The preferred, which like the common was entitled to one vote per share, was convertible into common at the option of the holders, on terms not here relevant.

There were 71,480 shares of Associated's common stock outstanding at the time the application was filed, of which 31,240 were held by the president of Associated, 9,000 by The Transport Company (received for engineering accounting data given in connection with the merger), and the remainder by stockholders in the corporations to be merged.

[7] Section 5 provides in pertinent parts:

"Sec. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common

Section 5 (2) makes lawful a consolidation of the sort here attempted only if the Commission authorizes it. The Commission is empowered to authorize and approve a

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carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: . . .

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall pre-

consolidation either as applied for or as qualified by such terms and conditions as it deems "just and reasonable," if it finds that the merger "will be consistent with the

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sent an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

. . . . .

"(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such per-

public interest." § 5 (2) (b). In passing upon a proposed consolidation the Commission is required to "give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2) (c). The foregoing provisions supply the general statutory standards for guiding the Commission's judgment; and within their broad limits, its authority is "exclusive and plenary." § 5 (11).

However, in two particulars, pertinent especially to the issues concerning anti-trust policy and railroad affiliation, § 5 lays down more explicit commands. One is a specific exemption of carriers and individuals participating in an approved merger "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the trans-

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son to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(11) The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

actions so approved . . . and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." § 5 (11). The other provides the standards to be applied in cases of affiliation of a motor carrier with a railroad. Where a railroad or "any person which is controlled by such a carrier, or affiliated therewith" [8] is an applicant in a consolidation proceeding, the Commission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." § 5 (2) (b). In the light of these controlling statutory provisions the issues must be stated more sharply for proper perspective of what is at stake.

II.

As has been said, they are intertwined. This is true especially of the issues concerning the propriety of the standards applied and whether due consideration was given to the anti-trust laws and policies, although the question of rail affiliation is closely related to both.

The chief attack on the orders is that the Commission improperly construed the standards by which Congress intended it to determine the propriety of a consolidation; and the burden of this complaint is that it did so "by failing to consider and give due weight to the anti-trust and other laws of the United States." The argument seems to be that the merger, notwithstanding the Commission's approval, violates the Sherman Act; hence the Commission is without power to approve the merger. This presupposes that Congress did not intend, by enacting the specific exemption of § 5 (11), to give the Commission leeway to approve any merger which, but for the ex-

[8] "Affiliated therewith" is defined in § 5 (6), *supra* note 7.

emption and the Commission's approval, would run afoul of the anti-trust laws. In other words, the Commission's authority is not "exclusive and plenary," as the section declares, within the boundaries set by the Interstate Commerce Act, including the exemption; but it is restricted also by all the ramifications of the anti-trust laws and policies, to which the Commission must give strict regard in approving motor consolidations, as if the exemption did not exist.

It is conceded this is not true of rail consolidations, though they are authorized, and subjected to the same standards, by the identical sections of the statute. A difference in application of the language is said to arise from the difference which existed in the conditions under which rail and motor carriers, respectively, were brought within the purview of the statutory commands. Thus, it is said, the Transportation Act of 1920 (41 Stat. 456) made a broad departure from previous policy by relieving rail consolidations, with the Commission's approval, from anti-trust restrictions in order to rehabilitate a broken-down industry. But, it is also said, such a condition did not characterize motor carriers when they were brought under regulation in 1935 or at the time of any subsequent legislation affecting them. Hence, it is admitted the Commission with propriety may approve a rail consolidation, otherwise prohibited by the anti-trust laws, in order to bring about needed or desirable improvement in service and economies in operation. But, as to motor carriers, it is urged the consolidation cannot be effected with any such purposes or consequences. Only when the existing service is inadequate and consolidation is necessary to bring about adequate service to the public, the argument runs, can the Commission approve it.

On its face the contention would seem to run in the teeth of the language and the purpose of § 5 (11). Nothing in its terms indicates an intention to create one au-

thority for rail consolidations and another for motor mergers. Identical provisions govern both. And to restrict the application of the section to motor carriers in the manner urged would nullify its operation as to them. The attack, when carried to such an extent, comes down to one upon the policy which Congress has declared. It has done so in terms which do not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation. It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action. The argument in its full sweep therefore must be rejected. But, taken for less than that, it poses a problem of accommodation of the Transportation Act and the anti-trust legislation, to which we now turn. In doing so we note that the former is the later in time and constitutes not only a more recent but a more specific expression of policy.

III.

To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That

legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12.

The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887.[9] For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives embodied in those efforts.[10] "Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from ex-

[9] 24 Stat. 379. See Sharfman, The Interstate Commerce Commission (1935), Part I, 11–20, and authorities cited, for a concise compilation of the more important legislation implementing the Interstate Commerce Act of 1887 and a reference to some of the impulses leading to the adoption of that Act; see also Healy, The Economics of Transportation (1940) ch. 18 *et seq.*

[10] Compare the Interstate Commerce Act of 1887, 24 Stat. 379, and the statutes collected in Sharfman, *supra* note 9, with the Transporta-

cessive or discriminatory rates";[11] and emphasis on the preservation of free competition among carriers was part of that effort.[12] The Act of 1920 added "a new and important object to previous interstate commerce legislation." It sought "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277. And in administering it, the Commission was to be guided primarily by consideration for "adequacy of transportation service, . . . its essential conditions of economy and efficiency, and . . . appropriate provision and best use of transportation facilities. . . ." *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25.

Since that initial effort at reshaping regulation of railroads to "ensure . . . adequate transportation service," [13] Congress has extended federal regulation in connection with other forms of transportation [14] and has elaborated

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tion Act of 1920, 41 Stat. 456 (see also MacVeagh, The Transportation Act of 1920 (1923)), the Emergency Transportation Act of 1933, 48 Stat. 211, and the Transportation Act of 1940, 54 Stat. 898. See also Annual Reports of the Interstate Commerce Commission for 1888, pp. 25–26; 1892, pp. 47–55; 1893, p. 9; 1894, p. 63; 1897, pp. 48–51; 1898, pp. 18–22; 1900, p. 13; 1918, pp. 4–9; 1919, pp. 1–6. See generally, Johnson, Government Regulation of Transportation (1938); Nelson, The Role of Regulation Reexamined, Transportation and National Policy, National Resources Planning Board (May, 1942) 197.

[11] *The New England Divisions Case,* 261 U. S. 184, 189.

[12] Cf. authorities cited *supra* notes 9 and 10. The Interstate Commerce Act of 1887 (24 Stat. 379) was in a sense a shadow cast by the coming Sherman Act (26 Stat. 209). Compare Snyder, The Interstate Commerce Act and Federal Anti-Trust Laws (1904) 121–122.

[13] *The New England Divisions Case,* 261 U. S. 184, 189.

[14] Cf. e. g., Air Commerce Act of 1926, 44 Stat. 568, as amended by 48 Stat. 1113; Air Mail Act of 1934, 48 Stat. 933; Air Mail Act of 1935, 49 Stat. 614; Civil Aeronautics Act of 1938, 52 Stat. 973; Motor

more fully the objectives to be achieved by its legislation. In 1935 it enacted a comprehensive scheme of regulation for motor carriers, designed to result in "a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art." [15] The policy which was to guide the Commission in administering that Act was fully stated [16] and has since been absorbed into the equally full statement of the national transportation policy. That policy, which is the Commission's guide to "the public interest," cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Texas* v. *United States*, 292 U. S. 522, demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated 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;

Carrier Act of 1935, 49 Stat. 543; and compare Title II of the Transportation Act of 1940, 54 Stat. 898, 929.

[15] Sen. Rep. No. 482, 74th Cong., 1st Sess., 3.

[16] "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part." 49 Stat. 543.

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; . . . 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." 54 Stat. 899.

The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5 (11), that the policies of the antitrust laws determine "the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, has its counterpart in motor carrier policy. The premises of motor carrier regulation posit some curtailment of free and unrestrained competition.[17] The origins[18] and legislative

[17] No motor carrier can operate in interstate commerce without a certificate of public convenience and necessity, 49 U. S. C. § 306, 49 Stat. 551, 52 Stat. 1238, 54 Stat. 923. Compare Monograph No. 21, Temporary National Economic Committee, 76th Cong., 3d Sess., 268.

The Reports of the Coordinator of Transportation (Sen. Doc. No. 152, 73d Cong., 2d Sess.; H. Doc. 89, 74th Cong., 1st Sess.) on which the Act is in large measure based (79 Cong. Rec. 12207; Sen. Rep. No. 482, 74th Cong., 1st Sess.; H. R. Rep. No. 1645, 74th Cong., 1st Sess.) disclose graphically that among the evils with which the motor carrier industry was afflicted and which would be cured by the Act was unrestrained competition. It was anticipated that the Act would confer benefits on the industry "by promoting a more orderly conduct of the business, lessening irresponsible competition and undue internal strife, encouraging the organization of stronger units, and otherwise enabling

history [19] of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when "competition between carriers may result in harm to the public as well as in benefit; and that when a [carrier] inflicts injury upon its rival, it may be the public which ultimately bears the loss." Cf. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277.

Whatever may be the case with respect either to other kinds of transactions by or among carriers [20] or to consolidations of different types of carriers,[21] there can be little doubt

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the industry to put itself on a sounder and more generally profitable basis." H. Doc. 89, 74th Cong., 1st Sess. (1934) 127.

[18] See particularly the Reports of the Coordinator of Transportation, cited *supra* note 17.

[19] Sen. Rep. No. 482, 74th Cong., 1st Sess.; 79 Cong. Rec. 12206.

[20] Even after the major shift in policy reflected in the Transportation Act of 1920, Congress left it abundantly clear that the preservation of competition and the elimination of monopolistic practices in many phases of the transportation industry was a desideratum. See e. g., 15 U. S. C. §§ 13, 14, 18–21; 38 Stat. 730 *et seq.*, 48 Stat. 1102, 49 Stat. 1526–1528; 31 I. C. C. 32, 61; 31 I. C. C. 351, 413–414; and § 5 (1) of the Interstate Commerce Act, 41 Stat. 480–481; 54 Stat. 905; and compare *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35.

[21] Cf. 49 U. S. C. § 5 (14)–(16); 37 Stat. 566, 41 Stat. 482, 54 Stat. 909. In connection with the consolidation of rail and motor carriers Congress was explicit on the subject of competition in its mandate to the Commission. Fearful of the dangerous potentialities which such coordination might create (see 79 Cong. Rec. 5654–5655, 12206, 12222–12225) Congress prescribed more rigorous requirements for that process than for simple motor carrier consolidations. For the latter approval may be granted if the Commission finds the transaction "consistent with the public interest." For a rail carrier to consolidate with a motor carrier, Commission approval requires a finding that the transaction will "be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Compare the language of § 213 (a) of the Motor Carrier Act of 1935, 49 Stat. 555–556, 52 Stat. 1239, (and cf. 86 Cong. Rec. 11546) with that of § 5 of the Transportation Act of 1940.

that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by "encouraging the organization of stronger units" in the motor carrier industry.[22] And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility.[23] It in terms relieved participants in appropriate mergers from the requirements of those laws. § 5 (11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value,[24] is significant chiefly as it aids in the

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[22] Cf. note 17 *supra*. Authorization of consolidation of rail carriers stems historically from circumstances different from those impelling the authorization of consolidation of motor carriers. Compare authorities cited in notes 9 and 10 *supra* with those in notes 17–19 *supra*. This difference in origins is not entirely to be ignored simply because the same provisions of § 5 now govern both motor carrier and rail carrier consolidations. Cf. 86 Cong. Rec. 11546. But whatever effect the difference may have, as a guide to the Commission concerning the extent to which and circumstances in which consolidation should be allowed, it cannot nullify the power given to the Commission by § 5 (11).

[23] Compare the provisions of the statutes cited *supra* notes 20 and 21.

[24] Cf. note 26 *infra;* compare also 41 Stat. 481–482; *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35; MacVeagh, The Transportation Act of 1920 (1923) 275–292.

attainment of the objectives of the national transportation policy.

Therefore, the Commission is not bound, as appellants urge, to accede to the policies of the anti-trust laws so completely that only where "inadequate" transportation facilities are sought to be made "adequate" by consolidation can their dictates be overborne by "the public interest." That view, in effect, would require the Commission to permit only those consolidations which would not offend the anti-trust laws. As has been said, this would render meaningless the exemption relieving the participants in a properly approved merger of the requirements of those laws, and would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices.[25] Compare *Dayton-Goose Creek Ry. Co.* v. *United States, supra; The New England Divisions Case, supra.*

Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commission power to control such developments.[26] The national transportation policy re-

[25] Cf. note 17 *supra.*

[26] E. g., Senator Wheeler, in charge of the measure in the Senate, said:

"At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizable systems. In view of past experience with railroad and public-utility unifications, it is regarded as necessary that the Com-

quires the Commission to "promote . . . economical . . . 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, [or] undue preferences or advantages. . . ." The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed consolidation is

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mission have control over such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance." 79 Cong. Rec. 5654–5655.

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"consistent with the public interest." Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell* v. *United States*, 315 U. S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

IV.

The Commission found, as has been noted, that the proposed consolidation would result in improved transportation service, greater efficiency of operation and substantial operating economies. The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to more efficient use of equipment and save motor fuel. Terminal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced.[27] The Commission also considered the extent to which competition among the merging carriers would be diminished, the effects of the consolidation on competing carriers and the consequences for transportation service and motor carrier operations in general in the areas affected. It found that in each of the areas served by the present components of the merger there are from 44 to more than 100 Class I carriers, many

[27] E. g., tracing shipments and settlement of claims would be facilitated, congestion at shipping platforms would be reduced, the average life of the equipment would be lengthened by scientific maintenance and safety programs on a large scale, vehicles would be shifted quickly to meet peak demands on certain routes, etc.

of which were regular route common carriers of general commodities, comparable in size—insofar as size is disclosed by operating revenues—to some of the participants in the consolidation. Between the principal points in each of the areas served substantial competition by independent Class I carriers now exists. While none of these carriers operates a through service over the entire area to be served by Associated, the Commission found that rail carrier service competes at all the principal points to be served by Associated, and that contract carriers also offer competition.

The Commission determined, on the basis of facts appearing in the record and its experience with other consolidations, that it was not likely that Associated's size and competitive advantages would enable it to control the price and character of interchange traffic, to drain off substantial amounts of shippers' business or in other ways to smother the competition of other motor carriers. It concluded that ample competition would remain and, weighing all the factors, that the consolidation was "consistent with the public interest."

Necessarily in its inquiry the Commission had to speculate to some extent as to the future consequences and effects of a present consolidation. But it based its judgment on available facts as to present operations and business practices and past experience with transportation operations and analogous transactions.

We cannot say that the Commission measured "the public interest" by standards other than those Congress provided or that its findings do not comply with the requirements of the Act. The material findings are supported by evidence; and while a more meticulous regard for its function might have impelled the Commission to accede to the Anti-Trust Division's request for certain information from other shippers bearing on the question of

competition, we do not think its failure to do so requires, on this record, that its conclusions be overturned.

V.

Appellants also attack the propriety of the Commission's conclusion that Associated is not, and would not be, on consummation of the consolidation, "affiliated" with any railroad. Whatever might have been the case if Arrow had been included in the merger, a different question is presented by the orders now under review.

Section 5 (2) provides:

"That if . . . any person which is controlled by a [rail] carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Section 5 (6) provides:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

The only relevant evidence now pointing toward affiliation of the applicant with rail carriers are the facts that Kuhn, Loeb and Company indirectly owns 9,000 shares

of Associated's common stock, has one representative among the nine directors of Associated, has investment banking connections with competing rail carriers, and is represented on the boards of directors of other railroads. For present purposes we may assume that by virtue of those connections the rail carriers' interests will be the banking house's interests in directing the affairs of Associated. But aside from the proportionately small (9,000 out of 1,000,000 common shares) stock ownership and the place on the board of directors, the Commission found no connection—either in the origins of the present proposal or in personnel, financing or otherwise—between Kuhn, Loeb and Company and the rail carriers on the one hand and Associated on the other. This contrasts sharply with the circumstances in Transport Co., 36 M. C. C. 61, where a much larger merger of eastern motor carrier operators, sought to be consummated with at least the assistance of Kuhn, Loeb and Company, was denied approval by the Commission. And in the present merger others, not associated, so far as this record shows, with Kuhn, Loeb and Company or rail carriers would have substantial blocks of stock.[28] We cannot find anything arbitrary or unreasonable in the conclusion that the consolidation as finally authorized will not result in Associated's being affiliated with a carrier by rail. It may be added that under the Commission's order in this case the relatively close holdings which will emerge from the consolidation cannot be altered without the Commission's approval. And it is the consolidation as approved which is exempted from the operation of the anti-trust laws and the prohibition against rail affiliation without approval. Any future

[28] E. g., H. D. Horton and the members of his family will own 14,917 shares of Associated's preferred stock and 267,873 shares of its common stock. The stockholders of Consolidated also would own substantially greater blocks than the 9,000 shares which Kuhn, Loeb and Company controls.

change which may bring the consolidation into clash with either prohibition may be considered when it arises.

Accordingly the judgment is

Affirmed.

MR. JUSTICE MURPHY is of the opinion that the judgment should be reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting:

I think that the Commission misconceived its authority under the merger and consolidation provisions of the Act. I agree that the Commission is not to measure motor vehicle consolidations by the standards of the anti-trust acts. Such a construction would make largely meaningless, as the opinion of the Court demonstrates, the power of the Commission under § 5 (11) to relieve participants in mergers or consolidations from the requirements of those acts. But I think a proper construction of the Act requires the Commission to give greater weight to the principles of competition than it apparently has done here.

I agree that the standard of the "public interest" which governs mergers and consolidations under § 5 embraces the national transportation policy contained in the Act. That declared policy calls, among other things, for the recognition and preservation of "the inherent advantages" of motor vehicle transportation; the promotion of "safe, adequate, economical, and efficient service" and the fostering of "sound economic conditions in transportation and among the several carriers"; the establishment and maintenance of reasonable charges "without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices"—to the end of "developing, coordinating, and preserving a national transportation system" which is "adequate to meet" the national needs. 54 Stat. 899. Those standards are specifically re-

ferred to in § 5 (2) (c) where an itemization of some of the factors to which the Commission shall give weight is made. And the preamble itself states that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

But I am of the opinion that the concept of the "public interest" as used in § 5 also embraces the anti-trust laws. Those laws extend to carriers as well as to other enterprises. But for the approval of the Commission the present consolidation would run afoul of the Sherman Act. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. And the Clayton Act (which makes specific references to common carriers) by § 11 expressly entrusts the Commission with the authority of enforcement of its provisions "where applicable to common carriers." 38 Stat. 734, 15 U. S. C. § 21. Those laws still stand. We thus have a long standing policy of Congress to subject these common carriers to the anti-trust laws. And we should remember that, so far as motor vehicles are concerned, we are dealing with transportation units whose rights of way—the highways of the country—have been furnished by the public. These considerations indicate to me that while the power of Congress to authorize the Commission to lift the ban of the anti-trust laws in favor of common carriers is clear (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25–26), administrative authority to replace the competitive system with a cartel should be strictly construed. I would read § 5 of the Transportation Act so as to make for the greatest possible accommodation between the principles of competition and the national transportation policy. The occasions for the exercise of the administrative authority to grant exemptions from the anti-trust laws should be closely confined to those where the transportation need is clear.

If it were the opinion of the Commission that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, I have no doubt that it would be authorized to lift the ban of the anti-trust laws. But unless such necessity or need were shown I do not think the anti-trust laws should be made to give way. Congress did not give the Commission *carte blanche* authority to substitute a cartel for a competitive system. It may so act only when that step "will be consistent with the public interest." § 5 (2) (b). But since the "public interest" includes the principles of free enterprise, which have long distinguished our economy, I can hardly believe that Congress intended them to be swept aside unless they were in fact obstacles to the realization of the national transportation policy. But so far as we know from the present record that policy may be as readily achieved on a competitive basis as through the present type of consolidation. At least such a powerful combination of competitors as is presently projected is not shown to be necessary for that purpose. In this case the hand of the promoter seems more apparent than a transportation need.

For these reasons I would resolve the ambiguities of the Act in favor of the maintenance of free enterprise. If that is too niggardly an interpretation of the Act, Congress can rectify it. But if the Commission is allowed to take the other view,[1] a pattern of consolidation will have been approved which will allow the cartel rather than the competitive system to dominate this field. His-

[1] The position here taken is substantially the view which originally obtained in the Commission. Northland-Greyhound Lines, Inc., 5 M. C. C. 123; Richmond-Greyhound Lines, Inc., 35 M. C. C. 555. But that view did not long obtain. See Northland-Greyhound Lines, Inc., 25 M. C. C. 109; Richmond-Greyhound Lines, Inc., 36 M. C. C. 747. And see Meck & Bogue, Federal Regulation of Motor Carrier Unification, 50 Yale L. Journ. 1376, 1393–1397.

tory shows that it is next to impossible to turn back the clock once such a trend gets under way.

But there is another phase of the case which in my view requires a reversal of the judgment below. The Commission has allowed the investment banker of railroad companies to be represented on the board of the motor vehicle company. It did so after a finding that it was not "reasonable to believe that the affairs of applicant would be managed in the interest of any railroad" and therefore that the motor vehicle company would not be affiliated with any railroad within the meaning of the Act. § 5 (5) (a), (6). But though we assume there was no such affiliation, I agree with Commissioner Patterson that that is not the end of the matter. The question still remains whether it is "consistent with the public interest" to allow such a banker's nexus between the two competitors. I cannot believe that Congress intended the Commission to treat such a matter as inconsequential. The whole history of finance urges caution when one investment banker stakes out his claim to two competing companies. Experience shows that when one gains a seat at his competitor's table, it is the beginning of the end of competition. A new zone of influence has been created. Its efficacy turns not on the amount of stock ownership but on a host of subtle and imponderable considerations. Such an intertwined relationship has been "the root of many evils" (Brandeis, Other People's Money, p. 51) and so demonstrably inimical to the "public interest" in the past as not to be disregarded today.

I agree that if § 5 were read as the Court reads it, the order of the Commission should be affirmed. But since the Commission took a view of the law which in my opinion was erroneous, I would reverse the judgment below so that the case might be returned to the Commission for reconsideration of the application under the proper construction of § 5.

MAHNICH *v.* SOUTHERN STEAMSHIP CO.

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

No. 200. Argued January 5, 1944.—Decided January 31, 1944.

1. A finding of seaworthiness by a district court sitting in admiralty is usually a finding of fact, which will not be reviewed here if the two courts below concurred in it. But the finding of seaworthiness in this case is reviewable here, since both courts below, holding themselves bound by a previous decision of this Court, reached that conclusion as a matter of law. P. 98.
2. A vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. P. 99.
3. A seaman who was injured on shipboard when the staging on which he was working fell as a result of a break in defective rope with which it was rigged, is entitled under the maritime law to indemnity from the shipowner for breach of the warranty of seaworthiness. P. 103.

   The owner is not relieved of liability in such case by the fact that the use of the defective rope in rigging the staging was due to the negligence of the ship's officers or of fellow servants of the seaman, for the owner's duty to furnish the seaman with safe appliances and a safe place to work is nondelegable; nor is the owner relieved by the fact that there was sound rope aboard, which could have been used in rigging the staging, for the owner's duty is to furnish the seaman with safe appliances for use in his work when and where it is to be done.
4. *Plamals* v. *The Pinar Del Rio,* 277 U. S. 151, to the extent that it conflicts herewith, is disapproved. P. 105.

135 F. 2d 602, reversed.

CERTIORARI, 320 U. S. 725, to review the affirmance of a decree, 45 F. Supp. 839, denying recovery in an action in admiralty for indemnity for injuries.

Mr. Abraham E. Freedman, with whom *Mr. Paul M. Goldstein* was on the brief, for petitioner.

Mr. Joseph W. Henderson, with whom *Mr. George M. Brodhead, Jr.* was on the brief, for respondent.

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

Petitioner, a seaman on respondent's vessel, the "Wichita Falls," was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury.

Petitioner brought this suit in personam in admiralty in the District Court for Eastern Pennsylvania, to recover indemnity and maintenance and cure. On the trial the evidence showed that the mate ordered petitioner to paint the bridge and to stand on the staging for that purpose. The staging consisted of a board supported at both ends by rope which, if sound, was sufficient in strength to sustain the stage and its load. The boatswain, by direction of the mate, had cut the rope for the staging from a coil, which had been stored for two years in the Lyle gun box. The rope, intended for use with the Lyle life-saving apparatus, had never been used. There was testimony that it had been examined and tested by the boatswain and the mate, and that it was generally sound in appearance. After the accident, examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it.

The trial judge concluded from the evidence that there was sound rope on board available for rigging the staging. He found that there was no fault in the manner in which the stage had been rigged, but that the rope selected by the mate was defective and that petitioner's injury was attributable to the negligence of the boatswain and the

mate in failing to observe the defect.[1] He held that the proceeding was brought too late to recover for the negligence under the Jones Act, and that the "Wichita Falls" was not unseaworthy by reason of the defective rope used in rigging the staging, citing *Plamals* v. *The Pinar Del Rio,* 277 U. S. 151, 155. He accordingly denied indemnity to petitioner, but gave judgment in his favor for maintenance and cure.

The Court of Appeals for the Third Circuit affirmed, 129 F. 2d 857, 135 F. 2d 602, by a divided court, resting its decision on the statement quoted from the opinion in *The Pinar Del Rio, supra,* 155, that "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." We granted certiorari, 320 U. S. 725, upon a petition which urged that the statement quoted from *The Pinar Del Rio, supra,* does not rule this case, and that the decision below is inconsistent with the decisions in *The Osceola,* 189 U. S. 158, and in *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424.

The sole issue presented by the petition for certiorari is that of respondent's liability to indemnify petitioner for the injury suffered by reason of the defective staging. No question is raised with respect to petitioner's right to recover under the Jones Act or his right to the award of maintenance and cure or its adequacy.

A finding of seaworthiness is usually a finding of fact. *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139, 145; *Steel* v. *State Line S. S. Co.,* L. R. 3 A. C. 72, 81–82, 90–91. Ordinarily we do not, in admiralty, more than in other

[1] The dissenting judge in the Circuit Court of Appeals thought that this finding of negligence on the part of the ship's officers was erroneous. See 135 F. 2d 602, 605. There was no attack on this finding here, and we have not examined the correctness of the trial judge's conclusion, for, as we will point out, the question whether there was such negligence does not control decision of the issues of this case.

cases, review the concurrent findings of fact of two courts below. *The Carib Prince,* 170 U. S. 655, 658; *The Wildcroft,* 201 U. S. 378, 387; *Luckenbach* v. *McCahan Sugar Co., supra; Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 13; *Just* v. *Chambers,* 312 U. S. 383, 385. Here, however, both courts below, holding themselves bound by *The Pinar Del Rio, supra,* have, on the facts found, held as a matter of law that the staging was seaworthy despite its defect. That conclusion of law is reviewable here.

Until the enactment of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, the maritime law afforded no remedy by way of indemnity beyond maintenance and cure, for the injury to a seaman caused by the mere negligence of a ship's officer or member of the crew. But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola, supra,* 175. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380–381; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 258–260; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 134; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 370–371; *Warner* v. *Goltra,* 293 U. S. 155, 158; *The Arizona* v. *Anelich,* 298 U. S. 110, 120 *et seq.; Socony-Vacuum Co.* v. *Smith, supra,* 428–429; *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, 40. The latter rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in *The Osceola, supra,* by numerous decisions of the lower federal courts during the last century. See *The Arizona* v. *Anelich, supra,* 121, footnote 2.

This was a recognized departure from the rule of the English law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, *Couch* v. *Steel,* 3 El. & Bl. 402, until the enactment of the

Merchant Shipping Act of 1876, 39 & 40 Vict., Chap. 80, § 5, reenacted by the Merchant Shipping Act of 1894, 57 & 58 Vict., Chap. 60, § 458. By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof, an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage. See *Hedley* v. *Pinkney & Sons S. S. Co.*, [1894] A. C. 222.

In a number of cases in the federal courts, decided before *The Osceola, supra,* the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually by the seaman's officers or fellow seamen, to supply seaworthy appliances. *The Noddleburn,* 28 F. 855, aff'd, 30 F. 142; *The Neptuno,* 30 F. 925; *The Frank and Willie,* 45 F. 494; *The Julia Fowler,* 49 F. 277; *William Johnson & Co.* v. *Johansen,* 86 F. 886; and see *The Columbia,* 124 F. 745; *The Lyndhurst,* 149 F. 900. But later cases in this and other federal courts have followed the ruling of *The Osceola, supra,* that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.[2] *Carlisle Packing Co.* v. *Sandanger, supra,* 259–260; *The Arizona* v. *Anelich, supra,* 120 *et seq.; Beadle* v. *Spencer,* 298 U. S. 124, 128–129; *Socony-Vacuum Co.* v. *Smith, supra,* 428–429, 432; *The H. A. Scandrett,* 87 F. 2d 708, 710–711; cf. *The Edwin I. Morrison,* 153 U. S. 199, 210.

If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness.

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[2] By statute the owner's similar obligation with respect to the carriage of goods is merely to exercise "due diligence to make the . . . vessel in all respects seaworthy." Harter Act, § 3, 27 Stat. 445, 46 U. S. C. § 192. See also Carriage of Goods by Sea Act, § 4 (1), 49 Stat. 1210, 46 U. S. C. § 1304 (1).

It is true that before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew. But this is not sufficient to insulate the owner from liability for their negligent failure to furnish seaworthy appliances, see Judge Addison Brown, in *The Frank and Willie, supra,* 495–497; *Carlisle Packing Co.* v. *Sandanger, supra,* 259–260, more than their negligence relieves him from his liability for maintenance and cure. *The Osceola, supra,* 175; *Pacific S. S. Co.* v. *Peterson, supra,* 134; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527.

It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle.[3] That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seaman. The defense of the fellow servant rule to suits in admiralty for negligence, a defense precluded by the Jones Act, has never avowedly been deemed applicable to the owner's stricter obligation to the seaman of the warranty of seaworthiness.

The Osceola, supra, in answer to certified questions, laid down as separately numbered and independent propositions the rule of the owner's unqualified obligation to furnish seaworthy appliances, and the rule that the owner is not liable to a seaman for the negligence of his fellow servants. It nowhere intimated that the owner is relieved from liability for providing an unseaworthy appliance, merely because the unseaworthiness was attributable to the negligence of fellow servants of the injured seaman rather than to the negligence of the owner. Indeed, to support the rule of absolute liability, the Court, see *The Osceola, supra,* 173–175, relied on cases in which the vessel or its owner had been held liable for injuries resulting from unseaworthiness, although application of the fellow

[3] See note 2, *supra.*

servant rule would have barred recovery. Of one, *The Frank and Willie, supra,* the Court, after pointing out that the seaman was injured by reason of the negligent failure of the mate to provide a safe place in which to work, said, "the question was really one of unseaworthiness and not of negligence."

The Court cited, discussed and relied upon *The Noddleburn, supra, Olson* v. *Flavel,* 34 F. 477, *The Frank and Willie, supra,* and *The Julia Fowler, supra.* In each the seaman was injured as a result of his use of unseaworthy appliances rendered so by the negligence of a fellow servant. In *The Julia Fowler, supra,* the injury was caused by a fall from a boatswain's chair which the Court found, as in this case, was rigged with defective rope by reason of the fault of the mate. The inapplicability of the fellow servant rule to this type of case was recognized explicitly in *The Noddleburn, supra,* 858, and in *The Frank and Willie, supra,* 495–497. And such was our holding in *Carlisle Packing Co.* v. *Sandanger, supra,* where it was said, at p. 259, "without regard to negligence the vessel was unseaworthy." See also the discussion in *The H. A. Scandrett, supra,* 710–711.

In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is nondelegable and not qualified by the fellow servant rule. *Hough* v. *Railway Co.,* 100 U. S. 213, 216–220; *Northern Pacific R. Co.* v. *Herbert,* 116 U. S. 642, 647–648; *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 386–388; *Union Pacific Ry. Co.* v. *Daniels,* 152 U. S. 684, 688–689. It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of

seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See *The Osceola, supra,* 174–175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. Whether petitioner knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. *The Arizona* v. *Anelich, supra,* 123–124; *Beadle* v. *Spencer, supra,* 129–130; *Socony-Vacuum Co.* v. *Smith, supra.*

Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one. We have often had occasion to emphasize the conditions of the seaman's employment, see *Socony-Vacuum Co.* v. *Smith, supra,* 430–431 and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting re-

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quirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done. For, as was said in *The Osceola, supra,* 175, the owner's obligation is "to supply and *keep in order* the proper appliances appurtenant to the ship." (Italics supplied.) It is not enough that the "Wichita Falls" had on board sound rope which could have been used to make the staging seaworthy, if in fact the staging was unsafe because sound rope was not used. *The Julia Fowler, supra; The Navarino,* 7 F. 2d 743, 746; cf. *The Portland,* 213 F. 699.

Respondent's argument that the defective rope was a consumable supply of the vessel, not falling within the requirement that the owner must furnish seaworthy equipment appurtenant to the vessel, is inappropriate here because, as we have said, it was the stage which was unseaworthy, by reason of the use of the defective rope in its construction. The stage was used in the repair of the ship, and was as intimately associated with it and with the seaman's employment as are the gangways or other appliances or the passageways used by the seaman in doing his work.

Moreover it would not be enough to say that this case concerns a consumable supply, for in *Carlisle Packing Co.* v. *Sandanger, supra,* the owner was held liable to a seaman for unseaworthiness, where a consumable supply of the ship was stored in such fashion as to render it dangerous to the seaman who used it. There gasoline had been negligently placed in a can marked "coal oil" and the seaman was burned by an explosion which resulted when he attempted to build a fire with the gasoline, which he had taken out of the can thinking it to be coal oil.

The statement from *The Pinar Del Rio, supra,* relied upon by the two courts below, could be taken to support

their decision, only on the assumption either that the presence of sound rope on the "Wichita Falls" afforded an excuse for the failure to provide a safe staging, or that antecedent negligence of the mate in directing the use of the defective rope relieved the owner from liability for furnishing the appliance thereby rendered unseaworthy. But as we have seen, neither assumption is tenable in the light of our decisions before and since *The Pinar Del Rio, supra.* So far as this statement supports these assumptions, it is disapproved. We cannot follow it, and also follow *The Osceola, supra,* the cases which it approved and *Carlisle Packing Co.* v. *Sandanger, supra.* We prefer to follow the latter as the more consonant with principle and authority.

Reversed.

MR. JUSTICE ROBERTS:

I think the judgment is wrong. The case does not present a situation calling for liberalizing the maritime law in favor of seamen by abolishing the defense of a fellow seaman's negligence. Congress did that in 1920 (41 Stat. 1007). But it required actions in such situations to be brought within two years, which it subsequently extended to three years. The sole question is whether recovery should be permitted beyond the time when Congress said action must be instituted. I should say nothing further on this question save that the method of reaching the decision seems to me contrary to right exercise of the judicial function.

The petitioner has undoubtedly obtained care and cure to which, as a seaman, he was entitled irrespective of fault on the part of owner or master. He failed timely to avail himself of his right to sue under § 33 of the Jones Act. In an action under that statute the defense of the negligence of a fellow servant would not have been open to the respondent. In an effort to obtain damages, he brought

this action under the general maritime law. His recovery *vel non* under the unusual circumstances can be of little importance to others than himself and the respondent. But, in order to give him the demanded relief, the court resorts to nullification of an earlier decision, *Plamals* v. *Pinar Del Rio,* 277 U. S. 151, indistinguishable in fact and law, which has stood unquestioned for sixteen years, and applied principles settled years before in *The Osceola,* 189 U. S. 158.

The history of *Plamals* v. *Pinar Del Rio* is important. The libellant, a seaman on a British ship lying in United States waters, was ordered by a mate to repair a stack. A sling was used, for which the mate selected a piece of rope. The rope broke and the seaman was injured. He filed a libel *in rem* against the vessel. The owner gave bond and released the ship.

The libel, after reciting the facts, alleged that the injuries were due "to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn and not suitable for use." The libel failed to refer to § 33 of the Jones Act, but, at the trial, the libellant's proctor stated that he relied upon it. The claimant in its answer asserted that the vessel was of British registry and, as the only redress open to the libellant was under the British Workmen's Compensation Law, the Admiralty Court should decline jurisdiction. The claimant amended its answer to deny liability on the ground that the ship was provided with proper tackle but, through the negligence of an officer, bad tackle was selected.

The District Court held that the British law,—the law of the flag,—afforded no action *in rem* nor any action for indemnity since there was an ample supply of good rope on board and the mate chose an insufficient rope for use.

On appeal the Circuit Court of Appeals held that the libellant's pleadings were inadequate but, as no point had

been made of their infirmity, went on to consider "whether, on the facts proven and under any applicable law, libellant has a case." [1] It said the libellant must make out a case of maritime tort; that, under the law of England, there could be no recovery and that if the applicable law were the maritime law of the United States the libellant could not recover for the improvident or negligent act of the mate, adding: "If the vessel had been unsupplied with good and proper rope, a different question would arise."

That court further held that, although, under the Jones Act, libellant could have sued at law or filed a libel *in personam,* the statute gave no right to a libel *in rem.* The decree dismissing the libel was, therefore, affirmed.

Petitioner sought review in this court and, in his petition and briefs, asserted the right to maintain a libel *in rem* under the Jones Act but, in the alternative, insisted that, under the general maritime law, independent of the Jones Act, the libellant was entitled to recover for the failure to supply, and keep in order, proper appliances, properly rigged, and for the unseaworthiness of the vessel in this respect.

It will be noted how closely that case parallels the instant one. In both, though for differing reasons, the libellant was precluded from relying on the Jones Act which would have avoided all question of a fellow servant's negligence. In both, the libellant then sought to resort to his claim for indemnity for a maritime tort. In the *Pinar Del Rio* case it was held that he had made no case on the latter theory, and in the present case it is held that he has made out such a case. This court, in the earlier case, held two things: first, that a libel *in rem* cannot be maintained under the Jones Act, and, second, that, if the case were treated as the Circuit Court of Appeals had treated it,—as one for

[1] 16 F. 2d 984, 985.

recovery of indemnity for a maritime tort,—the record would not support the claim. The court said:

"The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available.

"We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based upon that section. *The evidence would not support a recovery upon any other ground.*" (Italics added.)

These holdings were made in answer to extended argument in the briefs, the petitioner on the one hand contending that the vessel should be treated as an American vessel and as being unseaworthy, respondent contending that, whether British or American, she was not unseaworthy under the law of either nation and that the libellant's injuries were due to the negligence of a fellow servant. What the court said, therefore, was clearly responsive to the contentions of the parties. The present decision does not merely disapprove language used in the earlier case. It overrules the case and alters long-established law without adequate reason.

There has been some suggestion that the holding in the *Pinar Del Rio* case to which I have referred crept into the opinion by inadvertence. But I cannot assume any such thing in view of the proverbial care which all the justices exercise to prevent expression of opinion on questions not necessary to the decision of a case. The decision must be taken at face value as the expression of the views of all the members of the court.

Cases now cited in the opinion of the court were cited and considered by the court in the *Pinar Del Rio* case.[2]

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[2] *The Julia Fowler,* 49 F. 277; *The Noddleburn,* 28 F. 855; The *Osceola,* 189 U. S. 158; *The Navarino,* 7 F. 2d 743. *The Portland,* 213 F. 699, not cited, was, however, decided prior to this court's decision in the *Pinar Del Rio* case.

The most important of them, and one on which the Circuit Court of Appeals relied in that case, was *The Osceola, supra.*[3] The instant decision not only overrules the *Pinar Del Rio* case but asserts that it is inconsistent with the holdings in *The Osceola.* If this be true it must be because the court has a different conception of the word consequence than that I have.

In *The Osceola* this court, after the fullest consideration, recapitulated the admiralty law respecting the rights of injured seamen, *inter alia,* as follows (p. 175):

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen *in consequence* of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. . . ." (Italics supplied.)

"That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

Unseaworthiness in the abstract does not afford a cause of action. An injury must be "in consequence" of the unseaworthiness,—must be connected with and result from it. And "unseaworthiness" covers a variety of situations variously affecting the work and risks of seamen. Unseaworthiness of the kind on which the court bases its opinion is very different from that due to a faulty mechanism which is an inherent risk to life and limb. If the doctrine now announced is right, a vessel supplied with the newest charts would be unseaworthy if the owner failed to remove old charts from the pilot house; it would make the owner an insurer that, no matter how

[3] *The Osceola* has long been recognized as a leading case. It has been cited for the propositions it laid down at least eighteen times by this court, and nearly two hundred times by lower federal courts.

many adequate facilities were at hand, no insufficient one was anywhere on the ship. Here the so-called unseaworthiness did not consist in want of adequate ropes for the seaman's need. His injury was due entirely to the negligent selection by the mate of a piece of bad rope when ample good rope was at hand. The District Court found that the mate was negligent, the Circuit Court of Appeals accepted the finding, and the disposition of the case in this court is on the assumption of the correctness of this finding.

The question, therefore, is whether the ship is liable for the mate's negligent choice of a defective piece of rope when there was plenty of good rope aboard. Under the principles announced in *The Osceola,* recovery in admiralty for a maritime tort is barred by the mate's negligence. It was to avoid the interposition of such a defense of a fellow servant's act that the Jones Act made the Federal Employers' Liability Act applicable to the claims of injured seamen.

The court professes to have to choose between the doctrine it reads into the decision in *The Osceola* case and the ruling in *Pinar Del Rio.* But further it asserts that *Pinar Del Rio* is in conflict with *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, an opinion written by the same justice who wrote the opinion in the *Pinar Del Rio* case. The cited authority, as I read it, clearly ruled that in order for a seaman to recover for an injury where the ship is unseaworthy the unseaworthiness must be the direct cause of his injury.

That was an action brought in a state court by an injured seaman against the owner of a motor boat. When the boat left on her voyage a can intended for the use of the crew, supposed to contain coal oil, and so labeled, had been filled with gasoline and the seaman, without notice of this fact, attempted to use the contents and was

burned. The supply of life preservers was insufficient and his injuries were aggravated by his having to search for one before he could jump overboard and extinguish the flames consuming his clothing. A verdict and judgment for the seaman was sustained. This court found that erroneous instructions had been given the jury but held the error harmless since the record showed that, without regard to the owner's negligence, the vessel was unseaworthy when she left the dock, and the court held (p. 259): ". . . if thus unseaworthy and one of the crew received damage *as the direct result thereof,* he was entitled to recover compensatory damages." (Italics supplied.) The court cited, amongst other cases, *The Osceola.*

I am at a loss to understand the citation of this case as authority for the present decision. The reasoning of the court's opinion seems to be this: In the *Carlisle Packing Co.* case recovery was permitted because the injury was the direct result of unseaworthiness. That decision, therefore, requires that the owner be held liable in the instant case although the seaman's injury was not the direct result of unseaworthiness, but of the mate's negligence. It must be upon the basis of such reasoning that the *Pinar Del Rio* case is overruled and the judgment below reversed.

There is some suggestion that the *Pinar Del Rio* case was overruled by *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424. It need only be said that the *Pinar Del Rio* case was not cited in the briefs of counsel in the *Socony* case nor referred to in the opinion and that in fact the *Socony* decision involved and purported to deal only with the general doctrine of assumption of risk and not with the defense of fellow servant's negligence. That the defenses are not the same is made plain by the fact that it has always been held that a fellow servant's negligence is no defense in actions brought under the Federal Em-

ployers' Liability Act,[4] whereas assumption of other risks was a defense [5] until Congress recently explicitly acted to abolish it as such.[6]

Indeed, if in the *Socony* case, the suit had involved a fellow servant's negligence instead of the seaman's assumption of the risk involved in the use of an unsafe appliance supplied by the vessel, the case would have been so plainly ruled by earlier decisions [7] that it would have merited no consideration, much less an opinion, by this court.

The statement in the opinion that the defense of a fellow servant's negligence had never been deemed applicable to the owner's obligation to the seaman under the warranty of seaworthiness ignores the point that if the seaman is to recover the unseaworthiness must, under the authorities cited, be the direct cause of the injury. If it is not, but a fellow servant's negligence is the cause, the seaman could not recover,[8] until the law was altered by the Jones Act.

The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and

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[4] *Illinois Central R. Co.* v. *Skaggs*, 240 U. S. 66.

[5] *Seaboard Air Line* v. *Horton*, 233 U. S. 492.

[6] Act of Aug. 11, 1939, 53 Stat. 1404.

[7] *Jamison* v. *Encarnacion*, 281 U. S. 635; *Uravic* v. *Jarka Co.*, 282 U. S. 234.

[8] *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *The Rosalie Mahony*, 218 F. 695; *In re Tonawanda Iron & Steel Co.*, 234 F. 198; *Payne* v. *Jacksonville Forwarding Co.*, 280 F. 150; *The Daisy*, 282 F. 261; *Wood* v. *Davis*, 290 F. 1; *Hammond Lumber Co.* v. *Sandin*, 17 F. 2d 760; Benedict, Admiralty, 6 Ed., Vol. 1, p. 256.

parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.

Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case. The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes on the same question when another case comes before the court.[9] This might, to some extent, obviate the predicament in which the lower courts, the bar, and the public find themselves.

MR. JUSTICE FRANKFURTER joins in this opinion.

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[9] See *Minersville School District* v. *Gobitis,* 310 U. S. 586; *Jones* v. *Opelika,* 316 U. S. 584, 623; *Barnette* v. *West Virginia State Board of Education,* 47 F. Supp. 251, 252–3; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

EX PARTE HAWK.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. —. Decided January 31, 1944.

1. Since it does not appear that the applicant for habeas corpus, confined under sentence of a state court, has exhausted his remedies under the state law, the application is denied without prejudice. P. 118.
2. Where resort to state court remedies has failed to afford to a petitioner for habeas corpus a full and fair adjudication of the federal questions raised, either because the State affords no remedy, or because in the particular case the remedy afforded proves in practice unavailable or seriously inadequate, a federal court should entertain the petition; but in such case the petitioner should proceed in the federal district court before resorting to this Court. P. 118.
3. The statement often made that federal courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist" is inapplicable where the petitioner for habeas corpus has exhausted his state remedies and makes a substantial showing of denial of federal right. P. 117.

Application denied.

Henry Hawk, pro se.

Mr. Walter R. Johnson, Attorney General of Nebraska, for Neil Olson, Warden, respondent.

PER CURIAM.

This case comes here on petitioner's application for leave to file in this Court his petition for writ of habeas corpus. Petitioner is confined in the Nebraska State Penitentiary under sentence for murder imposed by the Nebraska District Court.

His present proceeding has been prefaced by several earlier applications to both state and federal courts. His petition for habeas corpus was denied without a hearing

by the Nebraska District Court whose decision was affirmed by the Nebraska Supreme Court, *Hawk* v. *O'Grady*, 137 Neb. 639, 290 N. W. 911. This Court denied certiorari, 311 U. S. 645. Petitioner then filed in the United States District Court for Nebraska a petition for habeas corpus, alleging matters not previously brought to the attention of the state courts. This application was denied without a hearing, and the Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that petitioner had not exhausted his state remedies, *Hawk* v. *Olson*, 130 F. 2d 910. We denied certiorari. 317 U. S. 697. Petitioner then urged his present contentions upon the Nebraska Supreme Court in a petition for writ of habeas corpus which that court denied without opinion. We denied his petition for habeas corpus upon like allegations but without prejudice to presentation of the matters alleged to the United States District Court, *Ex parte Hawk*, 318 U. S. 746.

Petitioner accordingly renewed his petition for writ of habeas corpus to the United States District Court for Nebraska and filed a like petition with the senior Circuit Judge for the Eighth Circuit; both petitions have been denied, and leave to appeal to the Circuit Court of Appeals for the Eighth Circuit has been denied by the senior Circuit Judge of that circuit. Petitioner thereupon filed the present application in this Court.

In the application now before us, and in those filed with the United States District Court and the senior Circuit Judge of the Eighth Circuit, petitioner alleges, among other things, that the state court forced him into trial for a capital offense, Neb. Comp. Stat. § 28–401, with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment, *Powell* v. *Alabama*, 287 U. S. 45; see *Smith* v. *O'Grady*, 312 U. S. 329; compare *Betts* v. *Brady*, 316 U. S. 455, and that his conviction was based in part on the intro-

duction at the trial of evidence known by the prosecution to be perjured, *Mooney* v. *Holohan*, 294 U. S. 103.

From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, *Walker* v. *Johnston*, 312 U. S. 275, 284–7; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101, 104–5; *Cochran* v. *Kansas*, 316 U. S. 255, 258. But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.

So far as appears, petitioner's present contentions have been presented to the state courts only in an application for habeas corpus filed in the Nebraska Supreme Court, which it denied without opinion. From other opinions of that court it appears that it does not usually entertain original petitions for habeas corpus, but remits the petitioner to an application to the appropriate district court of the state, from whose decision an appeal lies to the state Supreme Court, *Williams* v. *Olson*, 143 Neb. 115, 8 N. W. 2d 830, 831; see *In re White*, 33 Neb. 812, 814–15, 51 N. W. 287. From that court the cause may be brought here for review if an appropriate federal question is properly presented.

Of this remedy in the state court petitioner has not availed himself. Moreover, Nebraska recognizes and employs the common law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial, *Carlsen* v. *State*, 129 Neb. 84, 94–8, 261 N. W. 339. Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted.

Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for

crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. *Tinsley* v. *Anderson,* 171 U. S. 101, 104–5; *Urquhart* v. *Brown,* 205 U. S. 179; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Mooney* v. *Holohan, supra,* 115; *Ex parte Abernathy,* 320 U. S. 219. And where those remedies have been exhausted this Court will not ordinarily entertain an application for the writ before it has been sought and denied in a district court or denied by a circuit or district judge. *Ex parte Hawk, supra; Ex parte Abernathy, supra.*

The denial of relief to petitioner by the federal courts and judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist." See *In re Anderson,* 117 F. 2d 939, 940; *In re Miller,* 126 F. 2d 826, 827; *Kelly* v. *Ragen,* 129 F. 2d 811, 814–15; *Hawk* v. *Olson, supra,* 911–13; *Marsino* v. *Hogsett,* 37 F. 2d 409, 414; *United States ex rel. Foley* v. *Ragen,* 52 F. Supp. 265, 269–270; cf. *United States ex rel. Murphy* v. *Murphy,* 108 F. 2d 861, 862. To this, some courts have added the intimation that when the writ is sought by one held under a state conviction the only remedy ordinarily to be had in a federal court is by way of application to this Court. *Ex parte Jefferson,* 106 F. 2d 471, 472; *Kramer* v. *Nevada,* 122 F. 2d 417, 419; *In re Miller, supra; Hawk* v. *Olson, supra,* 913; cf. *Kelly* v. *Ragen, supra,* 814.

The statement that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency," often quoted from the opinion of this Court in *United States ex rel. Kennedy* v. *Tyler,*

supra, 17, was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. *Salinger* v. *Loisel,* 265 U. S. 224, 230–32. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan, supra,* 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore* v. *Dempsey,* 261 U. S. 86; *Ex parte Davis,* 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion.

Application denied.

NORTHWESTERN ELECTRIC CO. ET AL. *v.* FEDERAL POWER COMMISSION.

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

No. 195. Argued January 4, 5, 1944.—Decided January 31, 1944.

Pursuant to authority granted by the Federal Power Act to prescribe a uniform system of accounts for utilities subject to the Act, the Federal Power Commission, having found an item in the accounts of a utility company to be a "write-up"—balancing a liability on an issue of common stock in respect of which the company received no value—ordered the company to dispose of it by applying toward its elimination all net income above preferred-stock dividend requirements. *Held* that the order was authorized by the Act and was constitutional. P. 123.

1. The method adopted by the Commission for the disposition of the write-up, supported by expert evidence and not plainly arbitrary, may not be set aside on review, even though it may not accord with the best accounting practice. P. 124.

2. That the accounting method prescribed interferes with the function of management is not a valid constitutional objection. P. 124.

3. That the order prevents the company from redressing the deficiency of paid-in capital by entering among its assets subsequent appreciation in value does not constitute a taking of the property of the company or its stockholders. P. 124.

4. That a successor company might have been allowed to carry as an asset the actual cost to it of the physical property of the company is irrelevant. P. 124.

5. The order does not violate the reserved powers of the States under the Tenth Amendment. P. 125.

6. No conflict exists between the authority here exercised by the Federal Power Commission and that exercised by the Securities and Exchange Commission. P. 125.

134 F. 2d 740, affirmed.

CERTIORARI, 320 U. S. 722, to review the affirmance of an order of the Federal Power Commission. See also 125 F. 2d 882; 36 P. U. R. (N. S.) 202; 43 P. U. R. (N. S.) 148.

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Mr. A. J. G. Priest, with whom *Messrs. John A. Laing, Henry S. Gray,* and *Sidman I. Barber* were on the brief, for petitioners.

Mr. Charles V. Shannon, with whom *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Chester T. Lane, Paul A. Sweeney,* and *Reuben Goldberg* were on the brief, for respondent.

Mr. Spencer Gordon, on behalf of the American Institute of Accountants, as *amicus curiae,* filed a brief discussing principles of accounting.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Petitioners assert that an order of the Federal Power Commission made pursuant to its authority to prescribe a uniform system of accounts for electric utilities is invalid because in excess of the Commission's statutory power and in violation of the Fifth and Tenth Amendments to the Constitution.

Northwestern Electric Company is an operating utility all of whose common shares are owned by American Power & Light Company. Shortly after organization Northwestern issued 100,000 shares of $100 par common stock to promoters. Later the transaction was entered on its books as "Land and Water Rights" with a corresponding credit to "Common Capital Stock." Northwestern received no cash or property for the stock so issued. The company prospered and its common stock became valuable. In 1925 American purchased all the common stock for $5,095,946.48. In 1936 Northwestern was permitted by the regulatory authorities of the States of Oregon and Washington, in which it operates, to reduce the par value of its common stock from $100 to $35, thus reducing the outstanding common to $3,500,000. This reduction was

made in order that the stock might then represent the fair value of the company's assets. Entries on the asset side were written down $6,500,000 to offset the reduction in common stock liability.

Acting under § 301 (a) of the Federal Power Act of 1935 [1] the Commission prescribed a uniform system of accounts for utilities and ordered reclassification of their electric plant accounts with necessary adjusting entries to reflect such new classification as of January 1, 1937. Northwestern submitted a classification and the Commission, after investigation, issued a report thereon and requested Northwestern to submit a plan for disposition of the item of $3,500,000 upon its books and recommended that the amount should be transferred to Account 107—Electric Plant Adjustments—pending submission of such a plan. Northwestern failed to comply with these requests and an order to show cause was issued upon which a hearing was held. The Commission found that the cost of the physical property was all represented by obligations issued by the company and that the common stock did not represent money or property received. The Commission further found that in the interest of consumers, investors, and the public, the $3,500,000 write-up to be entered in Account 107 should be disposed of by applying net income above preferred stock dividend requirements to its elimination, and added that this disposition would insure the company's receiving value to balance common stock liability and that dividends ought not to be paid on the common stock until it had an equivalent paid-in value. An order was entered requiring Northwestern to comply with the finding.

The Commission granted a rehearing only as respects the required disposition of the asset item of $3,500,000, but refused a rehearing on all other matters involved in the

[1] 49 Stat. 847, 854, 16 U. S. C. § 825.

case. Northwestern obtained a review in the Circuit Court of Appeals,[2] which sustained the order as against Northwestern's contentions that the Commission was without power to make an order for the keeping of its accounts, because of existing State regulation; that the Commission's action was not sustained by the proofs before it, was an abuse of discretion, and constituted a denial of due process of law, since the system of accounts prescribed was to show the company's plant at the amount it cost rather than at its present fair value. Inasmuch as the rehearing was pending before the Commission on the disposition to be made of the write-up, the Circuit Court of Appeals declined to pass upon that matter.[3]

In connection with the rehearing, the Commission requested the company to suggest any disposition of the $3,500,000 item it thought appropriate. The company refused to make any suggestion, its position being that the entry should remain in Account No. 107. The result of permitting it thus to remain in the plant and property accounts of the company would be a continuance of a showing on its books of actual asset value to balance the outstanding common stock liability. The Commission reaffirmed its order and Northwestern again sought review in the Circuit Court of Appeals. American, which had been permitted to intervene, joined in the application for court review. The Circuit Court of Appeals refused to disturb the Commission's order.[4]

The Commission's power to prescribe a uniform system of accounting and to require Northwestern to keep accounts accordingly is not open to doubt. Its action was

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[2] As authorized by § 313 (b), 49 Stat. 860, 16 U. S. C. § 825*l*.

[3] *Northwestern Electric Co.* v. *Federal Power Commission*, 125 F. 2d 882.

[4] 134 F. 2d 740.

fully justified by the Act,[5] the relevant provisions of which are within the legislative power.[6] The only inquiries now open are whether the order as to the disposition of the $3,500,000 item appearing in Account 107 goes beyond the Commission's statutory mandate or constitutional limitations. We hold that it does neither.

The case presents only a question of proper accounting. In the light of the admitted fact that there has been a write-up of three and one-half million dollars on the asset side of the accounts to balance a stock liability created by the company in the same amount, which represents no value received for the stock issued, any accounting which limits plant items to their actual value when and as acquired demands that this write-up be eliminated from the accounts. Those in which the company previously carried the item were "Land and Water Rights," "Miscellaneous Non-Operating Intangible Capital," and "Organization." A mere write-up belongs in none of these accounts and cannot properly appear in any other account on the asset side of the ledger. If it should so remain, it would have to be in a new account reflecting present value in excess of actual cost which would, in effect, be a plant appreciation account and the Commission's form of accounting does not permit the carrying of any such item in the asset account since its system is a cost system of accounting.

The question is whether the write-up must be written off the books in some manner. Northwestern says it

[5] Sec. 201 (a), 49 Stat. 847, 16 U. S. C. § 824 imposes regulations upon interstate utilities; § 205, 49 Stat. 851, 16 U. S. C. § 824d gives the Commission authority to regulate rates, and § 301 (a) requires the keeping of accounts by utilities and authorizes the Commission to make rules and regulations necessary or appropriate for the purposes of the administration of the Act.

[6] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134; *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232.

should not be, but it offered no evidence before the Commission to show that in accounts based upon cost any such item should appear in plant account or elsewhere. There was expert evidence by Commission's witnesses that it must be eliminated. Nevertheless the petitioners insist the Commission's order as to disposition is arbitrary.

Although, as suggested in a brief filed by the American Institute of Accountants, the Commission's prescribed method of eliminating the write-up may not accord with the best accounting practice, it is sustained by expert evidence. It is not for us to determine what is the better practice so long as the Commission has not plainly adopted an obviously arbitrary plan.[7]

The objections based upon the Constitution are without merit and need but brief notice. That the accounting method prescribed interferes with the function of management to some extent is beside the point.[8] That the Commission's action prevents the company from redressing the deficiency of paid-in capital by entering among its assets appreciation of value subsequent to the issue of the common stock takes nothing from the company or the stockholders. Although if American had purchased the assets of Northwestern it might have been allowed to place among its assets on its own books the actual cost to it of the physical property of Northwestern, the fact is irrelevant upon the question whether Northwestern may carry a fictitious asset account representing estimated value of capital stock issued neither for money nor for property at exchange value.

Nothing in the statute or the order prevents Northwestern keeping other accounts if it so desires which

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[7] See *Norfolk & Western Ry. Co.* v. *United States, supra,* 141; *American Tel. & Tel. Co.* v. *United States, supra,* 236.

[8] *Norfolk & Western Ry. Co.* v. *United States, supra,* 143.

will give information with regard to estimated present appreciated value of its assets.

We find nothing in the statute which would have prevented a readjustment of the common stock account or the earned surplus account if the company had been willing and had proposed such readjustment to bring the statutory accounts into line with the Commission's prescribed system.

The Commission's order does not violate the reserved rights of the states under the Tenth Amendment. We are not here concerned with what the regulatory authorities of Oregon or Washington may or may not demand or permit. Whatever that action may be, it is subordinate to Congress' appropriate exercise of the commerce power. The Commission's order does not purport presently to affect or constrain action by the states within their fields.

We are not called upon to make any decision as to the ability of the company legally to declare and pay dividends.

The petitioners attack the regulations as in conflict with the powers and the regulations of the Securities and Exchange Commission, which also has regulatory power over Northwestern; but an examination of the statute and of the orders and proceedings of the Securities and Exchange Commission satisfies us that no conflict exists.

The judgment is

Affirmed.

B. F. GOODRICH CO. *v.* UNITED STATES.

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

No. 158. Argued January 3, 4, 1944.—Decided January 31, 1944.

The proviso of § 9 (a) of the Agricultural Adjustment Act which, in respect of the "processing tax" paid on processed cotton, authorizes a deduction from the manufacturers' excise tax imposed by § 602 of the Revenue Act of 1932, is not to be construed as authorizing a deduction also in respect of the tax on floor stocks levied by § 16 of the Agricultural Adjustment Act. P. 129.

135 F. 2d 456, affirmed.

CERTIORARI, 320 U. S. 722, to review the affirmance of a judgment for the Government, 48 F. Supp. 453, in a suit brought by the taxpayer for a tax refund.

Mr. William H. Bemis, with whom *Mr. Howard F. Burns* was on the brief, for petitioner.

Mr. Valentine Brookes, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch*, and *Warren F. Wattles* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a suit for refund of a portion of the manufacturers' excise tax on tires paid by the Pacific Goodrich Rubber Company, petitioner's wholly owned subsidiary, pursuant to § 602 of the Revenue Act of 1932.[1] The District Court's judgment was for the Government, 48 F. Supp. 453, and the Circuit Court of Appeals affirmed.

[1] "Sec. 602. Tax on Tires and Inner Tubes.

"There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

"(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight . . ." Revenue Act of 1932, c. 209, 47 Stat. 169, 261.

135 F. 2d 456. Certiorari was granted on a petition which alleged that the Circuit Court's affirmance rested on its erroneous decision of procedural questions. We were asked in the petition to pass upon these issues: (1) Whether there was a material variance between the claim which had been denied by the Commissioner and that sued upon in the District Court. See R. S. § 3226, as amended; *United States* v. *Andrews,* 302 U. S. 517. (2) Whether, if there was such a variance, it had been, or could have been, waived by the Government in the proceedings in the District Court. See *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. Argument at the bar and in the briefs of both parties was not, however, limited to these narrow procedural problems but also dealt with the merits of the claim for refund. This argument has disclosed that, regardless of the procedural questions, the judgment in favor of the Government can be supported on the ground that under the controlling tax statutes petitioner's claim has no merit. See *Helvering* v. *Gowran,* 302 U. S. 238, 245. We pass at once to a consideration of that decisive issue.

Petitioner claims it is entitled to the tax refund under provisions of the Agricultural Adjustment Act.[2] Section 9 (a) of that Act authorized the imposition of a "processing tax" on the "first domestic processing" of basic agricultural commodities, including cotton. A proviso at the end of the section granted to manufacturers of certain products, including tires, a deduction from the excise tax on those products because of the payment of the "processing tax" on the cotton used in them.[3] Another sec-

[2] 48 Stat. 31.

[3] "*Provided,* That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton

tion of the Act, § 16, imposed a different tax, equal to the processing tax, on articles held in floor stocks on a certain date for sale or other disposition which articles had been "processed wholly or in chief value" from a basic agricultural commodity.[4] This latter section did not grant any deduction from the manufacturers' excise tax because of the floor stocks tax. Nevertheless when the Pacific Goodrich Rubber Company computed its manufacturers' excise tax on tires it claimed deduction on account of the tax which it had paid on floor stocks of cotton fabrics. The Commissioner disallowed the deduction on the ground that, while deductions were allowable for cotton on which a "processing tax" had been paid under § 9 (a), they were not allowable for cotton on which a tax on floor stocks had been paid under § 16. This suit is based on the premise that the deduction proviso of § 9 (a) should be read into § 16.

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contained therein on which a processing tax has been paid." 48 Stat. 36. Although the coverage of this proviso was not specifically limited to the excise tax on tires, the proviso came into § 9 (a) as a Senate floor amendment introduced "to avoid an unduly burdensome tax on automobile tires." 77 Cong. Rec. 1959. The view was expressed on the floor of the Senate that, except for the proposed amendment, the cotton used in tires would be twice taxed by weight; once by the processing tax on cotton, and again by the excise tax on tires. 77 Cong. Rec. 1960. See Note 1, *supra*.

[4] Section 16, entitled "Floor Stocks," read in part as follows: "Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect . . . with respect to the commodity, is held for sale or other disposition . . . by any person, there shall be made a tax adjustment as follows:

"(1) Whenever the processing tax first takes effect, there shall be levied . . . a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date." 48 Stat. 40.

Within the literal meaning of the Agricultural Adjustment Act a tax on floor stocks was not a "processing tax," and therefore the proviso in § 9 (a) which spoke only of a "processing tax" on cotton was not literally applicable to the tax on floor stocks imposed under § 16. The tax on floor stocks, though complementing the processing tax, was not a tax upon the "processing" of an agricultural commodity but upon articles already processed from such a commodity and held for sale or other disposition on the date when the processing tax on the commodity went into effect. Although the literal language of the Act does not authorize the deduction which it claims, petitioner contends that the purpose of Congress to relieve tire manufacturers from so-called "double taxation" on cotton contained in tires will be defeated [5] unless we read into § 16 the proviso of § 9 (a).

With this contention we cannot agree. In the form in which the Agricultural Adjustment Act was introduced in Congress, neither § 9 (a), which authorized the "processing tax," nor § 16, which authorized the floor stocks tax, contained a proviso granting a deduction from the manufacturers' excise tax.[6] But § 16 of the bill did provide that under specified circumstances taxpayers subject to the floor stocks tax would be entitled to a tax adjustment in the nature of a refund.[7] When the bill was under consideration in the Senate, § 9 (a) was amended by adding a pro-

[5] See Note 3, *supra.*

[6] Senate Hearings on H. R. 3835, 73d Cong., 1st Sess., pp. 1, 3, 6.

[7] Section 16 (a) (2) of the original bill, subsequently enacted without amendment, provided that, "Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum . . . in an amount equivalent to the processing tax with respect to the commodity from which processed." In reporting on § 16 the House Committee on Agriculture stated that, "A corresponding refund is provided on floor stocks when the processing tax finally terminates." H. R. Rep. No. 6, 73d Cong., 1st Sess., 6.

viso [8] which authorized an adjustment on account of the "processing tax" in the nature of a deduction from the manufacturers' excise tax. Thus the bill as finally enacted provided one type of adjustment for the floor stocks tax in § 16 and a different type of adjustment for the processing tax in § 9 (a). We have been pointed to nothing in the Act as a whole or its legislative history which shows that Congress considered these separate methods of adjusting the two taxes insufficient to prevent the burden of "double taxation" on the tire manufacturers so far as Congress wanted to prevent it. We cannot say, therefore, that the expressed intention of Congress is defeated by a literal interpretation of the Act which declines to read the proviso of § 9 (a) into § 16.[9] The judgment of the Circuit Court is accordingly

Affirmed.

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[8] The proviso, originally introduced as an amendment to § 9 (a), authorized an adjustment to be computed by deducting from the manufacturers' excise taxes on certain articles, including tires, "an amount equal to the processing tax paid on the cotton used therein." 77 Cong. Rec. 1959. Subsequently the method of computing the permissible deduction was altered. See Conference Report accompanying H. R. 3835, printed as H. R. Report No. 100, 73d Cong., 1st Sess., 3; see also Note 3, *supra.*

[9] Cf. *Moore* v. *Goodyear Tire & Rubber Co.*, 141 F. 2d 328.

Counsel for Parties.

CARTER ET AL. *v.* VIRGINIA.

NO. 134. APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.*

Argued January 6, 1944.—Decided January 31, 1944.

1. Regulations by a State of the transportation of intoxicating liquor through the State in interstate commerce, requiring (1) that the vehicle use the most direct route and carry a bill of lading describing the route; (2) that the carrier post a $1,000 bond conditioned on lawful transportation; and (3) that the true consignee be named in the bill of lading and be one who has a legal right to receive the shipment at destination, *held* within the power of the State, independently of the Twenty-First Amendment, and not (absent conflicting federal regulation) in contravention of the Commerce Clause. P. 137.
2. As no procedural due process point was raised, the state court's conclusion that under the applicable state procedure only the bondsman, who was not a party to the present proceeding, had standing to object to the cancellation of a bond given pursuant to the regulations, is accepted here. P. 136.
3. The power of the State Board to cancel a bond given pursuant to the regulations, because of doubt of the responsibility of the bondsman, does not constitute an undue burden on interstate commerce. P. 136.

181 Va. 306, 313, 24 S. E. 2d 550, 569, affirmed.

APPEALS from convictions for violation of state regulations relating to the transportation of intoxicating liquors.

Mr. John S. Battle, with whom *Messrs. R. E. Joyce* and *Aubrey G. Weaver* were on the brief, for appellants in No. 134; and *Mr. Warren E. Miller,* with whom *Mr. Edward G. Hobbs* was on the brief, for appellants in No. 198.

Mr. Abram P. Staples, Attorney General of Virginia, for appellee.

*Together with No. 198, *Dickerson et al.* v. *Virginia,* also on appeal from the Supreme Court of Appeals of Virginia.

MR. JUSTICE REED delivered the opinion of the Court.

The appellants were convicted of violations of the Virginia Alcoholic Beverage Control Act [1] and certain Regulations issued pursuant to it, concerning the transportation of intoxicating liquor through the Commonwealth. Their contention that the pertinent provisions of the Act and Regulations [2] violated the Commerce Clause, Article I, § 8 (3), of the Federal Constitution was rejected by Virginia's highest court, the Supreme Court of Appeals. 181 Va. 306, 313, 24 S. E. 2d 550, 569. The cases are here on appeals pursuant to § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

The Act in question contains a comprehensive scheme for the control of trade in alcoholic beverages within the territory of Virginia. By the statute an Alcoholic Beverage Control Board is established and authorized to adopt such regulations "as it may deem necessary" to confine the transportation of liquor "to legitimate purposes." [3] The A. B. C. Board promulgated regulations applicable to

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[1] Michie's Virginia Code (1942) § 4675.

[2] Regulations of the Virginia Alcoholic Beverage Control Board, §§ 42, 44.

[3] Virginia Code, § 4675 (49a). "Transportation; transportation permits; penalties.—The transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. . . ."

transportation through Virginia.[4] The requirements here in issue are these: (1) The vehicle must use the most direct route and carry a bill of lading showing the route it will travel; (2) The carrier must post a bond in the penal sum of $1,000 conditioned on lawful transportation; and (3)

[4] Section 42 of the Regulations provides: "Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation. . . ."

Section 44 reads as follows: "Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported; the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

The bill of lading must show the name of the true consignee, and that consignee must have a legal right to receive the beverages at the stated destination.

Both cases reached the Virginia Supreme Court on stipulated facts. In No. 134, it was agreed that Carter and Macemore received 168 gallons of whiskey from a wholesaler in Maryland for transportation to an individual consignee in Thomasville, North Carolina. The appellants were apprehended in Rappahannock County, Virginia, while carrying the whiskey by truck. The appellants themselves did not post a bond, and a bond which was posted by the registered owner of the truck was cancelled because he was reputed to be a bootlegger. Their bill of lading did not show the route to be traversed through Virginia, and the intended delivery to the consignee was forbidden by the laws of North Carolina.

The facts stipulated in No. 198 are similar. Dickerson was arrested in Prince William County, Virginia, while driving a truck carrying more than one gallon of alcoholic beverages. He was traveling by the most direct route from Maryland to his employer-consignee, Page, in North Carolina. Page had posted the required bond, but the bill of lading did not show the route to be traveled, and Page was forbidden by the laws of North Carolina to accept delivery there.

All the individuals involved in the two cases were residents of North Carolina.

The appellants argue, first, that the Twenty-first Amendment gives Virginia no power to prohibit absolutely the shipment of liquor from Maryland to North Carolina through Virginia; second, that its power to regulate such shipments is limited by the Commerce Clause to regulations reasonably necessary to enforce its local liquor laws and not unduly burdensome on interstate commerce; third, that Virginia has no authority to penalize prospective violations of the criminal laws of North Carolina or

the United States. It will be observed that the intoxicating liquors in question are intended for continuous shipment through Virginia, so that here, as in the *Duckworth* case,[5] a different question arises from those considered under the Twenty-first Amendment,[6] where transportation or importation into a state for delivery or use therein was prohibited. But we may put aside the first and third contentions, for we are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-first Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question.

We have recognized that the several states in the absence of federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws. *Duckworth* v. *Arkansas,* 314 U. S. 390. Thus this Court has extended to this very field its recognition that regulation of interstate commerce by local authority in the absence of Congressional action is admissible to protect the state from injuries arising from that commerce. *California* v. *Thompson,* 313 U. S. 109, 113, 115, and cases cited; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 591; *Morf* v. *Bingaman,* 298 U. S. 407, 410; *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, 267. The commerce power of Congress is not invaded by such police regulations as Virginia has here enforced.

The state of transit may compel the carrier to furnish information necessary for checking the shipment against unlawful diversion, and the requirement that the truck follow a direct, stated route is within the rule of *Duck-*

[5] *Duckworth* v. *Arkansas,* 314 U. S. 390, 392–3.

[6] See *State Board* v. *Young's Market Co.,* 299 U. S. 59; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Commission,* 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395.

worth v. *Arkansas, supra.* Similarly, a state may require a reasonable bond of one who wishes to engage in interstate trade of a kind dangerous to well-recognized local interests. *California* v. *Thompson,* 313 U. S. 109.

The state court did not pass upon the legality under state or federal law of the cancellation of the bond in No. 134, since it concluded that only the bondsman, who was not a party to the proceeding, had standing to object under applicable state procedure. As no procedural due process point is raised, we accept its conclusion without further examination. *United Gas Co.* v. *Texas,* 303 U. S. 123, 139. It is urged, however, that the Board's power to cancel a bond because of doubts as to the trustworthiness of the bondsman amounts to an undue burden on interstate commerce.

The bond is to be furnished, according to § 42 of the Regulations, by the person transporting the liquor. Thus the requirement that the bond be signed by a responsible person appears to raise the same type of question as the requirement that delivery be lawful at the place of consignment, and the two may be considered together. Of the latter rule, the Virginia court said,

"We cannot escape the conclusion that one who deliberately and intentionally violates the Federal Constitution and the law of his resident State, in the unlawful transportation of liquor would hardly hesitate to violate the laws of this State while passing through it if he thought he might profit thereby. We cannot shut our eyes to the possibilities of such a situation and the necessity of prevention."

We are therefore dealing with a case in which Virginia is attempting no more than the enforcement of her own laws; she is not seeking to inflict punishment for the violation of the laws of North Carolina. Whether or not she is entitled thus to enforce her laws must be judged in the

light of our long-standing recognition of the exceptional problems involved in successfully regulating trade in intoxicating liquors. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 332; *Duckworth* v. *Arkansas*, *supra*, at 396. We do not consider the appellee's suggestion that complete exclusion (and hence these partial restraints) of motor carriers from the through liquor traffic and a limitation of through transit to rail carriers would be consonant with the Commerce Clause. Cf. *Zifrin, Inc.* v. *Reeves*, 308 U. S. 132, 140. Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the Commerce Clause alone. That Clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter. The Twenty-first Amendment limits that grant of power as to intoxicating liquor by prohibiting "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein . . . in violation of the laws thereof." By interpretation of this Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over such transportation or importation.[7] It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the Amendment. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 535, 538. But in the present case we need not consider the power of Virginia under the Twenty-first Amendment to regulate through shipments. It is enough that Virginia could conclude, in the absence of contrary federal legislation, that she could not safely permit the transportation

[7] *State Board* v. *Young's Market Co.*, 299 U. S. 59; *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391.

of liquor through her territory by those who concededly mean to break federal laws [8] and the laws of a neighboring state. By her ruling she has imposed no substantial clog on whatever cognate rights her sister states may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire.

For these reasons the judgment is

Affirmed.

MR. JUSTICE JACKSON concurs in the result only, for the reasons stated in his separate opinion in *Duckworth* v. *Arkansas,* 314 U. S. 390.

MR. JUSTICE BLACK, concurring:

I am not sure that state statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes. Cf. dissenting opinions, *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, 183; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 442; *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, 316. The Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce. Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy. *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U. S. 391; *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59.

Whatever limited force the Commerce Clause may retain with regard to the liquor traffic, it should not require the invalidation of the Virginia statutes here involved,

[8] Twenty-first Amendment, § 2; 27 U. S. C. § 122.

which do not conflict with any Act of Congress, and which are designed to enforce local liquor policies. Virginia seems to think that, unless adequate precautionary regulations are devised and enforced, liquor shipments ostensibly being transported through her territory to a neighboring state could be diverted for bootleg purposes contrary to her laws. Such precautionary regulations must come from either Virginia or the federal government. The legislature of Virginia has provided them; the Congress has not. This Court could invalidate the Virginia regulations, but only the Congress could devise and substitute effective federal regulations to take their place. I therefore agree with the Court "that Virginia could conclude, in the absence of contrary federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break federal laws and the laws of a neighboring state."

MR. JUSTICE FRANKFURTER, concurring:

1. After as thorough a consideration as it ever gave to a problem, this Court, in a long series of cases beginning with *Bowman* v. *Chicago & North Western Ry. Co.*, 125 U. S. 465, decided that intoxicating liquor is a legitimate subject of commerce, as much so as cabbages and candlesticks, and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce like that of all other merchantable goods was "free from all state control." *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323, 327, citing *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Vance* v. *Vandercook Company (No. 1)*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412. All of these decisions are still on the books. And so, before the Twenty-first Amendment displaced the Eighteenth, Mr. Justice Holmes was able to say: "I cannot for a moment believe that apart from the Eight-

eenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169.

2. If then the Commerce Clause be the measure of State action, such a requirement as the posting of a bond for transportation of goods from without Virginia would be beyond Virginia's powers even if the shipment of the liquor were for delivery into Virginia. *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129. Cases like *California* v. *Thompson*, 313 U. S. 109, which recognize the power of States to regulate local activities by taxation or otherwise related even though they be to interstate commerce, but none of which was concerned with restricting the through-passage of goods, liquor or any other, afford no basis for suggesting that a State has power to license the movement of goods in interstate commerce on oppressive or prohibitive terms. *A fortiori*, the Commerce Clause would prohibit and not permit such legislation as is before us in the case of liquor arriving in Virginia for ultimate delivery without. *Heyman* v. *Hays*, 236 U. S. 178.

3. In the light of the uniform current of decisions under the Commerce Clause prior to the Twenty-first Amendment, the Virginia legislation could not survive as to shipments bound beyond its borders. If the legislation is valid, as I believe it to be, it must be solely because the range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause.

4. The legislation is sustainable under the Twenty-first Amendment on one of two considerations. It is a notorious fact that State prohibition laws were to no small measure evaded by illicit diversion of liquor claimed to be transported through a State. Since we are dealing with

a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed to be for "delivery" there even though it is consigned for another State. The Twenty-first Amendment prohibits the "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof," not when the liquor is for delivery *and* use but for "delivery *or* use therein." In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. The decision in *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, has nothing whatever to do with the relation of the Commerce Clause to the power given the States by the Twenty-first Amendment to control the liquor traffic. That was a suit "to restrain enforcement of the [California] Alcoholic Beverage Control Act within Yosemite Park, on the theory that the Park is within the exclusive jurisdiction of the United States." All that was there decided, after extended consideration of the relation of the United States to the Yosemite Park, was that the United States did exercise exclusive jurisdiction over the land ceded by California to the Federal Government for park purposes, and that of course when "exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." 304 U. S. at 538. State control must yield to superior federal power, but State control by one State, since the Twenty-first Amendment, need not yield to State control by another State.

5. In the alternative, since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures

deemed by it necessary to prevent evasion of its policy by pretended through-shipments. In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

6. It is now suggested that a State must keep within "the limits of reasonable necessity" and that this Court must judge whether or not Virginia has adopted "regulations reasonably necessary to enforce its local liquor laws." Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a "reasonable regulation" of the liquor traffic. The issue was fairly presented in *Ma-*

honey v. *Triner Corp.*, 304 U. S. 401. And this was the holding:

"We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market* case, [299 U. S. 59] p. 62, 'involve not a construction of the Amendment, but a rewriting of it.' " 304 U. S. at 404.

Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the "reasonableness" of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

8. Fuller consideration has therefore convinced me that the power exercised by the State in *Duckworth* v. *Arkansas*, 314 U. S. 390, as well as in this case must rest on the authority given to the States by the Twenty-first Amendment. And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. So this Court has twice ruled. "Since the Twenty-first Amendment, as held in the *Young* case [299 U. S. 59], the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391, 394; see also *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398.

DAVIES WAREHOUSE CO. *v.* BOWLES, PRICE ADMINISTRATOR.

CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

No. 112. Argued November 18, 1943.—Decided January 31, 1944.

A public warehouse in California, the business of which is declared by the Constitution of the State to be that of a public utility and which is subject to comprehensive regulation (including the fixing of rates and charges) under the Public Utilities Act of the State, *held* a "public utility" within the meaning of the proviso of § 302 (c) of the federal Emergency Price Control Act, and thereby exempt from regulation under that Act. Pp. 152, 156.

137 F. 2d 201, reversed.

CERTIORARI, 320 U. S. 721, to review the dismissal of a complaint in a proceeding to have set aside, so far as applicable to the complainant, regulations promulgated by the Price Administrator under the Emergency Price Control Act.

Mr. Reginald L. Vaughan for petitioner.

Mr. Nathaniel L. Nathanson, with whom *Solicitor General Fahy* and *Mr. Paul A. Freund* were on the brief, for respondent.

Messrs. John E. Benton and *Frederick G. Hamley* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The petitioner, Davies Warehouse Company, is incorporated under the laws of California and conducts a public warehouse in Los Angeles. Its business is declared to be that of a public utility both by the Constitution of

California[1] and its Public Utilities Act.[2] The Act subjects to regulation by the Railroad Commission all warehouses which serve the public generally for compensation. § 2½. New warehouses may be established only after obtaining certificates of public convenience and necessity, which the Commission may refuse or condition and may suspend or revoke at any time for cause. § 50½. Petitioner must grant nondiscriminatory and equal rates to everyone, and it may not alter any existing rate or charge without permission. §§ 19, 15. The Commission upon its own motion or upon complaint may determine "the just, reasonable and sufficient rates" and fix the same by order. § 32. Petitioner is required to make periodic reports and is subject to numerous restrictions and disabilities. §§ 29, 51, 52, 75, 76, et al.

Several public warehouses, including the one before us, made application to the Commission for general rate increases. The Commission gave a public hearing in Feb-

[1] "The Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use . . ." California Constitution, Art. IV, § 33.

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature . . ." California Constitution, Art. XII, § 23.

[2] California Gen. Laws (Deering, 1937) Act 6386, § 2 (dd).

ruary 1942. From undisputed testimony it appeared that: notice of hearing had been sent to over 3,000 customers and no one appeared in opposition; rates had not been advanced since 1938; wages, however, had been advanced on four different occasions; materials and supplies and wages of clerical and supervisory employees had also increased; overall costs of operation had risen during the period 20–26 per cent. On May 12, 1942, the Commission authorized a general 15 per cent advance which, it said, "will permit applicants to increase their rates to reimburse them in part for their added labor expense." The permission was so conditioned, however, that the reasonableness of any particular rate could be attacked by any customer, either by way of reparation proceeding, for which the Act makes provision, or otherwise. The effective date of the new rates was set by the Commission as May 22, 1942.

In the meantime the United States Price Administrator, acting under the Emergency Price Control Act,[3] on April 28, 1942 issued a General Maximum Price Regulation. The effect of the federal regulation and later amendments would have been to prohibit petitioner after July 1, 1942 from charging the rate authorized by the California Railroad Commission.

This federal Act provides that "nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility." [4]

[3] 56 Stat. 23, 50 U. S. C. (Supp. II, 1942) § 901 *et seq.*

[4] § 302 (c), 50 U. S. C. (Supp. II, 1942) § 942 (c), reads: "The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation or purchases or sales of a commodity, or in connection with the operation of

Petitioner, asserting itself to be within this exemption, made timely protest to the Price Administrator, which was denied. It then filed a complaint with the United States Emergency Court of Appeals, on which the Act confers exclusive original jurisdiction to determine the validity of regulations,[5] asking it to set aside the General Maximum Price Regulations in so far as they purport to regulate its charges. The Emergency Court of Appeals dismissed the complaint. Importance of the construction of the Act to its administration led us to grant certiorari.

Congress, in omitting to define "public utility" as used in the Act, left to the Administrator and the courts a task of unexpected difficulty. Use of that term in a context of generality wears an appearance of precision which proves illusory when exact application becomes necessary. Relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis. It may be contended that the exemption runs in favor of any business generally and traditionally regarded as a utility, irrespective of ac-

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any service establishment for the servicing of a commodity: *Provided,* That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services."

[5] § 204 (d), 50 U. S. C. (Supp. II, 1942) § 924 (d), provides: ". . . 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. . . ."

tual state regulation. Or it may be urged to include any enterprise actually regulated as are utilities, regardless of traditional classification. Or it may be said to extend only to those businesses where actual utility regulation exists along with general and traditional utility character.

The Emergency Court of Appeals weighed the conflicting factors in thorough opinions and divided as to result.[6] Judges Maris and Magruder gave little weight to the existence of actual regulation and held the phrase to comprehend enterprises of the general utility type, among which they thought this warehouse had no place. They held that the federal price regulation superseded that of the state, but said, "This is one of those unfortunate cases where doubts would remain whichever way the case was decided"—a reservation we share. Chief Judge Vinson declared that this public warehouse possesses the basic indicia of a public utility and in addition has its rates fixed by an agency of the state, and under these circumstances must be considered a public utility within the meaning of the Act. He thought the state regulation should prevail over that of the Federal Price Administrator.

In *Munn* v. *Illinois,* 94 U. S. 113 (1877), this Court recognized that the business of public warehousing is "affected with a public interest" and that its regulation by the state is appropriate and constitutionally permissible. Cf. *Budd* v. *New York,* 143 U. S. 517, 544. Twenty-one states regulate warehouses in some respects.[7] Three states include warehouses in their statutory definition of

[6] 137 F. 2d 201.

[7] Arizona Code (1939) § 52–901; Arkansas Acts 1935, Act 83; California Gen. Laws (Deering, 1937) Act 6386, § 2 *et seq.;* Idaho Code Ann. (1932) § 59–128; Illinois Rev. Stat. (Bar Assn. ed. 1943) c. 111⅔, § 10 *et seq.,* c. 114, § 189 *et seq.;* Indiana Stat. Ann. (Burns, 1933) § 54–105 *et seq.;* Kansas Gen. Stat. (1935) § 34–224 *et seq.;* Maine

public utilities,[8] and eight include limited types of warehouses.[9] Forty-seven states have adopted the Uniform Warehouse Receipts Act, which gives warehouse receipts legal standing somewhat similar to that of a common carrier's bill of lading.[10]

We cannot, therefore, assume that Congress was unaware that a general statutory reference to "public utilities" might well be taken at least in some states to comprehend public warehouses. But Congress did not see fit to employ that precision of definition which it has used when it desired to make sure that its classification of public utilities for federal purposes would depend upon the nature of their activities uninfluenced by any state policy.[11] Legislative history is ambiguous, and in no instance was attention directed to the particular problem presented here as to the scope of the term "public utility." But the phrase was used to measure inclusions as well as exemptions and it seems to have been employed in a practical rather than legalistic sense. An effort was made

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Rev. Stat. (1930) c. 62, § 15 *et seq.;* Minnesota Stat. (1941) c. 233; Missouri Rev. Stat. Ann. (1941) § 14685.1 *et seq.;* Nebraska Comp. Stat. (Supp. 1941) c. 88, § 219 *et seq.;* Nevada Comp. Laws (1929) § 6106 *et seq.;* North Carolina Code Ann. (1939) § 5124, Laws 1941, c. 291; North Dakota Comp. Laws (Supp. 1925) § 4609, c. 2, *et seq.,* Laws 1931, c. 227; Oklahoma Stat. (Supp. 1943) tit. 81; Oregon Comp. Laws Ann. § 60–301 *et seq.;* South Dakota Code (1939) c. 60.03; Texas Stat. (Vernon, 1936) art. 6445; Utah Code Ann. (1943) § 76–2–1 *et seq.;* Washington Rev. Stat. Ann. (Remington) §§ 10344, 10392, (Supp. 1940) § 11569–1 *et seq.;* Wisconsin Stat. (1941) § 195.21.

[8] California, Indiana, South Dakota, *loc. cit. supra* note 7.

[9] Arizona, Idaho, Illinois, Maine, Nevada, North Dakota, Utah, Washington, *loc. cit. supra* note 7.

[10] 3 Uniform Laws Ann. (Supp. 1942) 6.

[11] E. g., Public Utility Holding Company Act of 1935, § 2 (a), 49 Stat. 804, 15 U. S. C. § 79b (a); Federal Power Act, § 201 (e), 49 Stat. 848, 16 U. S. C. § 824 (e).

in the Senate to insert a provision that public utility rates should not be increased without consent of the President.[12] That proposal was rejected, however, and a provision was substituted which required any public utility which asked for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a state, federal, or municipal commission.[13] It is difficult to believe that a different scope was intended to be given to the same words in different sections of the legislation. The use of the same generic term in these different contexts indicates that it had no narrower connotation and should receive no stricter interpretation in the exemption merely because used to define an exemption.

Legislative history is unequivocal in its showing that rates already subject to state regulation as public utility rates were not considered in need of further control. Mr. Leon Henderson, one of the authors of the bill and the first Price Administrator, gave as reasons for exempting utilities that they seemed to be under an adequate system of state regulation;[14] that this was an area not likely to give difficulty or to cause, so far as could then be seen, any inflationary trend; that utilities had problems peculiar to themselves and no further regulation seemed necessary;[15]

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[12] Amendment proposed by Senator Norris to S. J. Res. 161. H. R. 7565, as amended by Senate, § 1, 77th Cong., 2d Sess.

[13] 56 Stat. 765, 50 U. S. C. (Supp. II, 1942), § 961.

[14] ". . . and public utilities were under what for the time being at least seemed to be an adequate system of State regulation, and therefore did not need to be brought into review." Hearings before House Committee on Banking and Currency on H. R. 5479, 77th Cong., 1st Sess., Pt. I, Revised, p. 444.

[15] "Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial

and that he had found the agencies in control of utility rates "just as earnest as we are about keeping those costs down." [16]

Under these circumstances the reasonable view appears to be that Congress by the term "public utilities" exempted those whose charges already were regulated as public utilities and hence were not probable sources of inflationary dangers. It may be and probably is the case that in its rate regulation the California Commission will take account of different factors and have different objectives than does the Federal Price Administrator. That might have appealed to Congress as a reason for not exempting utilities at all, but it hardly helps define the limits of the exemption, for that objection is as cogent against what admittedly is included as against that which is left in doubt.

We think Congress desired to depart from the traditional partitioning of functions between state and federal government only so far as required to erect emergency barriers against inflation. No question as to the power of Congress to reach and regulate this business, should it find it necessary to do so, has been raised here. But as matter of policy Congress may well have desired

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determinations, of State regulations, and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill." *Id.*, pp. 54–55.

[16] ". . . I have found that every one of the agencies charged with these particular items of cost are just as earnest as we are about keeping those costs down." *Id.*, p. 445; see the dissenting opinion of Chief Judge Vinson in the Emergency Court of Appeals, 137 F. 2d 201, 209.

to avoid conflict or occasions for conflict between federal agencies and state authority which are detrimental to good administration and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-interest under control.[17] Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision.[18] In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress did not intend, and certainly has given no clear indication that it did intend, to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility. Classification by California of the public warehouse business as a utility is not novel, surprising, or capricious. The regulation imposed is not merely nominal or superficial but appears to be penetrating and complete. Therefore, we would have little hesitation in holding that petitioner's public warehouse under the circumstances is a public utility within the exemption of the Price Control Act, but for certain practical objections to that interpretation, urged on behalf of the Administrator with an earnestness which deserves, in view of the difficulties and importance of his task, careful examination.

1. It is urged that if the status of an industry under state law is to be considered, the Administrator "would have to face the question whether the particular business concerned was sufficiently 'affected with a public interest' constitutionally to justify the type of legal obligation

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[17] The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in opposition to what they consider an invasion by the Price Administrator of their field of public regulation.

[18] *Terminal Railroad Assn.* v. *Brotherhood of Trainmen,* 318 U. S. 1.

which the state imposes." The argument, in short, is that the Administrator would have to decide whether the state regulation is constitutional before he should recognize it. We cannot give weight to this view of his functions, which we think it unduly magnifies. State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the Administrator. Collusion between a state and a favored industry to impose forms of local regulation as a shield against federal control might be conceivable and if such a sham occurred the Administrator could perhaps challenge its effectiveness to support an exemption. But it more nearly accords with experience to assume that an industry does not submit to price regulation until it has explored all possible constitutional objections and litigated hopeful ones. We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.

2. It also is objected that if we consider the status of an industry under state law, the Price Administrator "would have to scrutinize and differentiate many kinds of franchises. Thus the Administrator, as incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions." We are not prepared to deny that in some degree this will be true, for we do not hold that all warehouses, or even that all warehouses regulated in some aspects, come within the exemption. We think the Administrator will have to form judgments and that they will be judgments of some difficulty. Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary

one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'" *Yonkers* v. *United States,* 320 U. S. 685, 690; *Palmer* v. *Massachusetts,* 308 U. S. 79, 84. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation

when viewed against the background of our form of government.

3. It also is contended than an interpretation must prevail as matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law. It is, of course, true that uniform operation of a federal law is a desirable end and, other things being equal, we often have interpreted statutes to achieve it.[19] But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the Federal Government. When we do at times adopt for application of federal laws within a state a rule different from that used by a state in administering its laws, the two rules may subsist without conflict, each reigning in its own realm. It is a much more serious thing to adopt a rule of construction, as we are asked to do here, which precludes the execution of state laws by state authority in a matter normally within state power. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified to permit us to say that considerations of nation-wide uniformity must prevail in a particular case over our judgment that it is out of harmony with other objectives more important to

[19] The Administrator cites *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1; *Lyeth* v. *Hoey*, 305 U. S. 188; *Morgan* v. *Commissioner*, 309 U. S. 78; *Jerome* v. *United States*, 318 U. S. 101, 104. See also *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 470; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

the legislative purpose.[20] What content we should give to the exemption in the case of a conventional utility not subject to a state regulatory statute or subject only to partial regulation is, of course, not before us.

4. Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.

We hold that the petitioner's business is that of a public utility within the exemption of the Act, and the judgment below is accordingly

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting:

I think the present decision places an unwarranted burden on those who are waging the present war against in-

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[20] See *Mangus* v. *Miller*, 317 U. S. 178, *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, *Myers* v. *Matley*, 318 U. S. 622 (bankruptcy); *Uterhart* v. *United States*, 240 U. S. 598, 603, *Crooks* v. *Harrelson*, 282 U. S. 55, *Blair* v. *Commissioner*, 300 U. S. 5, *Helvering* v. *Fuller*, 310 U. S. 69, 74, *Helvering* v. *Stuart*, 317 U. S. 154 (taxation); *McClaine* v. *Rankin*, 197 U. S. 154, *Rawlings* v. *Ray*, 312 U. S. 96 (statute of limitations); *Brown* v. *United States*, 263 U. S. 78 (condemnation); *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 364–66 (railroad consolidation); *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 206; *Board of Commissioners* v. *United States*, 308 U. S. 343.

flation. The Act exempts from federal price control the "rates charged by any common carrier or other public utility." § 302 (c). The Administrator has accordingly granted exemptions to enterprises furnishing the public with gas, electricity, water, light, heat or power, and telephone and telegraph services. That group embraces those enterprises which together with common carriers were traditionally included in the category of a "public utility." It should not be expanded by interpretation to include the filigree variety with which we are now concerned.

The purpose of the Act is to provide an instrument for national control of the inflationary forces set loose by the war. The need for uniformity in the enforcement of the Act is acute—to avoid inequality in burden and sacrifice; to weigh the odds for success as heavily as possible on the side of the public interest. The other exemptions in the Act apply uniformly throughout the country—wages, insurance rates, theatre admissions, fees for professional services, and the like. If the "public utility" exemption is confined to the traditional classes of utilities, substantial uniformity will be obtained as they are almost universally subject to rate regulation in the States. But under the view taken by the Court warehouses will be exempt in some States but not in others. The same will be true of wharves and docks, slaughter houses, public markets, cotton gins and what not. And even in the same State there will be exemptions for some warehouses but not for others. This dependence of exemptions on the vagaries of state law would be quite understandable if the federal act were designed to mesh with state control—federal control being interposed to take up where state regulation was impossible or ineffective, as in various types of public utility regulation. Then there would be a great need in view of our federal system to preserve as much local autonomy as possible. The same would also be true where only a partial overriding of state controls was necessary to reach the

limited federal objective. But the war against inflation is a grim affair calling for quite different requirements. It cannot be waged along those traditional lines. The luxuries of peace-time arrangements do not always fit the exigencies of this war emergency. Nor do the state rate-regulations in question supplement the federal system. They override it. And standards which they prescribe are not the standards for price-fixing under the present Act. The conventional power to fix rates is governed by criteria quite different from those which control the Administrator's action. He is to fix those maximum prices which "will be generally fair and equitable and will effectuate the purposes of this Act." § 2 (a).

Every exception read into the Act creates another point of leakage, multiplies the task of enforcement, and creates a favored class of businesses. I would not read the Act with such a hostile eye. Where two interpretations are possible I would take the one which avoids those results. The choice between the "letter" and the "spirit" is an ancient one even in the law. See Radin, A Short Way With Statutes, 56 Harv. L. Rev. 388. In this case I think the wrong choice has been made.

PRINCE *v.* MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, PLYMOUTH COUNTY.

No. 98. Argued December 14, 1943.—Decided January 31, 1944.

1. A state statute provides that no minor (boy under 12 or girl under 18) shall sell, or offer for sale, upon the streets or in other public places, any newspapers, magazines, periodicals, or other articles of merchandise. The statute makes it unlawful for any person to furnish to a minor any article which he knows the minor intends to sell in violation of the law; and for any parent or guardian to permit a minor to work in violation of the law. *Held*—as applied

to a guardian who furnished a minor ward with religious literature and permitted the minor to distribute the same on the streets, although the guardian accompanied the minor and both were acting in accord with their religious beliefs—not violative of freedom of religion, nor a denial of the equal protection of the laws, under the Fourteenth Amendment of the Federal Constitution. P. 167.

2. Whether there was a "sale" or "offer to sell," and whether what the minor was doing was "work," within the meaning of the state statute, were questions of local law upon which, on this record, the decision of the state court is binding here. P. 163.
3. With respect to the public proclaiming of religion in streets and other public places, as in the case of other freedoms, the power of the State to control the conduct of children is broader than its power over adults. P. 170.
4. There is no denial of equal protection of the laws in excluding children of a particular sect from such use of the streets as is barred also to all other children. P. 170.

313 Mass. 223, 46 N. E. 2d 755, affirmed.

APPEAL from a judgment entered on a rescript from the highest court of the State, which sustained convictions on two of three complaints for violations of a state statute.

Mr. Hayden C. Covington, with whom *Mr. Alfred A. Albert* was on the brief, for appellant.

Mr. Robert T. Bushnell, Attorney General of Massachusetts, for appellee.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. This time Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

When the offenses were committed she was the aunt and custodian of Betty M. Simmons, a girl nine years of age. Originally there were three separate complaints. They

were, shortly, for (1) refusal to disclose Betty's identity and age to a public officer whose duty was to enforce the statutes; (2) furnishing her with magazines, knowing she was to sell them unlawfully, that is, on the street; and (3) as Betty's custodian, permitting her to work contrary to law. The complaints were made, respectively, pursuant to §§ 79, 80 and 81 of Chapter 149, Gen. Laws of Mass. (Ter. Ed.). The Supreme Judicial Court reversed the conviction under the first complaint on state grounds;[1] but sustained the judgments founded on the other two.[2] 313 Mass. 223, 46 N. E. 2d 755. They present the only questions for our decision. These are whether §§ 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law.[3] They provide methods for enforcing the prohibitions of § 69, which is as follows:

"No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any

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[1] The court found there was no evidence that appellant was asked Betty's age. It then held that conviction for refusal to disclose the child's name, based on the charge under § 79, would violate Article 12 of the Declaration of Rights of the Commonwealth, which provides in part: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself."

[2] Appellant received moderate fines on each complaint, first in the District Court of Brockton, then on pleas of not guilty by trial *de novo* without a jury in the Superior Court for Plymouth County. Motions to dismiss and quash the complaints, for directed findings, and for rulings, were made seasonably and denied by the Superior Court.

[3] Mass. Gen. Laws (Ter. Ed.) c. 149, as amended by Acts and Resolves of 1939, c. 461.

description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place."

Sections 80 and 81, so far as pertinent, read:

"Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both." § 80.

"Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, . . . shall for a first offense be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; . . ." § 81.

The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons, who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute "Watchtower" and "Consolation," according to the usual plan.[4] She had permitted the children to

[4] Cf. the facts as set forth in *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Busey* v. *District of Columbia*, 75 U. S. App. D. C. 352, 129 F. 2d 24. A common feature is that specified small sums are generally asked and received but the publications may be had without the payment if so desired.

engage in this activity previously, and had been warned against doing so by the school attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears; and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children "to engage in the preaching work with her upon the sidewalks." That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passers-by to see, copies of "Watch Tower" and "Consolation." From her shoulder hung the usual canvas magazine bag, on which was printed: "Watchtower and Consolation 5¢ per copy." No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

Mrs. Prince and Betty remained until 8:45 p. m. A few minutes before this, Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warnings and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, "[N]either you nor anybody else can stop me . . . This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands." However, Mrs. Prince and Betty departed. She remarked as she went, "I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed." It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was ex-

cluded, to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation "to everlasting destruction at Armageddon."

As the case reaches us, the questions are no longer open whether what the child did was a "sale" or an "offer to sell" within § 69 [5] or was "work" within § 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law.[6] The only question remaining therefore is whether, as construed and applied, the statute is valid. Upon this the court said: "We think that freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen, and in the further statutory provisions herein considered, which have been adopted as means of enforcing

[5] In this respect the Massachusetts decision is contrary to the trend in other states. Compare *State* v. *Mead,* 230 Iowa 1217, 300 N. W. 523; *State* v. *Meredith,* 197 S. C. 351, 15 S. E. 2d 678; *State ex rel. Semansky* v. *Stark,* 196 La. 307, 199 So. 129; *Shreveport* v. *Teague,* 200 La. 679, 8 So. 2d 640; *People* v. *Barber,* 289 N. Y. 378, 46 N. E. 2d 329; *Thomas* v. *Atlanta,* 59 Ga. App. 520, 1 S. E. 2d 598; *Cincinnati* v. *Mosier,* 61 Ohio App. 81, 22 N. E. 2d 418. *Contra: McSparran* v. *Portland* (Circuit Court, Multnomah County, Oregon, June 8, 1942), cert. denied, 318 U. S. 768.

[6] The court's opinion said: "The judge could find that if a passer-by should hand over five cents in accordance with the sign on the bag and should receive a magazine in return, a sale would be effected. The judge was not required to accept the defendant's characterization of that transaction as a 'contribution.' He could believe that selling the literature played a more prominent part in the enterprise than giving it away. He could find that the defendant furnished the magazines to Betty, knowing that the latter intended to sell them, if she could, in violation of § 69. . . . The judge could find that the defendant permitted Betty to 'work' in violation of § 81. . . . we cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature." 313 Mass. 223, 227–228.

that prohibition." 313 Mass. 223, 229, 46 N. E. 2d 755, 758.

Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done.[7] Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.[8] Cf. *Meyer* v. *Nebraska,* 262 U. S. 390. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is "to preach the gospel . . . by public distribution" of "Watchtower" and "Consolation," in conformity with the scripture: "A little child shall lead them."

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and

[7] Appellant's brief says: "The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children." And at the argument counsel stated the prohibition would be valid as against a claim of freedom of the press as a nonreligious activity.

[8] The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter.

functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in *West Virginia State Board of Education* v. *Barnette*, 319 U. S.

624. Previously in *Pierce* v. *Society of Sisters,* 268 U. S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer* v. *Nebraska,* 262 U. S. 390, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce* v. *Society of Sisters, supra.* And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance,[9] regulating or prohibiting the child's labor[10] and in many other ways.[11] Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.[12] The right to practice religion freely does not include liberty to expose the community or the child

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[9] *State* v. *Bailey,* 157 Ind. 324, 61 N. E. 730; compare *Meyer* v. *Nebraska,* 262 U. S. 390; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

[10] *Sturges & Burn Mfg. Co.* v. *Beauchamp,* 231 U. S. 320; compare *Muller* v. *Oregon,* 208 U. S. 412.

[11] Cf. *People* v. *Ewer,* 141 N. Y. 129, 36 N. E. 4.

[12] *Jacobson* v. *Massachusetts,* 197 U. S. 11.

to communicable disease or the latter to ill health or death. *People* v. *Pierson,* 176 N. Y. 201, 68 N. E. 243.[13] The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger, cf. *Schenck* v. *United States,* 249 U. S. 47; and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity. Cf. *Schneider* v. *State,* 308 U. S. 147. And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

Concededly a statute or ordinance identical in terms with § 69, except that it is applicable to adults or all persons generally, would be invalid. *Young* v. *California,* 308 U. S. 147; *Nichols* v. *Massachusetts,* 308 U. S. 147; *Jamison* v. *Texas,* 318 U. S. 413; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *City of Struthers,* 319 U. S. 141.[14]

[13] See also *State* v. *Chenoweth,* 163 Ind. 94, 71 N. E. 197; *Owens* v. *State,* 6 Okla. Cr. 110, 116 P. 345.

[14] Pertinent also are the decisions involving license features: *Lovell*

But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a "sale" or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment,[15] more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.[16] It is too late now to doubt

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v. *City of Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496.

[15] See, e. g., Volumes 1–4, 6–8, 14, 18, Report on Condition of Women and Child Wage Earners in the United States, Sen. Doc. No. 645, 61st Cong., 2d Sess.; The Working Children of Boston, U. S. Dept. of Labor, Children's Bureau Publication No. 89 (1922); Fuller, The Meaning of Child Labor (1922); Fuller and Strong, Child Labor in Massachusetts (1926).

[16] See, e. g., Clopper, Child Labor in City Streets (1912); Children in Street Work, U. S. Dept. of Labor, Children's Bureau Publication No. 183 (1928); Children Engaged in Newspaper and Magazine Selling and Delivering, U. S. Dept. of Labor, Children's Bureau Publication No. 227 (1935).

that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses.[17] But, for obvious reasons, notwithstanding appellant's contrary view,[18] the validity of such a prohibition applied to children not accompanied by an older person hardly would seem open to question. The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situa-

[17] *Cox* v. *New Hampshire*, 312 U. S. 569; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

[18] Although the argument points to the guardian's presence as showing the child's activities here were not harmful, it is nowhere conceded in the briefs that the statute could be applied, consistently with the guaranty of religious freedom, if the facts had been altered only by the guardian's absence.

tions difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

In so ruling we dispose also of appellant's argument founded upon denial of equal protection. It falls with that based on denial of religious freedom, since in this instance the one is but another phrasing of the other. Shortly, the contention is that the street, for Jehovah's Witnesses and their children, is their church, since their conviction makes it so; and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The argument hardly needs more than statement, after what has been said, to refute it. However Jehovah's Witnesses may conceive them, the public highways have not become their religious prop-

erty merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do.

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation "for any [that is, every] state intervention in the indoctrination and participation of children in religion" which may be done "in the name of their health and welfare" nor give warrant for "every limitation on their religious training and activities." The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

The judgment is

Affirmed.

MR. JUSTICE MURPHY, dissenting:

This attempt by the state of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. She was a member of Jehovah's Witnesses and had been taught the tenets of that sect by her guardian, the appellant. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of the appellant, Betty Simmons on the night of December 18, 1941, was standing on a public street corner and offering to distribute Jehovah's Witness literature to passers-by. There was no expectation of pecuniary profit to

herself or to appellant. It is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in "an age-old form of missionary evangelism" with a purpose "as evangelical as the revival meeting." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108, 109.

Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. No question of freedom of speech or freedom of press is present and we are not called upon to determine the permissible restraints on those rights. Nor are any truancy or curfew restrictions in issue. The statutes in question prohibit all children within the specified age limits from selling or offering to sell "any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place." Criminal sanctions are imposed on the parents and guardians who compel or permit minors in their control to engage in the prohibited transactions. The state court has construed these statutes to cover the activities here involved, cf. *State* v. *Richardson,* 92 N. H. 178, 27 A. 2d 94, thereby imposing an indirect restraint through the parents and guardians on the free exercise by minors of their religious beliefs. This indirect restraint is no less effective than a direct one. A square conflict between the con-

stitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented.

As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general. The great interest of the state in shielding minors from the evil vicissitudes of early life does not warrant every limitation on their religious training and activities. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the rea-

sonableness that justifies such a drastic restriction when the distribution is part of their religious faith. *Murdock* v. *Pennsylvania, supra,* 111. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639. The vital freedom of religion, which is "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325, cannot be erased by slender references to the state's power to restrict the more secular activities of children.

The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. It was carried on in an orderly, lawful manner at a public street corner. And "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas,* 318 U. S. 413, 416. The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to the Jehovah's Witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. Reference is made in the majority opinion to "the crippling effects of child employment, more especially in pub-

lic places, and the possible harms arising from other activities subject to all the diverse influences of the street." To the extent that they flow from participation in ordinary commercial activities, these harms are irrelevant to this case. And the bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial. Cf. *Bridges* v. *California,* 314 U. S. 252, 262. Yet there is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful "diverse influences of the street." Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least. And the fact that the zealous exercise of the right to propagandize the community may result in violent or disorderly situations difficult for children to face is no excuse for prohibiting the exercise of that right.

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against

those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, "Jehovah's Witnesses Mold Constitutional Law," 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

MR. JUSTICE JACKSON:

The novel feature of this decision is this: the Court holds that a state may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: "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." ". . . 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." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109, 111.

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets "occupy the same high estate" and have the "same claim to protection" it would seem that child labor laws may be applied to both if to either. If the *Murdock* doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141; *Jones* v. *Opelika,* 316 U. S. 584, 319 U. S. 103; *Douglas* v. *Jeannette,* 319 U. S. 157. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.

My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds

of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.

The Court in the *Murdock* case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion, and *Murdock* overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts. 313 Mass. 223.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this opinion.

BROWN ET AL. *v.* GERDES ET AL., TRUSTEES.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 183. Argued January 4, 1944.—Decided February 7, 1944.

1. In a reorganization proceeding under Ch. X of the Bankruptcy Act, the bankruptcy court has exclusive jurisdiction to determine the amount which shall be allowed out of the bankrupt estate for services of attorneys who, by authority of the bankruptcy court, represented the bankrupt estate in litigation in a state court. P. 180.
2. The petition for reorganization in this case having been approved subsequently to the effective date of Ch. X, the result is unaffected

by the fact that the petition was filed and the main suit in the state court litigation was instituted prior to that date. P. 184.

3. Nor is the result affected by the fact that the litigation in the state court was within the exclusive jurisdiction of that court. P. 185.
4. It does not appear here that the State has imposed conditions for entry into its courts which are inconsistent with the authority of the bankruptcy court. P. 186.
5. Assuming that the state court could decline jurisdiction of the suits to enforce claims of the bankrupt estate, it could not take jurisdiction of them but fail to apply the federal rule governing the compensation of those who are employed by the bankruptcy court and who represent it in the state tribunal. P. 186.

290 N. Y. 468, 49 N. E. 2d 718, affirmed.

CERTIORARI, 320 U. S. 722, to review the reversal of an order of the lower state courts which fixed the amounts of fees and liens for services rendered by the plaintiffs as attorneys for a bankrupt estate. See also 290 N. Y. 868, 50 N. E. 2d 249.

Mr. William C. Scott, with whom *Messrs. David Paine, Lawrence S. Greenbaum,* and *Theodore S. Jaffin* were on the brief, for petitioners.

Mr. John Gerdes, with whom *Mr. James D. Carpenter, Jr.* and *Miss Mary-Chase Clark* were on the brief, for respondents.

Solicitor General Fahy and *Messrs. Chester T. Lane, Homer Kripke, George Zolotar,* and *Theodore L. Thau* filed a brief on behalf of the Securities and Exchange Commission, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether the New York court or the federal bankruptcy court has the power to fix the fees of petitioners who as attorneys represented the bankruptcy estate in litigation in the state courts. The

New York Court of Appeals held that that jurisdiction rested exclusively in the bankruptcy court. 290 N. Y. 468, 49 N. E. 2d 718. The case is here on a petition for writ of certiorari which we granted because of the importance of the problem under the Bankruptcy Act.

In January, 1939, a petition for reorganization of Reynolds Investing Co., Inc. was approved under Ch. X of the Bankruptcy Act. 52 Stat. 883, 11 U. S. C. § 501. In August, 1938, while the petition was pending but before its approval, the bankruptcy court authorized the debtor to commence an action in the New York courts to enforce and collect certain claims which the debtor had against its former officers and directors. See 28 N. Y. S. 2d 622. It also authorized retention of petitioners as counsel in the suit. After the approval of the petition the respondent trustees were authorized to prosecute the action and to be substituted as plaintiffs. That was done; and other actions were instituted by the trustees under order of the bankruptcy court with petitioners as counsel. In 1941 before final judgments were obtained in any of the suits, the trustees discontinued petitioners' services. Thereafter petitioners, pursuant to a stipulation [1] which reserved respondents' right to question the jurisdiction of the state court, instituted this suit in that court to fix and enforce their liens on the actions under § 475 of the New York Judiciary Law.[2] Respondents' objection to the ju-

[1] Respondents sought an order from the bankruptcy court directing petitioners to turn over their papers and memoranda. That motion was resisted by petitioners who claimed that the New York court had exclusive jurisdiction. Thereupon a stipulation was entered into with the approval of the bankruptcy court whereby respondents withdrew their motion and petitioners agreed to institute a suit in the state court for fixation of their liens, if any. The parties reserved their right to question the jurisdiction of the state court or bankruptcy court over the matter.

[2] "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a de-

risdiction of the state court was overruled, the value of petitioners' services determined, and the liens fixed. Those orders were affirmed by the Appellate Division (264 App. Div. 852, 36 N. Y. S. 2d 420) but reversed by the Court of Appeals. And as we read the opinion of that court the basis of its decision was that "exclusive jurisdiction" to fix these fees was in the bankruptcy court (290 N. Y. 472, 473, 475), not that New York as a matter of local law or policy would not undertake to fix them because of the special circumstances of this case.

We agree with the Court of Appeals that the power to determine the amount of these fees rests exclusively in the bankruptcy court.

Sec. 77B, like § 77 of the Bankruptcy Act,[3] had as one of its purposes the establishment of more effective control over reorganization fees and expenses (*Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 388; *Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464, 469) in recognition of the effect which a depletion of the cash resources of the estate may have on both the fairness and feasibility of the plan of reorganization. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 333–340 (dissenting opinion). And Ch. X of the Chandler Act which took the place of § 77B set up even more comprehensive supervision over compensation and allowances (H. Rep. No.

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partment of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

[3] See *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 685; *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U. S. 163.

1409, 75th Cong., 1st Sess., pp. 45–46) and provided a centralized control over all administration expenses, of which lawyers' fees are a part. *Watkins* v. *Sedberry,* 261 U. S. 571. Sec. 241 gives the judge authority to fix "reasonable compensation for services rendered" by various persons, including attorneys for the trustees. Allowances may be made only after hearing and upon notice to specified persons and groups of persons. § 247. Where the reorganization supersedes a prior proceeding in either the federal or state court the bankruptcy court is the one which is authorized to allow the "reasonable costs and expenses incurred" in the prior proceeding. § 258. In all cases persons who seek compensation for services or reimbursement for expenses are held to fiduciary standards. § 249; *Woods* v. *City National Bank Co.,* 312 U. S. 262, 267–269. And § 250 contains special appeal provisions governing orders granting or denying allowances. *Dickinson Industrial Site* v. *Cowan, supra.* Moreover, a plan of reorganization must provide "for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge." § 216 (3). In addition the plan must provide, in furtherance of the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 22; H. Rep. No. 1409, *supra,* pp. 42–44), for retention and enforcement by the trustee of all claims of the debtor or the estate not settled or adjusted in the plan. § 216 (13). Finally, § 221 (4) provides that in approving any plan the judge must be satisfied that "all payments made or promised" by the debtor, the new company, or any other person, "for services and for costs and expenses" are not only fully disclosed but "are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge."

Thus Ch. X not only contains detailed machinery governing all claims for allowances from the estate, It also

requires the plan to contain provisions for the payment of all allowances and places on the judge the duty to pass on their reasonableness. The approval of the plan of reorganization has been entrusted to the bankruptcy court exclusively. Even reports on plans submitted by the Securities and Exchange Commission are "advisory only." § 172. It could hardly be contended that the bankruptcy court might dispense with the finding required by § 221 (2) that the plan is "fair and equitable, and feasible" and confirm the plan on another basis or delegate the task to another court or agency. See *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 114–115; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510. But if that cannot be done, it is difficult to see how a plan could be confirmed which left the approval of certain allowances to a state court. The finding as to allowances required by § 221 (4) is as explicit and as mandatory as the finding of "fair and equitable, and feasible" required by § 221 (2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency. In the present case the plan of reorganization which was approved in 1940 gave the trustees full power to retain or displace attorneys representing them; and it retained in the bankruptcy court continuing jurisdiction over all claims in favor of the debtor and the prosecution thereof. And in accordance with the express requirements of § 241 (3) it left to the bankruptcy court the power to fix the "reasonable compensation" to be paid the attorneys of the trustees. Those requirements, prescribed by the Act, cause any conflicting procedure in the state courts to give way.[4] *Kalb* v. *Feuerstein*, 308 U. S. 433. The jurisdiction which Congress has conferred on the bankruptcy

[4] The submission of the matter to the state court with objections to its jurisdiction was a procedure which gave that "due regard for comity" suggested by the Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 345.

court is paramount and exclusive. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. Thus the supervention of bankruptcy deprives a state court, in which a receivership was pending, of power to fix the compensation of the receivers and their counsel who were appointed by the state court and who rendered service in the state proceedings. *Gross* v. *Irving Trust Co., supra; Emil* v. *Hanley,* 318 U. S. 515, 519.

Sherman v. *Buckley,* 119 F. 2d 280, which arose in ordinary bankruptcy, is relied upon for the contrary conclusion. In that case an action brought by the bankrupt had been pending in the state court for seven years before the adjudication in bankruptcy. The trustee obtained the consent of the bankruptcy court to allow the action to be prosecuted in the state court on behalf of the estate and to substitute attorneys other than those retained by the bankrupt. It was held that the state court could require as a condition upon the substitution the liquidation of the New York charging lien of the displaced attorneys. Whether that case was correctly decided on its facts we need not stop to inquire. It is sufficient to say that it does not state the correct rule of law under Ch. X of the Act.

It is said, however, that § 77B rather than Ch. X measures the jurisdiction of the bankruptcy court since the main suit was instituted in the state court prior to the effective date of Ch. X, September 22, 1938. See § 7. But the short answer is that the petition was approved after that date and the provisions of Ch. X were thus brought into play.[5] It is suggested that since § 23 of

[5] Even if the petition had been approved prior to the effective date of Ch. X its provisions would have applied in their entirety to the proceedings provided such approval was within three months prior to that date. § 276 (c) (1).

the Act[6] was applicable to reorganizations under § 77B but inapplicable[7] to those under Ch. X (§ 102), there was a greater limitation on the jurisdiction of the bankruptcy court over plenary suits at the time the main suit was instituted than there was after Ch. X became effective.[8] From that it is argued that since Congress left the enforcement of such claims to the state courts, it permitted them to control all incidents of the litigation including the fixing of attorneys' liens. Sec. 23 deals with questions of the jurisdiction of federal district courts, e. g., whether in suits by trustees in bankruptcy against adverse claimants the jurisdiction of the district courts rests on consent of the parties regardless of diversity of citizenship. *Schumacher* v. *Beeler*, 293 U. S. 367. The fact that the suits against the former officers and directors of the debtor could have been brought in the state courts alone does not advance the solution of the present problem. A bankruptcy trustee who by choice or by necessity resorts to a state court for the prosecution of a claim is of course bound by the adjudication made in the state proceeding. *Winchester* v. *Heiskell*, 119 U. S. 450; *Fischer* v. *Pauline Oil*

[6] Sec. 23 presently provides: "a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

[7] See Weinstein, The Bankruptcy Law of 1938 (1938), pp. 63–64; 2 Collier on Bankruptcy (14th ed.), pp. 435–436.

[8] See *In re Standard Gas & Electric Co.*, 119 F. 2d 658.

& Gas Co., 309 U. S. 294, 303. The state court has full control over the litigation. But even as an incident thereto, it may not take action which involves the performance of functions which Congress has entrusted to the bankruptcy court. See *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522, 537–538.

The suggestion has been made that New York could open its courts to the prosecution of such suits as the trustees instituted on condition that New York control the legal fees incident to the litigation; and that so long as New York did not discriminate against those asserting rights under the federal act such condition would be valid. Cf. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377. It does not appear, however, that New York has followed that course. The fact that New York has adopted measures designed to protect attorneys practicing in its courts does not demonstrate that New York has made its control over the fees a condition to the use of its tribunals. There is no such indication in the opinion of the New York Court of Appeals. Thus we cannot say that New York has provided conditions for entry into its courts which collide with a Congressional enactment. We can only assume therefore that the case is no different in principle from the one where a state grants to creditors attachments in aid of the collection of their claims. There can be no doubt that such liens could be nullified by supervening bankruptcy whether the creditor be lawyer or merchant.

But if it is assumed that New York might have refused to entertain such suits as were brought against the old management (cf. *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56–59), it does not follow that it could take jurisdiction of them but fail to apply any federal law in which those claims might be rooted. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. Where Congress has prescribed the rule to govern the compensation of those em-

ployed by the bankruptcy court, those claims are no less dependent on the federal rule because they are asserted as an incident to another suit. If the state court could disregard the federal rule in that situation, then any of the duties of administration which Congress has imposed on the bankruptcy court could be absorbed by the state tribunal. *Eau Claire National Bank* v. *Jackman, supra.* Congress has fixed the fees which various representatives or officers of the bankruptcy court may receive for their services. §§ 40, 48. Among these are the bankruptcy trustees. § 48 (c). As in the present case those trustees may at times choose to act as their own attorneys. But it would be novel doctrine indeed to hold that state courts could increase any maximum allowance which Congress might authorize bankruptcy trustees to receive from the estate merely because the trustees rendered some of their services in state tribunals. Yet if Congress can protect bankruptcy estates by itself prescribing maximum fees for those representing or rendering service to the estate, it is not apparent why it may not reach the same result by delegating that authority to the bankruptcy court. Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of all fees as part of the plan has been entrusted to the bankruptcy court exclusively. The case is therefore controlled by the principle of *Hines* v. *Lowrey,* 305 U. S. 85. In that case we held that where an Act of Congress limited to ten dollars the fees for services in connection with veterans' War Risk Insurance claims, the New York court could not award a greater amount to an attorney representing a guardian of an insane veteran even where the guardian was appointed by the New York court. We reversed a judgment of the New York court granting the attorney $1,500 for his services. The purpose of Congress to place the control of petitioners'

fees in the bankruptcy court is no less clear than its purpose to limit the amount of fees in the *Hines* case. In each the federal rule is the supreme law of the land.

We only hold that the bankruptcy court has exclusive authority under Ch. X to fix the amount of allowances for fees. Whether the amount so fixed could be secured by a lien created by local law raises a question which we do not reach.

Affirmed.

MR. JUSTICE ROBERTS concurs in the result.

MR. JUSTICE FRANKFURTER, concurring:

1. Since 1789, rights derived from federal law could be enforced in state courts unless Congress confined their enforcement to the federal courts. This has been so precisely for the same reason that rights created by the British Parliament or by the Legislature of Vermont could be enforced in the New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—enables them to enforce rights no matter what the legislative source of the right may be. See, for instance, *United States* v. *Jones,* 109 U. S. 513, 520.

2. In short, subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power, and the States are as free from control by Congress in establishing

state systems for litigation as is Congress free from state control in establishing a federal system for litigation. The only limitation upon the freedom of a State to define the jurisdiction of its own courts is that implied by Article IV, § 2 of the Constitution, whereby "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Constitution does not require New York to give jurisdiction to its courts against its will. But "If the State does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other States of the Union also would have a right to resort to it in cases of the same class." *Anglo-American Provision Co.* v. *Davis Provision Co., No. 1,* 191 U. S. 373, 374. The matter was well put by Judge Cuthbert Pound in connection with litigation under the Federal Employers' Liability Act in the state courts: "the State courts must make no hostile discrimination against litigants who come within the act in question; . . . they must treat litigants under the Federal act as other litigants are treated; . . . they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress." *Murnan* v. *Wabash Ry. Co.,* 246 N. Y. 244, 247, 158 N. E. 508, 509.

3. The upshot of the matter is that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction." *Claflin* v. *Houseman,* 93 U. S. 130, 136–137. Whether a state court is "competent to decide rights of the like character and class," whether the particular litigation is to be tried by jury and, if so, how the jury

is to be composed, whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature—in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be—all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211. As it was put by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330–331, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every other litigant who seeks access to its courts.

4. Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employers' Liability Act, and after thorough canvass the matter was thus summarized by Mr. Justice Holmes in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–388, "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."

5. The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court. It certainly has not done so by the Bankruptcy Act nor can any implication to that effect be derived from the Supremacy Clause of the Constitution. For the Supremacy Clause does not give greater supremacy to the Bankruptcy Act over the free scope of the States to determine what shall be litigated in their courts and under what conditions, than it gives with reference to rights directly secured by the Constitution, such as those guaranteed by the Full Faith and Credit Clause, see *Anglo-American Provision Co.* v. *Davis Provision Co., No. 1, supra,* or with reference to the power exercised by Congress under the Commerce Clause, see *Minneapolis & St. Louis R. Co.* v. *Bombolis, supra.*

6. The exercise of a right which Congress has not sought to exercise since 1789 and evidently has not exercised because of the constitutional relation of federal rights to their enforcement in state courts should not be read into Chapter X. c. 575, 52 Stat. 883, 11 U. S. C. § 501 *et seq.* We should hesitate long before we find that Congress has assumed the power to render unconstitutional state legislation by which access to a state court would be allowed to a litigant on no different terms than those which the State has prescribed for its own litigants to whom access to its courts is given in like cases. And certainly such a wholly novel doctrine of constitutional law should not be resorted to gratuitously when the case before us can be disposed of on the conclusive ground that the litigation conducted in the New York courts was conducted under an arrangement consonant with New York law, namely that the attorneys' fees were to be fixed not by the New York courts

but by the Bankrutcy Court. See *Matter of Heinsheimer*, 214 N. Y. 361, 108 N. E. 636. Recognition that such is New York law and that therefore the remission of fee-fixing in this case to the Bankruptcy Court is not in conflict with that law appears from the opinion below: "as a matter of fact the retainer of these attorneys was subject to the condition that the amount of any fees would be fixed by the United States District Court." 290 N. Y. 468, 475. The disposition of this case requires neither the assumption made in the Court's opinion relating to New York law, nor the application given to Chapter X, both of which must be inescapable before we even reach the constitutional issue needlessly projected.

7. *Hines* v. *Lowrey*, 305 U. S. 85, does not touch this problem. That case involved § 500 of the World War Veterans' Act which limited to $10 the fee that may be allowed for services in pressing a claim before the United States Veterans' Bureau and made it a crime to charge more. A New York court granted a fee of $1,500 for such services because the estate of the veteran was being administered by a committee appointed by the state court which had appointed an attorney to press the claim before the Veterans' Bureau. Of course this Court held that a state court cannot sanction that which Congress has outlawed as a crime. The New York court in effect denied the authority of federal law to fix fees for litigation before a federal tribunal—a very different thing from denying to the State of New York the authority to fix fees for litigation in its own courts. The limitations in the *Hines* case fixed by Congress did not run counter to any requirement of New York law governing the conduct of suits in its courts. That case was not concerned with such a situation, and therefore could not possibly hold that, if New York had a policy for litigation in its courts contrary to that expressed by Congressional enactment, a federal right could be pursued in disregard of the conditions for entry

into New York courts applicable to all other litigants. Congress has never said that it can subvert the declared policy of a State as to the manner in which, or the conditions under which, litigation in state courts should be conducted. The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress though of course state law may in words or by implication make the federal rule for conducting litigation the rule that should govern suits to enforce federal rights in the state courts. Surely it cannot be that should New York decide to regulate the public profession of the law by putting the determination of all attorneys' fees in charge of its courts, Congress could provide that actions thereafter brought in New York courts in the enforcement of federal rights shall not be subject to New York's fee system. I repeat, *Hines* v. *Lowrey, supra,* gives no support whatever to a claim which was not involved in that case, which it did not consider, and which runs counter to the whole course of federal judiciary legislation and federal adjudication.

We ought not to go out of our way to embarrass consideration of such delicate questions in the working of our federal system whenever in the future they may call for decision by this Court.

MR. JUSTICE JACKSON joins in this opinion.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 105. Argued December 15, 16, 1943.—Decided February 7, 1944.

In order to compete with railroads in the transportation of hard-surface floor-covering, motor carriers proposed to establish rates 47.5 per cent of first class, minimum 20,000 pounds (truckload), and 45 per cent of first class, minimum 30,000 pounds (carload). The Interstate Commerce Commission rejected the proposed rates as unjust and unreasonable, and unjustly discriminatory between shippers, so far as subject to a minimum of 30,000 pounds. *Held* that, because of the inadequacy of the record, this Court is unable to determine whether the decision of the Commission conforms to law; and the decree of the District Court refusing to set aside the Commission's order must be reversed. P. 209.

48 F. Supp. 432, reversed.

APPEAL from a decree of a District Court of three judges, refusing to set aside an order of the Interstate Commerce Commission, 34 M. C. C. 641.

Mr. Charles E. Cotterill for appellants.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton,* and *Nelson Thomas* were on the brief, for appellees.

Messrs. Luther M. Walter, Nuel D. Belnap, and *John S. Burchmore* submitted for the National Industrial Traffic League, intervener, urging affirmance.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Appellants are motor carrier associations who seek to put into effect proposed rate schedules in order to meet

rail competition. The schedules cover transportation of hard surface floor covering, e. g., linoleum, from points in New England and Middle Atlantic states to various destinations in Middle Western states. The Interstate Commerce Commission, three Commissioners dissenting, rejected the schedules. 34 M. C. C. 641. In so doing it upheld the previous conclusion of its Division 3. 31 M. C. C. 193. A three-judge District Court (28 U. S. C. § 47) sustained the Commission's decision. 48 F. Supp. 432. The appeal, under 28 U. S. C. §§ 47a, 345, brings the decree here for review. Eastern-Central is the principal appellant. We think the judgment must be reversed.

When the schedules were filed, the motor carriers' rates on carpeting generally were based on minimum weights varying between 16,000 and 20,000 pounds, roughly approximating a truckload. Below this weight the rate was equivalent to 70 per cent of first class. Above it the rate varied somewhat, in the neighborhood of 45 to 50 per cent of first class. Corresponding rail rates then were 70 per cent of first class for shipments of less than 30,000 pounds (less than carload lots) and 45 per cent for larger shipments. Thus, the differential according to weight was geared in the one case to rail carload capacity and in the other to truckload capacity.[1]

Conceiving that these structures gave the railroads an undue competitive advantage on larger shipments, appellants proposed specific rates designed to enable them to

[1] So it was found, in each instance, upon the evidence, and the finding is not disputed. The figures are only approximate; that is, 30,000 pounds represents not an exact carload capacity, since differences in loading characteristics of commodities and slight differences in carload capacities, may make possible loading slightly more or less in a car. Similar, perhaps somewhat wider, variations affect trucks. The findings were that 20,000 pounds reasonably can be viewed as a minimum weight geared to truckload capacity, though in some instances as much as 22,000 or 25,000 pounds actually can be loaded in one vehicle.

compete with the railroads for such shipments. They sought to utilize a new minimum weight. The rates tendered were approximately the equivalent of 70 per cent of first class for shipments of less than 20,000 pounds, 47.5 per cent for 20,000 to 30,000 pounds, and 45 per cent for 30,000 pounds or more. The schedules therefore substantially put rail and motor rates on the same plane for less than 20,000 and more than 30,000 pounds; but placed motor rates substantially lower than rail rates for shipments of 20,000 to 30,000 pounds.

Certain western rail carriers protested. Thereupon the proposed rates were made the subject of investigation and suspension proceedings. 49 U. S. C. § 316 (d), (g), 49 Stat. 558–560, 54 Stat. 924. Hearings were begun before Division 3. While they were pending appellants agreed to make applicable in connection with their proposed rate, minimum 30,000 pounds, a tariff provision that such shipments "must be received at and transported from the point of origin from one shipper in one day and on one bill of lading." [2] The rail protestants therefore presented no evidence and after the hearing withdrew their protest. While the proceedings were pending the rail carriers also reduced their rates minimum 30,000 pounds to 42.5 per cent of first class.

The hearings continued and appellants presented evidence which showed, among other things, that one motor carrier, Brady Transfer and Storage Company, of Fort Dodge, Iowa, had received "since these rates were suspended, four loads from the Western Trunk Line Territory, instead of 398, and three of those we haven't collected the charges on, because the rate was too high . . ." It appeared too that the eastbound movement consists largely of dairy products, requiring refrigeration. The

[2] Cf. Carpets and Carpeting from Official to Southern Territory, 237 I. C. C. 651; Peanut Butter from Montgomery, Ala., to Georgia, 22 M. C. C. 375.

bulk of the westbound movement is frozen or salted fish.

Division 3 made findings and conclusions first that, based upon the costs proven and comparison with motor carriers' rates on numerous commodities, the proposed rates 45 per cent were "just and reasonable provided the minimum that is applicable in connection therewith is reasonable." Accordingly it examined the reasons advanced in support of the proposed minimum of 30,000 pounds.

On this, it found in No. M–1445 [3] that linoleum shipments which move by rail to the Ohio points generally are consigned to warehouses having rail sidings, while linoleum is tendered to the appellant motor carriers in quantities weighing from 18,000 pounds upward. It found also, and the finding is not questioned, that it is physically impossible to load 30,000 pounds of linoleum into a single unit of equipment operated by appellants. While some of it can transport 25,000 pounds, "the normal truckload of linoleum approximates 22,000 pounds." Rejecting appellants' contention based on Carpets and Carpeting from Official to Southern Territory, 237 I. C. C. 651, the Division stated:

"The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents [appellants here] have not presented to us a valid reason *from the point of view of economy in transportation or otherwise,* such as we have found to exist in connection with certain trainload movements,[4] why they

[3] Two proceedings, Investigation & Suspension Docket No. M–1216 and No. M–1445, were heard separately, but consolidated before the Division.

[4] E. g., Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I. C. C. 485.

should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. *We adopt as a policy,* the condemnation *as unreasonable* of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight." (Italics supplied.)

The Division then found that, on the record, a reasonable truckload minimum on linoleum is 20,000 pounds and there was no showing of operating economies which would result if the proposed rates were restricted to apply only when 30,000 pounds are tendered. It concluded that the proposed schedules "are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable." The proposed schedules therefore, to the extent found not just and reasonable, were ordered cancelled "without prejudice to the establishment . . . of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 percent of the corresponding first-class rates." 31 M. C. C. 193.

Thereafter oral argument was had before the full Commission. At this stage the National Industrial Traffic League intervened and supported the Division's position.[5]

[5] This intervenor did not appear in the District Court, not having notice of the proceedings there until after the argument there. The appearance here is by virtue of an order granting a motion to intervene.

The Commission affirmed the Division's findings "that the proposed rates 45 and 47.5 percent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 percent of first class, are subject to a minimum of 30,000 pounds." Both rates, it said, "are within the zone of reasonableness." But "the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots." Since at that time the tariffs disclosed appellants' rates were either 45 or 47.5 per cent of first class, minimum 20,000 pounds, no order for the future was made. The Commission, in concluding its discussion, said:

"We are mindful of the fact that we approved certain [motor carrier] rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra.* However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, *but that for the future we shall follow the policy announced in the prior report herein* with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers." (Italics supplied.)

The District Court, sustaining the Commission's findings and decision,[6] held that the extent to which competi-

[6] The decree dismissed appellants' bill to set aside and enjoin enforcement of the Commission's order of suspension. The court agreed that the proposed rate of 45 per cent, minimum 30,000 pounds, is "a mere adoption on a volume basis of rates for railroad carload lots," having "no relation to the business of the motor carriers," both because there was no showing of any saving in operating costs when

tion should be recognized in arriving at just rates is a matter, within reasonable limits, for the expert judgment of the Commission and that, in exercising its discretion, that body had met the requirements of § 216 (i) of the Motor Carrier Act.[7] 49 U. S. C. § 316 (i).

I.

Notwithstanding the apparent difference between the Division and the full Commission, in the former's view that the proposed rate minimum 30,000 pounds is unreasonable and the latter's that it is both unreasonable and unduly discriminatory, the net effect is that the rate is unlawful, as a matter of policy which condemns all volume minimum rates unless it is clearly shown they will operate at costs per 100 pounds less than the costs incurred at reasonable loading capacity rates.

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carrying more than 20,000 pounds and because there was none that a 45 to 47.5 rate, for anything beyond 20,000 pounds "would not enable them to maintain reasonable competition with the railroads." As to the finding that rates of either 45 or 47.5 per cent, minimum 20,000 pounds, would not in themselves be unreasonable, the court said this "does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment."

[7] The court found that the Commission had met the section's requirements "in that it has given 'due consideration . . . to the inherent advantages of transportation by such carriers, (and) . . . to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service. . . .'" No specific reference was made, however, to the over-all national transportation policy, or its requirements particularly in relation to the Commission's duty "to . . . foster sound economic conditions . . . among the several carriers; to encourage the establishment and maintenance of reasonable charges, . . . without . . . unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail. . . ." Cf. note 13 *infra* and text.

Whether this policy is now intended to apply to all forms of transportation, rail, motor and water, without regard to competitive conditions affecting two or more of them, is not clear from the abbreviated reports made in this case. But their casting of the matter in terms of unqualified policy, dependent only upon proof of the required reduction in operating costs, gives both appearance and substance to the view this may be true, if not with respect to all carriers, then certainly with reference to motor carriers. If so the effect will be, as appellants urge, not to make reduction in costs merely one factor, nor indeed even the most important factor, in determining the reasonableness and discriminatory or contrary character of rates. It will be rather to make reduction in costs the exclusive criterion, eliminating all other considerations, including competitive conditions amounting to necessity. That is true, notwithstanding the Commission's report, immediately prior to stating its adoption of the policy announced by the Division, gave expression in an abstract way to a directly contrary principle, namely, "the extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case." [8] The latter statement, taken

[8] The Commission long has recognized that "reference to and . . . consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time" are necessary. 20 I. C. C. 43. Included as pertinent have been such "facts, circumstances, and conditions" as the expense attributable to the character of the commodity, e. g., whether it is subject to special risks or requires special services, cf. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108; 113 I. C. C. 389; 87 I. C. C. 711, or its transportation character is affected by the manner of packing, 98 I. C. C. 166; the value of the service rendered and of the commodity, e. g., 83 I. C. C. 334; 100 I. C. C. 471; 102 I. C. C. 325; cf. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 64 F. 723 (C. C. N. D. N. Y.); the possibility of securing continuous business or ad-

literally, squarely contradicts the policy unless indeed the statement was intended to qualify it in situations not indicated or contained an implicit limitation from context that the only "facts in each case" which would be material are those which would prove a reduction in costs.

That the purpose was not to qualify the policy seems apparent, not only from the latter's unqualified formulation and adoption and from the failure to intimate in what types of situation the qualification might operate, but also from two other considerations. One is that the statement was followed immediately by the broad and conclusive declaration, in general terms, without supporting data or reasons, except as supplied by the policy itself, that "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination." The statement was not limited to the particular competitive situation. In terms it applied to all between rail carriers and motor carriers. In short, the policy, and therefore the single factor that there was no evidence to show reduction in cost, was the sole criterion of decision. Other facts, including competitive disadvantage, became irrelevant. And the significance of the pol-

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ditional tonnage, *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263; peculiar needs or conditions affecting specific areas, 9 I. C. C. 318; 113 I. C. C. 389; 146 I. C. C. 419; cf. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; rates on the same or similar commodities elsewhere, 113 I. C. C. 389; 122 I. C. C. 235; and the need to meet competition, either by the same or other type of carrier, *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282; *Barringer & Co.* v. *United States*, 319 U. S. 1. See also 142 I. C. C. 121; 235 I. C. C. 485; 235 I. C. C. 723; 237 I. C. C. 651.

icy's application becomes more manifest by virtue of the fact that the case, though presented and decided on its own record, was regarded and determined as a test case.[9] Finally, the Commission's review of its previous decisions, upon which appellants relied, shows, we think, that its purpose, in the case of motor carriers at any rate, is to adhere strictly to the policy and, in the manner made, may be taken to indicate that it contemplates no departure whatever. If so, the effect of the decision is not merely to adopt "a policy of administration," as the Commission and the intervenors before it assert; but is rather to adopt, as a rule of law, the principle that only upon a showing of reduction in operating costs may a volume minimum rate be found reasonable and not unduly discriminatory.

II.

The Commission considered chiefly previous decisions in Carpets and Carpeting from Official to Southern Territory, *supra;* Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I. C. C. 485; and Petroleum Rail Shippers' Assn. *v.* Alton and Southern R., 243 I. C. C. 589. In the *Molasses* case, notwithstanding the Commission's previous refusal to authorize rail volume rates for more than carload lots at less than carload rates, it approved a multiple car rate, minimum 1,800 tons, on molasses which was lower than the carload rate. The effect was to authorize a lower rate to a number of carloads tendered as a single shipment. The departure was made to enable the

[9] The brief of the National Industrial Traffic League, intervenor, points out that appellants and other carrier associations joined in a petition to the Commission for reargument and reconsideration of eleven cases previously decided by Divisions 2 and 3, including the one presently involved, I. and S. No. M-1216. The petition was rejected, since the petitioners were not parties of record to all the proceedings. But coincidentally the Commission reopened I. and S. No. M-1216, for oral argument.

rail carriers to meet water competition. However, there was a showing that in the circumstances a material saving in costs per 100 pounds would be made in transporting such multiple-car shipments. In the *Petroleum Shippers* case the Commission considered authorizing multiple-car rates on petroleum, but declined to do so upon finding that the record did not establish existence of a substantial cost saving in such shipments.

In the *Carpets and Carpeting* case the Commission approved certain rates subject to a minimum weight of 30,000 pounds on linoleum. In doing so, it said:

"We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading." 237 I. C. C. 651, 657–658.

And in Peanut Butter from Montgomery, Ala., to Georgia, 22 M. C. C. 375, Division 2, although declaring in one breath that motor carriers should not maintain volume rates subject to minimum weights greater than equipment generally available can transport, in the next noted that the national motor-freight classification is replete with such ratings, refused to condemn them and said that if they were restricted to apply only when tendered by one shipper, in one day and on one bill of lading, they would be "in consonance with Carpets and Carpeting from Official to Southern Territory, supra."

III.

These cases disclose departures, though tentatively made, from the Commission's long-standing [10] policy in the same respect, adopted when its powers extended only to rail carriers. Influenced primarily by the desire to secure shipping advantages for the small shipper equal to those given the large one and thus to enforce the policy of the interstate commerce legislation against undue discrimination, the Commission at first declined to adopt wholesale rates.[11] The major departure was in allowing lower rates for carload lots than for less-than-carload shipments. This was justified by the difference in costs. Accordingly, the structure became fixed with this as the major and for long the only differential; and with it the principle that such a saving in operations alone justifies a differential. That policy received judicial approval [12] and remained controlling so long as the Commission had authority only over railroads.

But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the

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[10] E. g., Paine Bros. & Co. *v.* Lehigh Valley R. Co., 7 I. C. C. 218; Anaconda Copper Mining Co. *v.* Chicago & Erie R. Co., 19 I. C. C. 592, 596; Rickards *v.* Atlantic Coast Line R. Co., 23 I. C. C. 239, 240; Woodward Bennett Co. *v.* San Pedro, L. A. & St. L. R. R., 29 I. C. C. 664, 665; J. W. Wells Lumber Co. *v.* Chicago, M. & St. P. Ry., 38 I. C. C. 464, 465; and compare Scofield *v.* Lake Shore & Michigan So. Ry. Co., 2 I. C. C. 90.

[11] See note 10 *supra*.

[12] Compare *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 240–241.

coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy, as declared by the later legislation.[13] This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

Necessarily the impact of these changes brought problems the Commission previously had not faced. Necessarily too the Commission in facing them, including those of adjustment among the various forms of transportation, called upon its previous experience in the railroad field for guidance to its judgment. But that experience could not apply fully to the other and different forms of carriage. Nor could it do so always when the interests of two or more

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[13] Motor Carrier Act of 1935, 49 Stat. 543; Transportation Act of 1940, 54 Stat. 899.

That policy demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as, in the statute's language, 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*; . . . 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." 54 Stat. 899. (Italics added.) Cf. *McLean Trucking Co.* v. *United States, ante,* p. 67.

were found in conflict. Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation. Hence, in such situations, principles previously established for application within a single form of transportation cannot always be transplanted to control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest.

Thus, in the problem presented by this case, application of the principle that volume minimum rates will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation, may be made within either the railroad area or the motor area without substantial disturbance or difficulty. Each has its unit of carriage or loading and that unit has a substantial relation to costs; hence, upon the long-established railroad principle, to reasonableness and the discriminatory or nondiscriminatory character of rates. But, as between rails and motors, the two units are different. And the two forms of carriage compete, unless the lower rates geared to the respective units are of a character that each forces the other form of carriage from the field. The junction of difference in available units, with rates geared to them, and the fact of competition or competitive possibility produces or may produce consequences neither the character of the unit nor the fact of competition, nor both together, could create in either form of service taken alone. In short, the very fact a rail carload is 30,000 pounds and a truckload 20,000, with rates respectively tied to these weights, may make a life-or-death difference in the competitive struggle, with consequences affecting not only the carriers but the public interest as well. And appellants'

argument that a 30,000-pound minimum is necessary to meet rail competition is at least consonant with the frequent recognition, both by the Commission and by this Court, that there are occasions when it is appropriate for the former to consider a carrier's need to meet other carriers' competition as a factor justifying what otherwise would be an unreasonable or an unduly discriminatory rate.[14]

But whether and to what extent competition may have destructive effect, or other consequences hurtful to the public interest, in a particular situation may depend not merely on the difference in sizes of units, but on other factors. Each form of carriage has some inherent advantages over the others, such as mobility, speed, normal volume capacity, etc. Purely legal restrictions, such as limitations upon tonnage placed on trucks by state laws, create like or contrary effects. Whether, in a particular situation, the mere difference in loading capacity or some other or others of the many important factors affecting competitive position will be controlling depends upon the character of, and the factors involved in, that situation. And this is as true of one form of transportation as of another when, but for rate structures geared solely to costs of operation, it comes within a competitive tangent.

IV.

In such a situation, therefore, to tie rate differentials exclusively to minimum weights based on available unit size conceivably might allocate all shipments of that size to the form of transportation to which it appertains. Or, if the effect were less extensive, still it might impose conditions upon the competition unduly burdensome or not required by the competitive situation and the applicable statutory policies. Thus, appellants say the Commis-

[14] Cf. note 8 *supra.*

sion's ruling has such consequences in this case, namely, to force them to make the 45 per cent rate available on shipments between 20,000 and 30,000 pounds, thus placing the railroads at a disadvantage on such tonnages and compelling the motor carriers to reduce their rates on them below what the competition requires; or to compel them to forego an equality of rate with the railroads on shipments of 30,000 pounds and more by charging only the one rate of 47.5 per cent on all shipments of 20,000 pounds and more. From these alternatives it is charged the consequence is to force the truckers "out of that very large field of traffic" and allocate it to the railroads. Whether this is the effect or not, we have no means of knowing on this record. Nor can we tell, other than by sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested, whether the proposed rates will give the motor carriers an undue competitive advantage as to shipments of 20,000 to 30,000 pounds, whether there will be discrimination in fact between classes of shippers, or whether though these things may result in the particular situation they will do so only by virtue of its peculiar features or by virtue of its conformity to conditions generally prevailing in regions competitive as between rail and motor carriers.

These, and other questions of like import, remain unanswered upon the record. The problem is novel. It is not free from complexity, as appears from the Commission's hesitant departures from, then its return to, the long-established railroad rule, in inter-carrier situations. Further, the matter is one of general importance. It affects not only shipments of linoleum, and motor carriers, but many kinds of shipment and all kinds of carriers within the Commission's jurisdiction. It may touch vitally the public interest. It involves, to some extent, the important task of reconciling previously established rail-

road policies with, or adapting them to, the requirements of the presently effective national transportation policy and its application to a coordinated transportation system. Upon a matter of such consequence and complexity, our function in review cannot be performed without further foundation than has been made.

We do not mean by this to imply that the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record. We do not undertake to determine what result the Commission should reach. But we cannot say the one at which it has arrived has the sanction of law without further basis than we now have. This in itself requires reversal. Consequently we need not speak concerning appellants' other contentions, except insofar as the pertinence of some of them to the necessary further proceedings requires.

V.

Appellants' broadest contention must be rejected at this stage. It is, in effect, that as a matter of law, in the particular circumstances competitive necessity becomes the controlling consideration, and costs of operation, that is the requirement that minimum volume rates be geared to loading capacity, become immaterial. That view must be rejected for the same reason as requires rejection, on this record and until further buttressed, of the Commission's converse view that costs exclusively control and competition becomes immaterial. Conceivably particular circumstances might make one or the other factor predominant and, in such a situation, the choice would be for the Commission to make, upon a proper weighing of the facts and opposing policies possibly applicable. Whether in any case this contention of appellants could be accepted may be doubtful. Certainly it should not be in advance of further action by the Commission and then only in circum-

stances which would justify it as being in the public interest so clearly that no other view would be tenable.

Appellants also say that as a matter of law there could be no unjust discrimination in the present circumstances, since they insist there is no showing, upon the facts, that different classes of shippers would be affected. On the contrary they assert that all shippers actually are in the same class and all are free to avail themselves of the alternative rates above 20,000 and 30,000 pounds, 47.5 per cent and 45 per cent, respectively, as they please. But the only bases for this assertion are, first, the absence of any finding that the availability of the 45 per cent rate, minimum 30,000 pounds, "would in practical effect be confined to only a few or a particular class of shippers" and the further assertion that no such finding could be made, since 30,000-pound shipments of linoleum "are the normal units of quantity purchase and sale as revealed by the railroad carload rates which apply between the same localities only on shipments of 30,000 pounds." Obviously, as the Commission noted, the mere existence of these rates in the tariffs hardly could be taken to prove the conclusion appellants sought to draw from that fact. Certainly it could not be taken as conclusive evidence. Whether or not, however, the proposed rates in fact would operate to create an undue discrimination between shippers, or classes of them, is a matter upon which the record factually throws no light. It is therefore one for further examination by the Commission.

In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to

understand, with a fair degree of assurance, why the Commission acts as it does. Cf. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours.

The judgment is

Reversed.

MR. JUSTICE FRANKFURTER, with whom the CHIEF JUSTICE and MR. JUSTICE REED concur, dissenting:

This case in its essentials can be reduced to simple terms; in effect, the question is whether the Interstate Commerce Commission acted unlawfully in holding unreasonable and discriminatory a proposed schedule of rates for the shipment of linoleum in trucks operated by members of appellants, associations of motor carriers. The facts are these. On linoleum shipments between points in New England, New Jersey, Delaware, Pennsylvania, and New York, and destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, the members of the Eastern Central Motor Carriers Association charged 50% of first-class rates, minimum 20,000 pounds.[1] This minimum is approximately the weight which conventionally is a truckload. Railroad rates on linoleum at this time were 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for those

[1] "First-class" is used to designate the rates applied to a class of commodities. Percentages of a class rate are used as rates for designated commodities.

weighing at least 30,000 pounds—a conventional railroad carload.

By schedules filed to become effective August 24th, 1940, Eastern proposed rates of 47.5% of first-class, minimum 20,000 pounds, and 45% of first-class, minimum 30,000 pounds. The practical effect of this change would be to require a shipper who could send only 20,000 pounds of linoleum to pay a higher rate than one who could ship a consignment of 20,000 and 10,000 pounds. And two shippers, one with 10,000 pounds and the other with 20,000 pounds could combine their shipments at the lower rate, while a shipper of 10,000 pounds who could not conveniently join with others would have to pay the higher rate. These are the changes here in controversy. Upon the protest of the western trunk line rail carriers, later withdrawn when the appellants agreed that their 30,000 pound minimum rate would apply only on shipments "received at and transported from the point of origin, from one shipper in one day and on one bill of lading," operation of the proposed schedules was suspended and Division 3 of the Commission held hearings to determine their validity. Upon their conclusion, Division 3 found that the proposed rates were reasonably compensatory, but that it was physically impossible to load 30,000 pounds of linoleum into a single unit of equipment, and that there was no showing that operating economies result when a 30,000 pound minimum shipment involving a truckload and fraction of another truckload is tendered. The Division thereupon concluded that a minimum weight greater than a truckload is unreasonable unless such a rate is justified by savings in cost, and ordered the proposed schedules cancelled to the extent found unjust and unreasonable. 31 M. C. C. 193.

This decision was fully reviewed by the entire Commission upon oral and printed arguments by the motor car-

riers, the linoleum shippers, and the National Industrial Traffic League, a group organized to promote the free interchange of commerce. The shippers and the Traffic League urged the Commission to leave the order of Division 3 undisturbed, while the motor carriers sought to justify the rates as legitimate means of meeting rail competition. The Commission agreed with Division 3 that the rates were unreasonable and held that the 30,000 pound minimum, based on no difference in transportation cost, would be discriminatory. 34 M. C. C. 641.

If the sole issue were whether there would be discrimination in favor of the 30,000 pound lot shipper as against the 20,000 pound lot shipper, clearly the Commission could find as it did, and the court below properly did not undo what the Commission did. 48 F. Supp. 432. Is there in fact more? The appellants contend that rail competition excuses and legalizes the discrimination beyond the Commission's power to condemn. This Court does not yield to that claim, but it does hold that either the Commission must state with particularity why the evidence of competitive conditions in this record is so vague and inadequate as to afford no justification for discrimination, or, in effect, requires the Commission to proceed with a full-dress investigation of the entire competitive relations between motor and rail carriers.

The Commission, on the basis of the evidence before it, concluded that "The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination." Prior decisions of this Court surely do not require greater explication of the reasons on which the Commission's conclusions are based. See *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86–87; *United States* v. *B. & O. R. Co.,* 293 U. S. 454, 464–465. The Commission did not adopt an inflexible "principle that volume minimum rates

will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation," if its statement that "The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case" is to be accepted. Burke has said somewhere that he could not imagine English law without the law reports. Substantially the same considerations that call for giving reasons in rendering judicial decisions apply to the determinations of such agencies as the Interstate Commerce Commission. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511. But we should not be more exacting of reports of the Interstate Commerce Commission explaining its orders than we are of the opinions of lower courts whose judgments come before us for review.

Nothing in this record calls for more explicitness than is ordinarily demanded. For nothing in the record requires the Commission to discuss the conceivable validity of proposed schedules which, aside from competitive conditions, are manifestly discriminatory. Such discriminatory rates were supported by a bare recital that railroad rates were nominally lower than motor carrier rates and that the business of one motor carrier had decreased. At the hearing before the Division, a representative of one motor carrier stated that the proposed rates were more than adequate to cover costs, that they did not vary substantially from rates imposed on the shipment of other comparable commodities, and that railroad competition had caused his company's linoleum business to decline. He also testified that his firm competed for linoleum shipments with other motor carriers. This is the proposed justification for a rate differential concededly based on no difference in transportation cost or in service rendered and which therefore discriminates between those who ship 30,000 pound lots and

those who ship 20,000 pound lots. And the record becomes even more barren when it is noted that the competitive conditions said to require adoption of the proposed discriminatory tariffs were not such as to prevent the rail carriers' acquiescence in the adoption of the new schedule when, on appellants' theory, the rail carriers had advantages intended to be mitigated by the new rates. The Commission found that either 47.5% or 45% was an allowable rate for either a 30,000 or 20,000 pound shipment—either rate "was within the zone of reasonableness." It thereby permitted the motor carriers to compete on an entire equality with the rail carriers. But it forbade discrimination as between linoleum shippers equally placed. What the appellants really complain of is not that they cannot meet the railroad competition at the 45% rate on 30,000 pound lots, but that they cannot do so and yet collect 47.5% on lots of 20,000 pounds which are outside rail competition. Be that as it may, a mere arithmetic difference between railroad rates and motor carrier rates is quite blind. The rates themselves may not be at all revealing on competitive conditions; they may not tell what a shipper gets for his money and what he is paying for. That is, the quality of the service, the advantages of one type of service over the other, the availability of equipment, safety, labor cost, and many other factors may all give significance to the figures that figures themselves do not give.

The present ruling apparently imposes upon the Commission the duty of pursuing such complicated and far-reaching investigations every time a motor carrier rate that may have a relation to a railroad rate is found to be discriminatory in relation to another motor carrier rate affecting the same commodity. Such an investigation is an undertaking of vast scope involving consideration of factors which it would require an expert merely to catalogue. The different characteristics of rail and motor carrier serv-

ices, the economic wisdom of excluding motor carriers from large-bulk linoleum trade or limiting their participation in such trade, the availability of other commodity shipments to replace linoleum trade diverted to rail carriers, the availability of and cost of transporting commodities which might be used to fill the truck only partially loaded with linoleum—these are only a few of the factors which may become relevant. Compare III–B Sharfman, *The Interstate Commerce Commission,* pp. 572 *et seq.* The appellants introduced no evidence on the basis of which the Commission could intelligently weigh these considerations. To hold that the Commission must on its own initiative embark on such an investigation in a proceeding of this nature is to impose what may well be a crippling burden.

To speak more particularly of the task which the Commission now faces, it should be noted that Eastern files tariffs with the Commission for about 650 carrier members. A typical commodities clause from the carriers' certificates of public convenience and necessity provides for the shipment of "*General commodities,* except those of unusual value, and except dangerous explosives, household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over regular routes . . ." Thus it appears that the exceptions are few and the allowable shipments many. An investigation of the scope apparently required by the Court would entail a detailed study of the relations of the rate structures in a case merely involving the rates on specific commodities one to the other. If rail competition turns out to be actually detrimental to the successful operation of appellants' linoleum business, the war-time load on the railroads might become relevant, and the Commission might have to decide whether the atypical circumstances at this time

justify competitive discriminatory rates which might otherwise be unreasonable.

That the Commission is an expert body to which Congress has seen fit to commit the regulation of the intricate relationships between the various means of national transportation is a well-worn phrase which ought not to lose its significance in practice when the actions of the Commission come here for review. We should be very reluctant to define for the Commission the occasions which appropriately demand investigation of general transportation problems, and more particularly when a contest over the rate on a particular commodity included in a network of tariffs calls for such a general investigation. Surely it is within the special competence of the Commission to put on a discriminating carrier the duty of justifying by proof his plain discrimination as to a particular rate and not permit him to compel the Commission by a mere assertion to embark upon a far-flung inquiry. There are undoubtedly occasions when the Interstate Commerce Commission will undertake such an investigation in the public interest. But it ought not to be compelled to do so upon the occurrence, from an administrative point of view, of a more or less accidental filing of a tariff revision. When the carrier seeks to supplant a lawful rate, as is the case here, the burden is on it to supply all the essential information to justify the proposed new rate. § 216 (g), Part II of the Interstate Commerce Act, 49 U. S. C. § 316 (g). If it does not do so, it has failed to sustain the duty cast upon it by law, and the Commission in so finding has duly exercised its authority. The Commission's dispositions of Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I. C. C. 985 and Petroleum Rail Shippers' Assn. *v.* Alton & Southern R., 243 I. C. C. 589, are entirely consistent, so far as that is relevant, with its order in this case.

Counsel for Parties.

COMMISSIONER OF INTERNAL REVENUE *v.* LANE-WELLS CO. ET AL.

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

No. 115. Argued January 12, 1944.—Decided February 14, 1944.

1. Where a personal holding company, for the years 1934, 1935 and 1936, failed to make and file a separate return on Form 1120H, as required by applicable and valid Treasury Regulations, in respect of the surtax imposed on personal holding companies by Title IA of the Revenue Acts of 1934 and 1936, *held* that assessment of the tax may be made at any time, notwithstanding that the corporation made and filed for each year a return on Form 1120 in respect of the ordinary income tax imposed by Title I of the Acts. P. 222.

   The filing of the ordinary income-tax returns, in which the corporation erroneously denied that it was a personal holding company, did not start the statute of limitations running against assessment of the surtax.

2. Under the Revenue Acts of 1934 and 1935, imposition of the penalty for failure to file a return (as distinguished from tardily filing) is mandatory; but under the Revenue Act of 1936 the taxpayer may be relieved of the penalty where the failure to file was "due to reasonable cause and not due to willful neglect." P. 224.

134 F. 2d 977, reversed.

CERTIORARI, 320 U. S. 724, to review the reversal of a decision of the Board of Tax Appeals, 43 B. T. A. 463, which sustained the Commissioner's determination of deficiencies in personal-holding-company surtax and penalties.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Alvin J. Rockwell,* and *Mrs. Muriel S. Paul* were on the brief, for petitioner.

Mr. Raphael Dechter for respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Lane-Wells Company is a transferee and successor of the taxpayer Technicraft Engineering Corporation and as such is liable for its taxes. The Commissioner, the Board of Tax Appeals,[1] and the Circuit Court of Appeals [2] have held that Technicraft was a personal holding company in 1934, 1935, and 1936, and that question is no longer open.

For the years named, Technicraft filed the usual corporation income tax returns on Treasury Form 1120. On this form the following appeared: "Is the corporation a personal holding company within the meaning of Section 351 of the Revenue Act of 1934 [or the appropriate year]? (If so, an additional return on Form 1120H must be filed.)" To this each year Technicraft answered, "No." In none of the years in question did it file a personal holding company return on Form 1120H. It was advised, and in good faith believed, that it was not a personal holding company within the meaning of the Act.

The Commissioner relies upon the taxpayer's alleged default in two respects. First, the deficiency notices were given within three years of the filing of the corporate return on Form 1120 for the year 1936, but not within three years of such returns for 1934 and 1935 and not within four years (the period as to a transferee) of the 1934 return. Hence, a part of the tax is barred by the statute of limitations if the return filed is the only one required to start the statute. Second, the Commissioner has assessed and the Board has upheld as to each year a 25 per cent penalty for failure to file the personal holding company return.

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[1] 43 B. T. A. 463.

[2] 134 F. 2d 977, 980.

The Court of Appeals for the Ninth Circuit reversed the decision of the Board of Tax Appeals. It held the one return sufficient to start the running of the limitation statute as to both income taxes and personal holding company taxes and held that there was no default warranting imposition of the penalty. This decision conflicted with that of the Court of Appeals for the Second Circuit in *Simpson & Co.* v. *Helvering,* 128 F. 2d 742, and we granted certiorari.

Prior to 1934, as now, personal holding companies were liable for the regular corporation income taxes under Title I of the Revenue Acts and they, like all other corporations, were subject to additional tax upon an accumulation of profits where there was present a purpose of avoiding surtaxes upon shareholders.[3] The obscurity of corporate taxpayers' purposes and difficulties of proof made the latter tax something of a dead letter in practice, and a new tax was devised "to provide for a tax which will be automatically levied upon the holding company without any necessity for proving a purpose of avoiding surtaxes."[4] The new tax was included in a separate title of the Revenue Act of 1934, Title IA—Additional Income Taxes, and constituted § 351, entitled Surtax on Personal Holding Companies. As part (c) thereof it enacted that administrative provisions, including penalties, applicable in respect of the taxes imposed by Title I should apply in respect of the tax imposed by this section.[5] It seems

[3] *E. g.,* Revenue Act of 1932, § 104, 47 Stat. 195.

[4] Sen. Rep. No. 558, 73d Cong., 2d Sess., p. 15; 1939–1 Cum. Bull. (Part 2) 586, 596.

[5] § 351 (c) provides: "All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable." 48 Stat. 752.

clear that this section created a new tax separate from that on income of ordinary corporations.

Among the administrative provisions of Title I incorporated by reference in the personal holding company tax section are § 54 (a),[6] which requires one liable for such tax to "make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe," and § 62, which directs the Commissioner to prescribe and publish "all needful rules and regulations for the enforcement of this title." [7] Pursuant thereto Treasury Regulations were promulgated providing unequivocally: "A separate return is required for the surtax imposed under section 351. Such return shall be made on Form 1120H." [8]

The taxpayer has not complied with this regulation. It says, however, that its regular corporation income tax return must be taken as an equivalent to the separate return, under our decision in *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, both for starting the period of limitation and for avoiding the penalty. The taxpayer in the *Germantown* case filed a return on a wrong form. The return contained, however, "all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax," and the Court said, "this defect falls short of rendering it no return whatever." 309 U. S. at 308, 310. There the only liability involved was for a Title I income tax, and the return

[6] § 54 (a) provides: "Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe." 48 Stat. 698.

[7] § 62 provides: "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title." 48 Stat. 700.

[8] Regulations 86 and 94, Article 351–8.

was addressed to that liability, as to which the court held that it set the statute of limitations running. Here the taxpayer is under liabilities for two taxes and under an obligation to file two returns, and it says that one return addressed to but one of the liabilities answers the purpose of both.

It is contended by the Government that the returns in the present case were insufficient to advise the Commissioner that any liability existed for the holding-company tax. The Board of Tax Appeals found that the returns filed by the corporation disclosed its gross income and deductions and its resulting net income. 43 B. T. A. 470, 471. The Circuit Court of Appeals construed this as finding that they "showed all the facts necessary for the respondent to compute the taxes as a personal holding company obligation." 134 F. 2d at 978. But it seems admitted that the returns did not show the facts on which liability would be predicated. Such liability was expressly denied by the return, and to obtain data on which corporations subject to the tax could be identified and assessed was the very purpose of requiring a separate return addressed to that liability. Taxpayer says that the information called for by Form 1120H is information that could have been called for by Form 1120. We assume so, but we do not see how the fact helps the taxpayer, for the Treasury was fully within the statute in requiring that information in a separate return.

Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self-assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. For such

purposes the regulation requiring two separate returns for these taxes was a reasonable and valid one and the finding of the Board of Tax Appeals that the taxpayer is in default is correct.

Since no personal holding company returns were filed, the statute of limitations did not commence to run,[9] and the assessment of the tax was not barred.[10]

Since the taxpayer defaulted in filing a required return for the years 1934 and 1935, the 25 per cent penalty in the applicable acts became mandatory [11] and was correctly upheld by the Board of Tax Appeals.

For 1936 the penalty presents a different question. The statute applicable provides that it could be lifted if

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[9] The statute provides: "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." § 276 (a), 48 Stat. 745.

[10] The Treasury Regulation also provided: "The same provisions of law relating to the period of limitation for assessment and collection which govern the taxes imposed by Title I also apply to the surtax imposed under Title IA. However, since the surtax imposed under Title IA is a distinct and separate tax from those imposed under Title I, the making of a return under Title I will not start the period of limitation for assessment of the surtax imposed under Title IA. If the corporation subject to section 351 fails to make a return, the tax may be assessed at any time." Regulations 86, Art. 351–8.

The Court of Appeals thought this unauthorized. As we have indicated, we do not agree that it was beyond the delegated authority, and it appears only to declare what was even otherwise the law.

[11] The 1934 statute reads: "In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax." § 291, 48 Stat. 746. A 25 per cent penalty is likewise mandatory in this case under § 406 of the Revenue Act of 1935, 49 Stat. 1014. This provision excuses late filing, for reasonable cause, but not complete failure to file.

it were shown that such failure was "due to reasonable cause and not due to willful neglect." Revenue Act of 1936, § 291, 49 Stat. 1727. The Board has made no finding on that subject, apparently assuming that the mandatory provisions applied to all years. The question is one of fact in the first instance for the Board's determination. *Dobson* v. *Commissioner,* 320 U. S. 489. The Government does not object to a remand to the Board for the limited purpose of reconsidering the imposition of the 25 per cent penalty for the year 1936 only, if the respondent shall seasonably apply to the Board therefor. In all things else the decision of the Board of Tax Appeals is affirmed. The judgment of the Court of Appeals is reversed, and the cause remanded with directions to remand to the Tax Court for further proceedings in accordance with this opinion.

Reversed.

R. SIMPSON & CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 1. Argued January 12, 1944.—Decided February 14, 1944.

Of a case to which § 1140 (b) (2) of the Internal Revenue Code is applicable, this Court is without jurisdiction after a petition for a writ of certiorari has been denied and the period of 25 days allowed by Rule 33 for filing a petition for rehearing has expired. P. 229.

128 F. 2d 742, writ dismissed.

CERTIORARI, 319 U. S. 778, to review the affirmance of a decision of the Board of Tax Appeals, 44 B. T. A. 498. This Court had previously denied certiorari, 317 U. S. 677.

Mr. Gerald Donovan for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,*

and *Messrs. Sewall Key, Alvin J. Rockwell,* and *Ray A. Brown* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

For the years 1934, 1935, and 1936 the taxpayer, a corporation, filed complete income and excess-profits tax returns on Form 1120 of the Treasury Department. Each of these included a question whether the corporation was a personal holding company within the meaning of § 351 of the applicable revenue act and stated that if it was, an additional return on Form 1120H was required. The taxpayer answered the question in the negative and did not in any year file personal holding company returns on Form 1120H.

The Commissioner imposed personal holding company surtaxes for each year and under the authority of § 406 of the Revenue Act of 1935 and § 291 of the Revenue Acts of 1934 and 1936 imposed a 25 per cent penalty for failure to file the personal holding company return.

The president, who executed the income tax returns, did not file personal holding company returns because he thought the taxpayer was not a personal holding company within the meaning of the Act. It was actively engaged in the pawnshop business. However, more than 50 per cent of its capital stock was owned by less than five stockholders, and more than 80 per cent of its gross income was derived from interest. The taxpayer filed information returns showing dividends of over $300 paid to each stockholder during those years and its books and records made available to the Commissioner during audit disclosed the facts. No fraud or bad faith is suggested.

The Board of Tax Appeals affirmed the penalties,[1] and its decision was affirmed by the Circuit Court of Appeals.[2]

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[1] 44 B. T. A. 498.

[2] 128 F. 2d 742.

There appearing to be no conflict of decision between circuits, we on November 9, 1942 denied certiorari.[3] The 25-day period allowed by our rule in which to file petition for rehearing expired. In February 1943 a conflict developed through decision of *Lane-Wells Co.* v. *Commissioner* by the Court of Appeals for the Ninth Circuit.[4] Petitioner asked leave to file out of time a petition for rehearing and we consented. On June 7, 1943, we granted petition for rehearing, vacated the order denying certiorari, and granted certiorari limited to the penalty question.[5] We asked counsel in view of § 1140 of the Internal Revenue Code and *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, to discuss our jurisdiction to grant a petition for rehearing in the case.

Section 1140 of the Internal Revenue Code, in relevant part, provides:

"The decision of the Tax Court shall become final—

. . . . .

"(b) *Decision affirmed or petition for review dismissed.*—

. . . . .

"(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

"(3) *After mandate of the Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

There are other provisions dealing with the situations where the Board's decision is modified or reversed by the Circuit Court of Appeals or by this Court, the purpose be-

[3] 317 U. S. 677.

[4] 134 F. 2d 977.

[5] 319 U. S. 778.

ing to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again and assessment may be made by the Commissioner. The Revenue Act of 1926 had identical provisions.[6] In reporting upon the provision in the Revenue Bill of 1926, the Senate committee said:

"Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 37.

In *Helvering* v. *Northern Coal Co., supra,* we considered the provision of the 1926 Act, corresponding to § 1140 (b) (3) of the Internal Revenue Code, dealing with issuance of mandate by this Court. The question was whether notwithstanding the lapse of more than thirty days after mandate we could grant a petition for rehearing, and it was urged that this statute did not qualify the inherent power of the Court to reconsider its judgments throughout the term in which they are entered. Quoting the statute, we held: "In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

While it appears that we have a number of times granted certiorari to review decisions in cases originating with the

[6] § 1005, 44 Stat. 110.

Tax Court after once denying the petitions, *Duquesne Steel Foundry Co.* v. *Burnet,* certiorari denied, 282 U. S. 878, certiorari granted, 282 U. S. 830; *Neuberger* v. *Commissioner,* certiorari denied, 308 U. S. 623, certiorari granted, 310 U. S. 655; *Crane-Johnson Co.* v. *Commissioner,* certiorari denied, 308 U. S. 627, certiorari granted, 309 U. S. 692; *Helvering* v. *Cement Investors,* certiorari denied, 315 U. S. 802, certiorari granted, 315 U. S. 825, in all but one of these cases the petition for rehearing was filed within 25 days after the denial of certiorari. In the other, the question of jurisdiction was not raised or considered, and therefore it does not establish a construction of the statute. *United States* v. *More,* 3 Cranch 159, 172; *Snow* v. *United States,* 118 U. S. 346, 354; *Cross* v. *Burke,* 146 U. S. 82, 86; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 236; *Arant* v. *Lane,* 245 U. S. 166, 170.

It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the controversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects of the question presented by the case. Our rules provide for petitions for rehearing as matter of right within 25 days after judgment,[7] and this rule has been applied to petitions for rehearings of orders denying certiorari. We have applied it to cases falling within the purview of § 1140 (b) (2). No mandate issues on denial of certiorari, and after a final decision the mandate does not issue until expiration of the 25-day period within which petition for rehearing may be filed.[8] If, therefore, we follow the practice heretofore observed, by which we regard denials of certiorari

[7] Rule 33.

[8] Rule 34.

as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter an additional thirty days before finality. The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been "salutary and in accordance with sound policy." There appears to be no good reason, therefore, to hold that the rule as to rehearings, in so far as it permits as matter of right the filing of petition therefor within 25 days, may not apply to this class of cases. But when under our rules our denial has become final, this statute deprives us of jurisdiction over the case.

Accordingly the writ of certiorari is dismissed for want of jurisdiction.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting:

I can find no warrant in § 1140 of the Internal Revenue Code for saying that the decision of the Tax Court becomes "final" only after the expiration of the 25-day period within which a petition for rehearing may be filed. The section contains no such provision. The 25-day period for rehearings is prescribed by our Rule 33. But our authority to grant petitions for rehearing during the Term rises from the same source. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 136–137; *Art Metal Construction Co.* v. *United States,* 289 U. S. 706; *Bronson* v. *Schulten,* 104 U. S. 410, 415. Hence I see no basis for saying that one, but not the other, qualifies that provision of § 1140 which states that the decision of the Tax Court becomes final "upon denial of a petition for certiorari."

DOBSON *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 44. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Decided February 14, 1944.

The recoveries here in question were not as matter of law proceeds of the "sale or exchange" of a capital asset, and were properly taxed as ordinary income rather than as capital gain under § 117 of the Internal Revenue Code. P. 232.

Rehearing denied.

ON PETITION for rehearing of two of the four cases decided in *Dobson* v. *Commissioner,* 320 U. S. 489.

Messrs. Leland W. Scott and *William L. Prosser* for petitioners.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petition for rehearing in two of the four cases decided together on December 20, 1943 states that these contained an issue not present and not considered in the main case. In these two cases the Tax Court held that recoveries by these taxpayers in 1939 did constitute taxable income. It held, also, that the recovery was taxable as ordinary income, despite taxpayer's contention that it should be taxed as capital gain under § 117 of the Internal Revenue Code. This contention, the petition says, presents questions of law to be determined by this Court, rather than of fact finally to be determined by the Tax Court.

The weakness of taxpayers' position lies in the fact that not every gain growing out of a transaction concerning

*Together with No. 47, *Harwick* v. *Commissioner of Internal Revenue,* also on certiorari to the Circuit Court of Appeals for the Eighth Circuit.

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capital assets is allowed the benefits of the capital gains tax provision. Those are limited by definition to gains from "the sale or exchange" of capital assets. Internal Revenue Code § 117 (2), (3), (4), (5).

We certainly cannot say that the items in question were as matter of law proceeds of the "sale or exchange" of a capital asset. Harwick asserted a claim, and the three other taxpayers involved in these cases filed suit, against the National City Company, demanding rescission of their purchases of stock. Their claims were compromised or admitted; the taxpayers seek to link the recoveries resulting therefrom with their prior sales of the stock, which resulted in losses. The Tax Court did not find as matter of fact, and we decline to say as matter of law, that such a transaction is a "sale or exchange" of a capital asset in the accepted meaning of those terms. Cf. *Helvering* v. *Flaccus Leather Co.*, 313 U. S. 247; *Fairbanks* v. *United States*, 306 U. S. 436. In *Helvering* v. *Hammel*, 311 U. S. 504; *Electro-Chemical Engraving Co.* v. *Commissioner*, 311 U. S. 513; *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 312 U. S. 666, on which petitioners rely, we held as matter of law that losses resulting from a sale were not to be denied the benefits of the capital losses provisions because the sale was a forced or involuntary one, as upon foreclosure. Those cases are no aid to petitioners here.

Petition for rehearing is denied.

MR. JUSTICE DOUGLAS dissents.

Syllabus.

ANDERSON NATIONAL BANK ET AL. *v.* LUCKETT, COMMISSIONER OF REVENUE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 154. Argued February 2, 1944.—Decided February 28, 1944.

A statute of Kentucky sets up a comprehensive scheme for the administration of abandoned bank deposits. Upon a report by the bank and notice to the depositor, and with an opportunity for either to be heard, the State takes into its protective custody bank accounts which, having been inactive for at least ten years if demand accounts or for at least twenty-five years if non-demand, the statute declares to be presumptively abandoned. The bank is relieved of its liability to the depositor, who receives instead a claim against the State, enforcible at any time until the deposit is judicially found to be abandoned and for five years thereafter. Refusal by the designated state officer to make payment is reviewable by the state courts. In an action by a national bank to enjoin the enforcement of the statute, *held:*

1. In requiring payment of the deposit accounts to the State on the prescribed notice, without recourse to judicial proceedings or any court order or judgment, the statute does not deprive the depositor or the bank of property without due process of law. Pp. 240, 247.

(a) Apart from questions which may arise under the national banking laws in the case of national banks, a State, by a procedure satisfying constitutional requirements, may compel surrender to it of deposit balances, when there is substantial ground for belief that they have been abandoned or forgotten, especially where the State acquires them subject to all lawful demands of depositors. P. 240.

(b) The statutory rebuttable presumption of abandonment of demand deposits after inactivity of ten years, and of non-demand deposits after inactivity of twenty-five years, is sustained. P. 241.

(c) Subject to the requirements of procedural due process, the

depositors, prior to a judicial decree of actual abandonment, will not be deprived of their property by the surrender of their presumptively abandoned bank accounts into the custody of the State. P. 241.

(d) The requirement that a depositor without actual notice of a proceeding for the judicial determination of abandonment must make claim within five years after the decree, does not infringe constitutional rights. P. 241.

(e) Notice to the depositors of the statutory proceedings, by the sheriff's posting on the courthouse door or bulletin board, for a period of six weeks, a copy of the bank's report of deposits presumed abandoned, in conjunction with the notice provided by the statute itself and by the taking of possession of the bank balances by the State, is sufficient notice to the depositors to satisfy the requirements of due process. P. 243.

(f) The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. P. 246.

(g) It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. P. 246.

(h) The mere fact that the State or its authorities acquire possession or control of property as a preliminary step to the judicial determination of asserted rights in the property is not a denial of due process. P. 247.

2. The statute does not infringe the national banking laws and does not unconstitutionally interfere with a national bank as an instrumentality of the federal government. Pp. 247, 252.

(a) The statute does not discriminate against national banks in directing payment to the State, pursuant to the statute, of presumptively abandoned accounts by state and national banks. P. 247.

(b) The statute is not in conflict with any provision of the national banking laws. P. 247.

(c) *First National Bank* v. *California,* 262 U. S. 366, distinguished. P. 250.

3. As an appropriate incident to the exercise of its power to require the surrender to it of presumptively abandoned accounts in national as well as state banks, the State may require the banks to file reports of inactive accounts. P. 252.

294 Ky. 674, 172 S. W. 2d 575, affirmed.

APPEAL from the affirmance of a judgment which, upon a remand (293 Ky. 735, 170 S. W. 2d 350), dismissed the bill in a suit to enjoin the enforcement of a state statute.

Messrs. Wm. Marshall Bullitt and *Charles W. Milner* (*Mr. Leo T. Wolford* was with the latter on the brief) for appellants.

Mr. Earl S. Wilson, Assistant Attorney General of Kentucky, with whom *Messrs. M. B. Holifield* and *A. E. Funk,* Assistant Attorneys General, were on the brief, for appellees.

By special leave of Court, *Mr. Clarence A. Linn,* Deputy Attorney General, with whom *Mr. Robert W. Kenny,* Attorney General, was on the brief, for the State of California, as *amicus curiae,* urging affirmance.

Messrs. John F. Anderson and *Trevor V. Roberts,* on behalf of the Comptroller of the Currency of the United States; *Messrs. Herbert W. Clark, Roland C. Foerster,* and *Edward Hohfeld,* on behalf of the California Bankers Association; and *Messrs. J. B. Faegre* and *Hayner N. Larson,* on behalf of the Northwestern National Bank of Minneapolis et al., filed briefs, as *amici curiae,* urging reversal. *Messrs. J. A. A. Burnquist,* Attorney General, and *Wm. C. Green,* Assistant Attorney General, on behalf of the State

of Minnesota (*Mr. John E. Martin,* Attorney General, joining with them on behalf of the State of Wisconsin), and *Mr. Herbert J. Rushton,* Attorney General, on behalf of the State of Michigan, filed briefs, as *amici curiae,* urging affirmance.

Mr. Chief Justice Stone delivered the opinion of the Court.

Under Kentucky Revised Statutes of 1942, ch. 393, §§ 393.060 *et seq.,* every bank or trust company in the state is required to turn over to the state, deposits which have remained inactive and unclaimed for specified periods. The questions for decision are: (1) whether the statute under which the state purports to acquire the right to demand custody of the deposits, affords due process of law, even though the depositors may not receive personal notice of the pending transfer and there may be no prior judicial proceedings, and (2) whether the statute, as applied to deposits in a national bank, conflicts with the national banking laws or is an unconstitutional interference by the state with appellant's operations as a banking instrumentality of the United States.

So far as here relevant, the provisions of the statute may be summarily stated as follows. Demand deposits held by a bank, with accrued interest, are presumed abandoned unless the owner has, within ten years preceding the date for making the report required by § 393.110, negotiated in writing with the bank, or been credited with interest on his passbook at his request, or had a transaction noted upon the books of the bank, or increased or decreased the amount of his deposit (§ 393.060). Non-demand deposits, with accrued interest, are likewise presumed abandoned, unless the owner, within the twenty-five years preceding the report, has taken one or more of such enumerated actions (§ 393.070).

The holder of property presumed abandoned, including any national bank, is required to file with the state Department of Revenue, annually before September 1, a report in duplicate of such property as of the preceding July 1; the copy is sent to the sheriff of the county in which the property is located, and he is under the statutory duty of posting the copy on the court house door or bulletin board, before the following October 1 (§ 393.110 (1)). The holder is required to turn over to the Department of Revenue before November 15, the property so reported, unless the holder or owner certifies facts to rebut the presumption of abandonment, or unless the statute of limitations has run as between the owner and the holder. In neither such case need the holder turn over the property except upon an order of court. If a claimant has filed an action with respect to any such property, the holder is required to notify the Department of the pendency of the action but is not required to turn over the property during its pendency. (§ 393.110 (2).) In any case the holder of such property is entitled to a judicial determination of his rights, under § 393.160, providing for appeals from the decisions of the Commissioner of Revenue, or under § 393.230, providing for an equitable action by the Commissioner to compel the surrender of such property (§ 393.110 (3)).

A person refusing to turn over property under this statute is subject to a penalty of 10% of its amount, but not to exceed $500; he is subject to no penalty, however, if he posts a compliance bond (§ 393.290). Any person who transfers property to the state under this statute is relieved of liability to the owner, and the state is required to reimburse the holder for any such liability (§ 393.130).

The Commissioner may institute judicial proceedings to establish conclusively that property, in his hands be-

cause presumed abandoned, is actually abandoned, or that the owner of the property has died and that there is no person entitled to it (§ 393.230 (2)). In such an action the procedure is governed by the Kentucky Civil Code of Practice (§ 393.240 (2)).

A claim to property surrendered to the state may be made at any time, unless the property has been judicially determined, under § 393.230, to have been actually abandoned, in which case any claim to the property by a person not actually served with notice and who did not appear and whose claim was not considered during the proceeding, must be made within five years of the judicial determination (§ 393.140 (1) and (2); and see *Anderson National Bank* v. *Reeves,* 293 Ky. 735, 738, 741, 170 S. W. 2d 350). The claimant is required to make publication of his claim in a newspaper of general circulation in the county, or if there is none, he is required to post his claim at the court house door and at three other conspicuous places in the county (§ 393.140 (3)). The Commissioner of Revenue is directed to consider and determine the validity of any claim and any defense; if he approves the claim, he must authorize its payment (§ 393.150). Judicial review of his determination in the appropriate state courts is provided (§ 393.160).

The statute thus sets up a comprehensive scheme for the administration of abandoned bank deposits. Upon a report by the bank and notice to the depositors and with an opportunity to be heard, if either wish it, the state takes into its protective custody bank accounts which, having been inactive for at least ten years if demand accounts, or at least twenty-five years if non-demand, the statute declares to be presumptively abandoned. The bank is relieved of its liability to the depositors, who receive instead a claim against the state, enforcible at any time until the deposits are judicially found to be abandoned in fact and

for five years thereafter. Refusal by the designated state officer to make payment is reviewable by the state courts.

Appellant, a national banking association organized under the laws of the United States, brought the present suit in the Circuit Court of Kentucky for Franklin County. The bill of complaint, filed by appellant on behalf of itself and all others similarly situated, sought to enjoin appellees, the state Commissioner of Revenue and other state officers, from enforcing the statute here in question. The Circuit Court held invalid so much of the challenged statute as requires the payment of deposits to the state merely on the prescribed notice, and without the order or judgment of a court of competent jurisdiction. It gave judgment perpetually enjoining appellees from enforcing such parts of the statute. The Kentucky Court of Appeals sustained the Act in its entirety, holding that it affords due process, and that it neither infringes the national banking laws nor is a prohibited interference with a banking instrumentality of the United States. It accordingly reversed the judgment of the Circuit Court, and instructed it to deny an injunction. 293 Ky. 735. On remand, the Circuit Court entered its judgment, dismissing the bill. The Court of Appeals affirmed. 294 Ky. 674, 172 S. W. 2d 575. The case comes here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

Appellant contends here: (1) that the statute, in requiring payment of the deposit accounts to the state on the prescribed notice, without recourse to judicial proceedings or any court order or judgment, deprives the depositors and appellant of property without due process of law, and (2) that such withdrawal of accounts from a national bank infringes the national banking laws, particularly R. S. § 5136, 12 U. S. C. § 24, which authorize national banks to accept deposits and to do a banking business, and is an unconstitutional interference with the

federally authorized function of national banks as instrumentalities of the Federal Government.

I.

Appellant argues that the statute deprives both the bank and the depositors of their property rights in the bank accounts, and contends that the procedure by which the state acquires its asserted right to demand payment of the accounts is so lacking in notice to depositors and in an opportunity for them to be heard as to deny the state the right to assert the depositors' claims and afford to the bank no protection if it responds to the state's demand for payment of the accounts.

While the Kentucky statute is entitled "Escheats," its provisions, so far as applicable to bank deposits, are concerned only with personal property deemed abandoned. At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia.* See 7 Holdsworth, A History of English Law (2d ed.) 495–496. Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, exist in the several states of the United States. *Hamilton* v. *Brown,* 161 U. S. 256; *Christianson* v. *King County,* 239 U. S. 356; *Security Bank* v. *California,* 263 U. S. 282; *United States* v. *Klein,* 303 U. S. 276.

Apart from questions which may arise under the national banking laws in the case of national banks, it is no longer open to doubt that a state, by a procedure satisfying constitutional requirements, may compel surrender to it of deposit balances, when there is substantial ground for belief that they have been abandoned or forgotten, *Security Bank* v. *California, supra,* certainly when the state acquires them subject to all lawful demands of the depositors. *Provident Savings Institution* v. *Malone,* 221 U. S. 660.

The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion. See *Security Bank* v. *California, supra,* 285 and cases cited; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562. And it is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned, see *Provident Savings Institution* v. *Malone, supra,* 664, just as it may provide for the administration of the property of a missing person. *Cunnius* v. *Reading School District,* 198 U. S. 458; *Blinn* v. *Nelson,* 222 U. S. 1.

With respect to the statutory rebuttable presumption of abandonment of demand deposits after inactivity of ten years and of non-demand deposits after inactivity of twenty-five years, we are unable to say that the legislative determination is without support in experience. We have sustained like statutory presumptions that shorter periods of inactivity furnish the basis for state administration of unasserted claims or demands. See *Security Bank* v. *California, supra; Cunnius* v. *Reading School District, supra; Blinn* v. *Nelson, supra;* cf. *Provident Savings Institution* v. *Malone, supra.*

In the present posture of the case we conclude, subject to the requirements of procedural due process, that prior to a judicial decree of actual abandonment, the depositors will not be deprived of their property by the surrender of their bank accounts to the state. We need not decide whether the procedure for determining abandonment in fact conforms to due process, for appellant has not attacked this procedure here and no such proceeding is before us. Prior to such a decree the present statute merely compels the summary substitution of the state for the bank, as the debtor of the depositors. It deprives

the depositors of none of their rights as creditors, preserving their right to demand from the state payment of the deposits, and their right to resort to the courts if payment is refused. True, payment over of the deposits to the state may be the precursor of a decree of abandonment and the shortening of the period within which a claimant may demand payment of his deposit. But, if the notice to depositors is adequate, we cannot say that the period of five years allowed for that purpose after the decree, is an infringement of constitutional rights. *Terry* v. *Anderson,* 95 U. S. 628, 632–633, and cases cited; *United States* v. *Morena,* 245 U. S. 392, 397.

Appellant and the Comptroller of the Currency, as *amicus curiae,* point to the formalities with which the depositors must comply before they will be able to recover their deposits, and argue that the state *may* be less solvent or less willing to pay than the bank. In the absence of some persuasive showing, which is lacking here, that these formalities will be more onerous than those which would or could be properly required by the bank, or that the state *will* in fact be less able or less willing to pay, it cannot be assumed that the mere substitution of the state as the debtor will deprive the depositors of their property, or impose on them an unconstitutional burden. See *Dohany* v. *Rogers,* 281 U. S. 362, 366–368; cf. *Blinn* v. *Nelson, supra,* 7; *Corn Exchange Bank* v. *Coler,* 280 U. S. 218, 223. In the absence of a showing of injury, actual or threatened, there can be no constitutional argument. *In re 620 Church St. Corp.,* 299 U. S. 24, 27, and cases cited.

Since the bank is a debtor to its depositors, it can interpose no due process or contract clause objection to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment, for in that case payment of the debt to the state, under the statute, relieves the bank of its liability to the depositors. *Security Bank* v. *California, supra,* 285, 286. But if the statute

is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligation to the depositors would be discharged by payment of the deposits to the state. Hence our inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard.

As we have said, the statute provides for notice to the depositors by requiring the sheriff to post on the court house door or bulletin board a copy of the bank's report of deposits presumed abandoned. We think that this, in conjunction with the notice provided by the statute itself and by the taking of possession of the bank balances by the state, is sufficient notice to the depositors to satisfy all requirements of due process.

The statute itself is notice to all depositors of banks within the state, of the conditions on which the balances of inactive accounts will be deemed presumptively abandoned, and their surrender to the state compelled. All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. *Reetz* v. *Michigan,* 188 U. S. 505, 509; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting land owners, are familiar examples. *Huling* v. *Kaw Valley Co.,* 130 U. S. 559, 563–564; *Ballard* v. *Hunter,* 204 U. S. 241, 254–257, 262.

The report of the bank, required to be posted on the court house door or bulletin board, lists the abandoned accounts as defined by the statute and thus gives notice

to the owners of all those accounts which, because of their inactivity for the periods and in the ways specified by the statute, are deemed abandoned and required to be paid to the state. This notice, when read in the light of the knowledge of the statute, with which all persons having such bank accounts within the state are chargeable, is sufficient to advise that the listed accounts are deemed presumptively abandoned and will at the end of six weeks from the date of filing be paid over to the state, and that both before and after that event the depositors will be afforded opportunity to present their claims and to have them judicially determined, if rejected.

Posting on the court house door as a method of giving notice of proceedings affecting property within the county, is an ancient one and is time-honored in Kentucky. The Act of the Kentucky legislature of December 19, 1796, provided in § 2 for the use of this method of warning absent defendants in equity proceedings that a decree would be entered against them, if they did not appear. This means of giving notice was employed in the escheat statutes of Kentucky at least as early as 1852. Kentucky Revised Statutes of 1852, p. 308, c. 34, Art. IV, § 3 (1). The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for "Not lightly vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank,* 250 N. Y. 136, 141, 164 N. E. 882, aff'd, *sub nom. Corn Exchange Bank* v. *Coler, supra.* To that effect, see *Otis Co.* v. *Ludlow Mfg. Co.,* 201 U. S. 140, 154; *Ownbey* v. *Morgan,* 256 U. S. 94, 108–109, 112; *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31; *Corn Exchange Bank* v. *Coler, supra,* 222–223; *Snyder* v. *Massachusetts,* 291 U. S. 97, 110–111.

We cannot say that the posting of a notice on the door of the court house in a Kentucky county is a less efficacious method of giving notice to depositors in banks of the

county than publication in a local newspaper, or that in the circumstances of this case it is an inadequate means of giving notice of the summary taking into custody of the designated bank accounts by the state. This is the more so because in this case the notice is the immediate prelude to and accompanies the compulsory surrender of the bank balances to the state, unless the depositors in the meantime intervene as claimants. The statutory procedure, so far as it affects depositors, is in the nature of a proceeding in rem, in the course of which property, against which a claim is asserted, is seized or sequestered, and held subject to the appearance and presentation of claims by all those who assert an adverse interest in it. In all such proceedings the seizure of the property is in itself a form of notice of the claim asserted, to those who may claim an interest in the property. See *Corn Exchange Bank* v. *Coler, supra,* holding constitutional a statute providing for no notice to the owner of a bank deposit other than its seizure.

Security Bank v. *California, supra,* was a proceeding to compel the bank to pay over to the state inactive bank accounts as the first step in their sequestration and, if unclaimed, their possible ultimate escheat. The Court held, 263 U. S. at 289–290, that publication of notice of the proceeding in a newspaper at the state capital was sufficient notice to absent depositors to meet due process requirements. It supported this conclusion by reference to the proceeding against the bank by which it was required to pay over the deposits to the state "as *in personam* so far as concerns the bank; as *quasi in rem* so far as concerns the depositors," 263 U. S. at p. 287. Since the service of process on the bank personally was equivalent to a seizure of the accounts, it was deemed to supplement the publication as an independent notice, in itself, to the depositors of the seizure and of their opportunity given by the statute to appear and assert their claims against the state.

Like procedure, begun by the seizure or acquisition of control of a res, including, in some cases, choses in actions, has been sustained as affording adequate notice to absent claimants in escheat proceedings, *Hamilton* v. *Brown, supra; Christianson* v. *King County, supra,* 373; in garnishment proceedings, *Harris* v. *Balk,* 198 U. S. 215, 223; in proceedings for the administration of a debt due an absentee, *Cunnius* v. *Reading School District, supra;* in proceedings begun by attachment, *Cooper* v. *Reynolds,* 10 Wall. 308; and in admiralty proceedings, *The Mary,* 9 Cranch 126, 144.

We cannot say, nor does appellant seriously urge, that the length of notice by posting, six weeks, is inadequate. Three weeks notice by publication of the condemnation of the land for a public highway was held sufficient by this Court in *North Laramie Land Co.* v. *Hoffman, supra;* and thirty days was deemed sufficient in a like proceeding in *Huling* v. *Kaw Valley Co., supra.*

What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. *Davidson* v. *New Orleans,* 96 U. S. 97, 107–108; *Ballard* v. *Hunter, supra,* 255; *North Laramie Land Co.* v. *Hoffman, supra,* 282–283; *Dohany* v. *Rogers, supra,* 369, and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient.

For this reason also it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting

property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review. And such is obviously the case here, where there is full opportunity to the depositors to be heard by the State Commissioner, whose decision is subject to court review. It is difficult to see what right here asserted would have been better preserved by a court procedure whose end was the compulsory surrender of the deposit balances by the bank to the state, which takes subject to the claims of the depositors.

The mere fact that the state or its authorities acquire possession or control of property as a preliminary step to the judicial determination of asserted rights in the property is not a denial of due process. *Samuels* v. *McCurdy,* 267 U. S. 188, 200; *North Laramie Land Co.* v. *Hoffman, supra; Corn Exchange Bank* v. *Coler, supra; Phillips* v. *Commissioner,* 283 U. S. 589, 593–601, and cases cited.

We conclude that the procedural provisions of the Kentucky statute are adequate to meet all constitutional requirements, and that it does not deprive appellant or its depositors of property without due process of law.

II.

We come now to appellant's second contention, that the Kentucky statute infringes the national banking laws and unconstitutionally interferes with appellant as an instrumentality of the federal government. But the statute does not discriminate against national banks, cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky

statutes. Cf. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275.

This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. *Waite* v. *Dowley,* 94 U. S. 527, 533; *First National Bank* v. *Missouri,* 263 U. S. 640, 656; *Lewis* v. *Fidelity Co.,* 292 U. S. 559, 566; *Jennings* v. *U. S. Fidelity & Guaranty Co.,* 294 U. S. 216, 219. Thus the mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law. Compare *Earle* v. *Pennsylvania,* 178 U. S. 449, with *Van Reed* v. *People's National Bank,* 198 U. S. 554.

As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property within the state whose transfer and devolution is subject to state control. *Security Bank* v. *California, supra,* 285, 286, and cases cited; *Irving Trust Co.* v. *Day, supra,* 562. It has never been suggested that non-discriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state. Under the statute the state merely acquires the right to demand payment of the accounts in the place of the depositors. Upon payment of the deposits to the state, the bank's obligation is discharged. Something more than this is required to render the statute obnoxious to the federal banking laws. For an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment ac-

cording to the law of the state where it does business. A demand for payment of an account by one entitled to make the demand does not infringe or interfere with any authorized function of the bank. In fact, inability to comply with such demands is made a basis in the national banking laws for closing the doors of the bank and winding up its affairs.

Appellant argues that if the present act is sustained, it will open the door to the exertion of unlimited state discretionary power over the deposits in national banks, and that the act imposes a burden on appellants such as was held to be inadmissible in *First National Bank* v. *California,* 262 U. S. 366, which was followed in *National City Bank* v. *Philippine Islands,* 302 U. S. 651. As we have seen, the only power sought to be exerted by the state over the depositors' accounts is the assertion of its lawfully acquired right to collect them, in accordance with the obligation, which was both assumed by appellant and is to be performed in conformity with the banking laws of the United States. In this respect the state's power to make such a demand cannot extend beyond its power under state law and the Federal Constitution to acquire control of deposit accounts from their owners. So long as it is thus limited, and the power is exercised only to demand payment of the accounts in the same way and to the same extent that the depositors could, we can perceive no danger of unlimited control by the state over the operations of national banking institutions. We need not decide whether, within the limit, the state's power over deposits in national banks is as simple as its like power over deposits in state banks. Compare *First National Bank* v. *California, supra,* with *Security Bank* v. *California, supra.* We are concerned only with the question whether the particular power here asserted is a forbidden encroachment upon the privileges of a national bank.

The decision of this Court in *First National Bank* v. *California, supra*, did not rest on any want of power of a state to demand of a national bank, payment of deposits which the state was lawfully entitled to receive. Decision there turned rather on the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks. In that case the state brought a statutory proceeding in its courts to compel a national bank to pay over to it an inactive deposit account. The statute required "escheat to the state" of all balances in deposit accounts remaining unclaimed and inactive for more than twenty years, where neither the depositor nor any claimant had filed any notice with the bank showing his present address. It authorized suit in behalf of the state to recover such amounts and directed that judgment should be given for the state "if it be determined that the moneys deposited in any defendant bank or banks are unclaimed," for the period and in the manner specified by the statute. It will be noted that the statute required no proof that the forfeited accounts had been in fact abandoned, or that their owners were unknown or had died without heirs or surviving kin. Upon mere proof of dormancy for the prescribed period, the statute declared the accounts to be escheated to the state.

After pointing out that the state Supreme Court, in sustaining the judgment in the state's favor, had declined, as unnecessary to its decision, to express an opinion whether the absent depositors could reclaim their forfeited deposits from the state, this Court declared that the statute "attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers." 262 U. S. at p. 370.

And since it was thought that such alterations might be made by that and other states "and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen," the Court declared that the effect on the national banking system would be incompatible with the statutory purposes of establishing a system of national banks acting as federal instrumentalities. That effect it specifically described as follows (p. 370): "The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation."

The unusual alteration of depositors' accounts to which the Court referred was plainly the statutory declaration of escheat of depositors' accounts merely because of their dormancy for the specified period, without any determination of abandonment in fact. This it treated as in effect "confiscation" of depositors' accounts, operating as an effective deterrent to depositors' placing their funds in national banks doing business within the state.

We have no occasion to reconsider this decision, as appellees urge, for the grounds assigned for it are wholly wanting here. While the seizure and escheat or forfeiture for mere dormancy of a national bank account are unusual, the escheat or appropriation by the state of property in fact abandoned or without an owner is, as we have seen, as old as the common law itself. Here there is no escheat or forfeiture by reason of dormancy. Dormancy without more is made the statutory ground for the state's taking inactive bank accounts into its custody, the state assuming the bank's obligation to the depositors. And the deposits

need not be surrendered, if the depositors or the bank make it appear that abandonment has not occurred. This is not confiscation or even an attempted deprivation of property. Escheat or forfeiture to the state may follow, but only on proof of abandonment in fact. We cannot say that the protective custody of long inactive bank accounts, for which the Kentucky statute provides, and which in many circumstances may operate for the benefit and security of depositors, see *Provident Savings Institution* v. *Malone, supra,* 664, will deter them from placing their funds in national banks in that state. It cannot be said that it would have that effect, more than would the tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons, which a state may maintain and apply to depositors in national banks.

Nor are we able to discern any greater or different effect so far as prospective depositors in national banks are concerned, from the application of the ancient law of escheat or forfeiture of goods as *bona vacantia,* to bank accounts found to be without an owner, or to have been in fact abandoned by their owners. Compare *United States* v. *Klein, supra.* True, under the Kentucky statute, as in the case of an attachment or the administration of the estate of a deceased depositor, a change in the dominion over the accounts will ensue, to which the bank must respond by payment of them on lawful demand. But this, as we have said, is nothing more than performance of a duty by the bank imposed by the federal banking laws, and not a denial of its privileges as a federal instrumentality. In all this we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks.

Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate

incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. *Waite* v. *Dowley, supra; Colorado Bank* v. *Bedford,* 310 U. S. 41, 53.

Affirmed.

FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, *v.* WIENER ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 252. Argued February 4, 7, 1944.—Decided February 28, 1944.

1. Upon review of a decision of a state court, either on appeal or on certiorari, this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though they were properly presented to and passed upon by the state court. P. 259.
2. The state court having rested its decision in this case upon (1) the invalidity of the federal Act under the Fifth Amendment and (2) the invalidity of the state Act under the Fourteenth Amendment, either of which grounds was adequate to support the judgment; and the appellant having assigned as error only the Fifth Amendment question; and the Fourteenth Amendment question not having been briefed or argued by either party in this Court,—*held* that, upon the record, this Court was without jurisdiction to decide either question, and the cause must be dismissed for want of jurisdiction. Pp. 258, 261.
3. Appellant having assigned as error the decision of the state court holding the federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal; or he could have filed a petition for writ of certiorari in addition to his appeal. But since he failed to raise or brief in this Court any question as to the validity of the state statute under the Fourteenth Amendment, this Court has no jurisdiction of the case either on certiorari or on appeal, and there is no occasion for the application of Jud. Code § 237 (c). P. 263.

203 La. 649, 14 So. 2d 475, appeal dismissed.

APPEAL from the affirmance of a judgment which held unconstitutional, as applied to the appellees, a state inheritance tax statute.

Mr. Leonard L. Lockard, with whom *Mr. Eugene Stanley,* Attorney General of Louisiana, was on the brief, for appellant.

Mr. Sidney L. Herold for appellees.

By special leave of Court, *Assistant Attorney General Samuel O. Clark, Jr.,* with whom *Solicitor General Fahy, Messrs. Sewall Key, Carlton Fox,* and *Alvin J. Rockwell,* and *Miss Helen R. Carloss* were on the brief, on behalf of the United States, as *amicus curiae,* urging dismissal of the appeal and upholding the constitutionality of § 402 (b) of the Revenue Act of 1942. *Mr. Max Radin* argued the cause on behalf of the States of Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington, and the Oklahoma Tax Commission (with him on the brief were the Attorneys General of those States and *Mr. E. L. Mitchell*), and *Messrs. Joseph D. Brady, George Donworth, Charles E. Dunbar, Jr., Palmer Hutcheson, J. P. Jackson, Gerald Jones, Samuel H. Morris,* and *Harry C. Weeks* filed a brief, as *amici curiae,*—urging affirmance.

Mr. Chief Justice Stone delivered the opinion of the Court.

This case comes here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), from a judgment of the Supreme Court of Louisiana, appellant assigning as error that that court had held invalid, as in violation of the Fifth Amendment, § 402 (b) (2) of the Revenue Act of 1942, 56 Stat. 942. On considering the jurisdictional statement filed by appellant pursuant to Rule 12 of the Rules of this Court, we postponed decision of the jurisdictional questions to the argument on the merits.

Section 237 (a) of the Judicial Code authorizes an appeal to this Court from a judgment of the highest court of the state "where is drawn in question" the validity of a statute of the United States and the decision is against its validity.

The error assigned is therefore one cognizable on appeal. The question for our decision is whether, the state court having rested its decision and judgment upon two independent grounds, each adequate to support the decision but only one of which appellant has assigned as error on appeal to this Court, we have jurisdiction to decide either.

Appellees, children and sole legatees of Wiener, who had died a resident of Louisiana, leaving his widow surviving, brought the present proceeding in the District Court for the First Judicial District of Louisiana to establish the amount of the state inheritance tax on the interest acquired by them under the will of decedent. Under state law they cannot be placed in possession of the property inherited by them until they have paid the tax. Act No. 127 of the Extra Session of 1921 as amended by Act No. 44 of 1922; see § 3 of Act No. 119 of 1932. So far as material here, the amount of their liability for the tax depends upon the meaning and application of Act No. 119 of the Louisiana Acts of 1932, Louisiana Code of Practice, Arts. 996.89–996.94, and of § 402 (b) (2) of the Revenue Act of 1942. Act No. 119 directs the levy, in addition to existing inheritance taxes, of "an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926." The Act provides that whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by the decedent shall be less than 80% of the estate tax payable to the United States under the provisions of the Revenue Act of 1926, the difference between that amount and 80% shall be paid to Louisiana.[1]

[1] The purpose of the Act, declared by § 4, was to secure for the state the benefit of the credit allowed by § 301 (b) of the Revenue Act of 1926, 26 U. S. C. § 813 (b), which allowed the taxpayer a credit against the estate tax imposed by that Act for estate, inheritance or legacy

Section 402 (b) (2) of the Revenue Act of 1942 amends § 811 (e) of the Internal Revenue Code, which was derived from § 302 (e) of the Revenue Act of 1926, so as to include in the gross estate of decedent for purposes of the federal estate tax, property

"to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

Relying on these statutory provisions appellant, who is charged by state law with the duty of collecting the state inheritance tax, set up by his answer that the State of Louisiana is entitled to recover an inheritance tax equal to 80% of the basic federal estate tax, which by § 402 (b) (2) of the Revenue Act of 1942, is to be computed upon the entire community, and prayed judgment against appellees for an inheritance tax so computed.

To this answer appellees interposed pleas that the inheritance tax demanded of them, insofar as it is measured by the interest of the widow in the community, is unconstitutional for want of the uniformity prescribed by § 8 of Article I of the Constitution, and is a denial of due process, in contravention of the Fifth Amendment, in that it taxes property not belonging to decedent and not acquired by appellees under the will. The District Court sustained these pleas on the grounds assigned and gave judgment accordingly.

It will be observed that although the federal estate tax, laid on all the property included in the taxable estate

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taxes actually paid to a state or territory or the District of Columbia, and provided that the total credit for such taxes should not exceed 80% of the federal estate tax payable.

of the decedent, is payable by the estate,[2] the effect of appellant's contention in both state courts was that Act No. 119 had, by virtue of § 402 (b) (2) of the Revenue Act of 1942, imposed an inheritance tax measured by the entire community property and had authorized collection of that entire tax from the decedent's legatees. The case thus presented not only the question whether a tax could constitutionally be imposed on the entire community property on the death of the husband, but also the further question, not necessarily governed by the federal Act, cf. *Riggs* v. *Del Drago,* 317 U. S. 95, whether the entire tax could be collected from those who inherit from the decedent, although they took no interest in the share of the community property retained by the surviving spouse.

On appeal to the state Supreme Court the Attorney General of the United States was allowed to intervene; on the argument there he urged that the validity of § 402 (b) (2) of the Revenue Act of 1942 was not in question, but that the only issue before the court was the validity of Act No. 119 under the Fourteenth Amendment, if construed and applied in the manner contended for by appellant. Appellees accordingly were allowed to amend their plea of unconstitutionality so as to plead in the alternative that if Act No. 119 were construed so as to impose on them an inheritance tax measured by the entire community property it would violate the Fourteenth Amendment.

The Supreme Court of Louisiana affirmed the judgment of the District Court but for different reasons. 203 La. 649, 14 So. 2d 475. It held that "the construction sought to be placed on Act No. 119 of 1932 by the tax collector . . . would render it violative of the due process guaran-

[2] The tax is made a lien on the gross estate, which includes the entire community property here, Internal Revenue Code § 827 (a), and is a personal liability of the wife to the extent of the interest acquired by her, Revenue Act of 1942, § 411.

teed by the 14th amendment to the Constitution of the United States, since such interpretation would result in the imposition of a tax upon those succeeding to the estate of a decedent measured in part by the property comprising the estate of another, to which the estate of the decedent is in no way related." For this conclusion it relied upon *Hoeper* v. *Tax Commission*, 284 U. S. 206, holding that a state graduated income tax measured by the joint income of husband and wife violated the Fourteenth Amendment. It said that the tax was there held invalid because "any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

The Court thus made an alternative decision that either Act No. 119 did not impose on appellees a tax on property not bequeathed to them or that if it did it violated the Fourteenth Amendment. But it also went on to hold that "the limitation placed upon the state by the Fourteenth Amendment is likewise placed on the Federal Government by the Fifth Amendment" and that § 402 (b) of the Revenue Act of 1942, which appellant, by interpretation of Act No. 119, had contended was the measure of the tax to be imposed on appellees, is likewise a violation of the Fifth Amendment if interpreted so as to tax the entire community property here.

Appellant, in his assignments of error here, made no mention of the ruling of the state Supreme Court that Act No. 119, as construed and sought to be applied by him, violates the Fourteenth Amendment. He assigned as error the Supreme Court's decision that § 402 (b) (2) of the Revenue Act of 1942 violates the Fifth Amendment. He also asserted that it had erred "in denying legal efficacy" to that provision of the Revenue Act which required the valuation of all the community property of decedent and his surviving spouse in the computation of the fed-

eral estate tax. But in his "Statement of the points on which he intends to rely," filed pursuant to paragraph 9 of Rule 13 of this Court, he stated, "the only issue before the Court, and the point on which he intends to rely is that the Act of Congress held by the Supreme Court of Louisiana to be unconstitutional, to-wit Section 402 (b) (2) of the Revenue Act of 1942, approved October 21, 1942, is constitutional and that the Supreme Court of Louisiana erred in holding said statute to be violative of the Fifth Amendment to the Federal Constitution."

Rule 9 of this Court's Rules requires the appellant in all cases to file assignments of error "which shall set out separately and particularly each error asserted," and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that "The Court will consider nothing but the points of law so stated." See also Rule 27, par. 6. It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even though properly presented to and passed upon by the state court. *O'Neil* v. *Vermont,* 144 U. S. 323, 331; *New York* v. *Kleinert,* 268 U. S. 646, 651; *Herbring* v. *Lee,* 280 U. S. 111, 117; *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 172; *Jones* v. *Opelika,* 316 U. S. 584, 592. The rule is the same in the case of applications for certiorari. Rule 38, par. 2; *General Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 179; *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 357.

There is a special reason why this practice should be followed here. Doubtless because of appellant's disclaimer, in his points to be relied upon, of a purpose to present any but the Fifth Amendment question, appellees have proceeded on argument and in briefs in this Court on the assumption that only the Fifth Amendment ques-

tion was before us. Appellant's only mention of the impact of the tax on appellees is to say that "they have been victimized by the state law not the federal law." And he has made no effort to sustain the constitutionality of the imposition by the state of the entire burden of the tax on appellees. This is important because on the present record the two questions as to the constitutionality of the state and federal statutes are materially different in point of substance and in kind. The Fifth Amendment is relevant only because the federal tax on community property is made the measure of the tax which Louisiana, not the federal government, imposes upon appellees. If the federal tax on community property infringes the Fifth Amendment then obviously that property is not "subject to taxation under the Federal Revenue Act" as the Louisiana Act requires, and there is wanting the taxable subject matter upon which the Louisiana statute purports to impose the tax, namely community property which is subject to a federal tax.

It is not the federal but the state statute which imposes the tax on appellees, and the Fourteenth Amendment question in this case is not merely that the state statute, like the federal statute, imposes the tax on a subject matter which is not constitutionally taxable, but that the state statute does something which, as we have seen, the federal statute does not do, namely imposes on appellees an inheritance tax which includes in its measure some of the community property which they do not receive. As already pointed out, this was the question raised by appellees' supplemental plea of unconstitutionality, allowed and decided by the Supreme Court of Louisiana. By it they challenged, as a violation of the Fourteenth Amendment, the imposition on them of an "inheritance tax" "based or measured upon the value of the entire community." Even though it were decided that the federal statute validly imposes the tax on decedent's estate with

its burden distributed among all those entitled to share in the estate as the state law may provide, see *Riggs* v. *Del Drago, supra,* the question would remain for decision whether the Fourteenth Amendment permits the particular distribution for which appellant contends, requiring appellees to bear all the tax although they share in only part of the estate on which it is laid.

But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the different question arising under the Fifth Amendment. In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. Rule 27, paragraph 6 declares that errors not urged in the briefs will be disregarded. And, independently of "technical" rules it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.

It is apparent that the decision of the single question arising under the Fifth Amendment, cannot, in the present state of the record, be dispositive of the case. The only tax here sought to be imposed is the state inheritance tax authorized by Act No. 119. The state court having held that that Act is either inapplicable or, if applicable, is an infringement of the Fourteenth Amendment, any ruling we could make as to the validity of § 402 (b) (2) could afford no basis for affirming, modifying or setting aside the decision of the state court that by reason of the invalidity or inapplicability of Act No. 119, the tax demanded cannot be imposed.

Any determination which we might make of the Fifth Amendment question would thus leave unaffected the state court's judgment brought here for review. Our opinion on that subject would be advisory only, since there is nothing before us on which we could render a decision

that would have any controlling effect on the rights of the parties. Hence the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here. *Berea College* v. *Kentucky,* 211 U. S. 45, 53; *Enterprise Irrigation Dist.* v. *Canal Co.,* 243 U. S. 157, 163–4; *Lynch* v. *New York,* 293 U. S. 52, 54–5; *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210–11. In such a case this Court has said that it will not enter "a useless and profitless reversal" "where the same judgment will be rendered by the court below, after they have corrected the error in the federal question." *Murdock* v. *City of Memphis,* 20 Wall. 590, 634–5. Compare *Pugh* v. *McCormick,* 14 Wall. 361, 374. For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result, *United States* v. *Buzzo,* 18 Wall. 125, 129; *United States* v. *Britton,* 108 U. S. 199, 207; *Lederer* v. *McGarvey,* 271 U. S. 342, 344. See also the rules stated in *New Orleans* v. *Emsheimer,* 181 U. S. 153; *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645; *Lindheimer* v. *Illinois Tel. Co.,* 292 U. S. 151, 176; and in *Hirabayashi* v. *United States,* 320 U. S. 81, 85, and cases cited.

The cause is accordingly dismissed for want of jurisdiction. In the view we take of the case we do not reach the question whether the appeal should not also be dismissed because of doubt whether the decision of the Louisiana Supreme Court as to Act No. 119 rests on a holding that the Act violates the Fourteenth Amendment, or merely that it is inapplicable as a matter of construction of a state statute not reviewable here. With that left in doubt, we could not say that the decision of the state Supreme Court does not rest on a non-federal ground adequate to support

it. Compare *Lynch* v. *New York, supra,* 55; *Honeyman* v. *Hanan,* 300 U. S. 14; *Bakery & Pastry Drivers Local* v. *Wohl,* 313 U. S. 572; *New York ex rel. Rogalski* v. *Martin,* 320 U. S. 767, with *State Tax Commission* v. *Van Cott,* 306 U. S. 511; *Minnesota* v. *National Tea Co.,* 309 U. S. 551; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481.

Appellant having assigned as error the decision of the Louisiana Supreme Court holding the federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 547. Or he could have filed a petition for writ of certiorari in addition to his appeal. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U. S. 93, 98. But since he failed to raise or brief in this Court any question as to the validity of the Louisiana statute under the Fourteenth Amendment, we have no jurisdiction of the case either on certiorari or on appeal, and there is no occasion for the application of Judicial Code, § 237 (c), 28 U. S. C. § 344 (c). See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, p. 40, and cases cited.

Dismissed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON concur, dissenting:

If this appeal were dismissed summarily I should remain silent. But opinions on the jurisdiction of this Court must serve as guides for the bar as well as for all other courts. Therefore the reasons for my inability to concur in the Court's views, involving as they do general considerations, call for somewhat detailed expression.

1. The law of the jurisdiction of this Court raises problems of a highly technical nature. But underlying their solution are matters of substance in the practical working

of our dual system and in the effective conduct of the business of this Court. While therefore the disposition of jurisdictional questions involves specialized knowledge, we are not dealing with problems the answers to which depend on the use of talismanic words or on the observance of rigid forms. On no one I venture to believe has the conviction stronger hold than on me that it is important to postpone constitutional adjudications and therefore constitutional conflicts until they are judicially unavoidable, or to keep them, when unavoidable, within the strict confines of a specific case. That is why we should be uncompromising in observing the limits of our authority and should avoid laxity in assuming jurisdiction. See 49 Harv. L. Rev. 68, 90–107. But the duties of this Court do not hang on the thread of mere verbalism.

2. We do not review a case from a state court which can be supported on a non-federal ground because federal authority ought not to intrude upon the domain of the States. This far-reaching political consideration was decisive even after the Civil War in settling the rule that not only do we not review a case from a state court that can rest on a purely state ground, but we do not even review state questions in a case that is properly here from a state court on a federal ground. *Murdock* v. *Memphis,* 20 Wall. 590.

3. The requirement of assignment of errors in order to invoke our reviewing power rests on a wholly different consideration. "The purpose is to enable the court as well as opposing counsel, readily to perceive what points are relied on." *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91. Of course, when the error complained of is a rejection of a claim of the invalidity of a state statute under the United States Constitution, the claim must have been effectively pressed before the state court and rejected by it. But the requirement is not for some abra-

cadabra. The nub of the matter is found in *Bryant* v. *Zimmerman*, 278 U. S. 63, 67:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

4. These general considerations bring us to the particular case. Its reviewability here is questioned on numerous grounds. Any one of them would be conclusive. Apparently, however, a cloud of unreviewability is compounded by intermingling doubts on several scores. If the judgment of the Supreme Court of Louisiana can rest on a non-federal ground there is an end of the matter. If that court went off on the constitutionality of a federal statute when that statute was not drawn into question again there is an end to the matter. If the judgment in fact rested on the validity of a state statute urged to be repugnant to the United States Constitution, the case could come here but only if the claim of invalidity was properly presented and duly rejected by the state court. And even then such error could be urged here only if brought before this Court by revealing assignment of errors. If that requirement were not met, again the appeal would call for dismissal.

5. This controversy "concerns the constitutional validity of an act of Congress"—§ 402 (b) (2) of the Revenue Act of 1942, 56 Stat. 798, 942—"which is directly drawn in question. The decision depends upon the determination of this issue." *Smith* v. *Kansas City Title Co.*, 255

U. S. 180, 201. This is so, that is, unless we wish to overrule the *Kansas City Title* case as well as the recent unanimous decision in *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, and adopt the dissenting views of Mr. Justice Holmes in the *Kansas City Title* case, *supra* at 213. In any event, however, the decision of the Louisiana Supreme Court cannot be supported on a non-federal ground and does involve the validity of a state statute under the United States Constitution. Finally the assignment of errors, the order allowing appeal and the statement of points on which appellant relied satisfy the reasons for our Rules 9 and 13 (9). All three considerations are intertwined in the distinctive circumstances of this case and they establish our jurisdiction, once the cause of this litigation is kept in mind and our jurisdictional requirements are not turned into formalism "run riot."

6. What then was in issue in this litigation and what issue was determined in the judgment that was brought here? The tax collector claimed that "the heirs of Sam Wiener, Jr., owe an inheritance tax on the entire community estate rather than upon the one-half interest in the community inherited by them" for the reason that

"by virtue of Act No. 119 of the Legislature of Louisiana for the year 1932, the State of Louisiana is ultimately entitled to recover an inheritance tax against this estate which is equal to eighty per cent of the basic federal tax as fixed by the Federal Revenue Act of 1926,"

and that

"Congress in the Revenue Act of 1942, (Title IV, Sec. 402A, 56 Statutes 798, Title 26, Sec. 811, U. S. C. A.) provides that the basic Federal Estate Tax is computed upon the entire community and accordingly, the State of Louisiana is entitled to an amount equal to eighty per cent of the basic Federal Estate Tax so calculated." (R. 8)

The claim of the State for an inheritance tax in a sum equal to 80% of the tax due to the Federal Government as

computed in part under § 402 (b) (2) was thus based on the interdependence between the Louisiana Act No. 119 and § 402 (b) (2) of the Revenue Act of 1942. The latter was incorporated by reference into the former. The two became inseparable for purposes of construction—in a case like the present a decision involving Act No. 119 inescapably depended upon the determination of the validity of § 402 (b) (2).[1] Such was the issue tendered by the State, and issue was joined by the appellees' plea of unconstitutionality:

"notwithstanding anything to the contrary that may be contained in the Federal Revenue Act of 1942, approved on October 21, 1942, there may not be included in the estate of the decedent, subject to the Federal Estate Tax (and consequently subject to the provisions of the State Inheritance Tax under Act 119 of 1932) any property except that which was owned by the decedent at the instant of his death, and by his death transmitted to his heirs." (R. 9)

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[1] Section 2 of Act No. 119 of the Louisiana Acts of 1932 provides that "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

Section 302 of the Revenue Act of 1926 as amended by § 402 (b) (2) of the Revenue Act of 1942, includes in the gross estate property, "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." 44 Stat. (part 2) 9, 70; 56 Stat. 798, 942.

In this plea the constitutional invalidity of the federal act was challenged as follows:

"Such statutory provision is in contravention of and violative of the Fifth Amendment to the Constitution of the United States, in that its application would deprive these appearers of their property without due process of law by its imposition of taxes upon them, based both upon an arbitrary inclusion in the estate of the decedent of property which did not belong to him and upon the application thereto of graduated rates based upon values arrived at by reference to such other property." (R. 10)

7. Putting to one side the claim of unconstitutionality of § 402 (b) (2) for want of uniformity, this is the issue which persists throughout the litigation—the issue arising from the claim of constitutional invalidity under the Fifth Amendment of the method of computing the federal estate tax according to the Amendment of 1942 inasmuch as the state inheritance tax is concededly ascertained through the ascertainment of the federal estate tax. This was the issue raised by the pleadings in the First Judicial District Court of Louisiana; this was the issue tendered by the agreed statement of facts before that court (R. 11, particularly par. 4); this was the issue which that court decided against the State because it found a statute of Congress "violative of the Fifth Amendment to the Constitution of the United States in that its application here would deprive the heirs of the decedent of their property without due process of law" (R. 13); this was the issue formulated by both parties in their appeal to the Supreme Court of Louisiana (R. 14, 16); on the basis of this issue that court invited the Attorney General of the United States to appear as *amicus curiae*. After the Attorney General, so appearing, suggested for the first time that "the tax liability here in issue is only that imposed by the state statute," appellees

"Without in any manner conceding the correctness of that position, but on the contrary expressly reaffirming that this cause involves and depends upon the constitutionality of the federal statute,"
amended their plea of unconstitutionality, with the State's consent, by adding also an attack upon the validity of the state statutes "either alone or in conjunction with the federal statute" (R. 18).

By this process the case reached the Supreme Court of Louisiana. No one can read that court's opinion and be left in any doubt that Louisiana Act No. 119 of 1932 and § 402 (b) (2) of the Revenue Act of 1942 were treated inseparably and the validity of the former made to depend on the fate of the latter. Two passages give the pith of the opinion:
"Now, because of the Congressional adoption of Section 402 (b) (2) of the Revenue Act, amending Section 811 (e) of the Internal Revenue Code of 1939, 26 U. S. C. A. Int. Rev. Code § 811 (e), the tax collector of Caddo parish is contending inheritance and estate taxes in this state, under Act No. 119 of 1932, must be computed on the basis established in that section."
"we are asked to place an interpretation on Act No. 119 of 1932 and Section 402 (b) (2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife." 203 La. 649, 656, 669–70.

On this showing the lower court concluded that § 402 (b) (2) offends the Due Process Clause of the Fifth Amendment, and therefore the reliance of the State upon § 402 (b) (2) as read into Act No. 119 made the latter Act offensive to the Due Process Clause of the Fourteenth Amendment.

8. The invalidity, because wanting in due process, of § 402 (b) (2) infused into Act No. 119, is the issue that runs like a silver thread unbroken and unalloyed through this litigation as it took its course from the First Judicial District Court of Louisiana to the State Supreme Court and from there to this Court. This makes it abundantly clear why the errors were assigned as they were—claims of error in holding that § 402 (b) (2) is unconstitutional and in denying

"legal efficacy to the provisions of Section 402 (b) (2) of the Federal Revenue Act of 1942 as requiring the valuation of all of the community property standing in the name of the decedent, Sam Wiener, Jr., in the computation of the federal basic estate tax; and, consequently, in the computation of the inheritance tax due to the State of Louisiana which, under the statute of the state, is required to be eighty percent of the amount of the federal basic estate tax." (R. 32, Assignment of Errors, 2.)

Because such was the issue and because the judgment of the Supreme Court of Louisiana determined that issue, the order allowing appeal recites that "there was drawn in question the validity of Section 402 (b) (2) of the Federal Revenue Act of 1942," (R. 33). Such having been the issue and such its determination, appellant naturally set it forth in his statement of the points on which he intended to rely. (R. 35)

9. If a federal claim was drawn in question in *Smith* v. *Kansas City Title Co., supra,* and *Standard Oil Co.* v. *Johnson, supra,* it was not less drawn in question in this case. If the earlier two decisions are to continue to stand, I am unable to make a differentiation between them and the record before us.[2] Much is to be said for the reasoning

[2] The *Kansas City Title* case was a suit by a Missouri shareholder of a Missouri trust company to enjoin the directors from buying bonds of Federal Land Banks and Joint Stock Land Banks on the

of Mr. Justice Holmes in the *Kansas City Title* case in urging that the incorporation of a federal act into a state law nevertheless makes the suit, for purposes of our jurisdiction, one arising under the state and not under the federal law. But his view was rejected. In the recent *Standard Oil* case we had an opportunity to adopt his view and reject that of the Court in the *Kansas City Title* case. Instead, we unanimously applied the reasoning of

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theory that the statutes authorizing the banks and bonds being unconstitutional, the bonds were not lawful securities for investment purposes. The Court held that this was a statement of a cause of action arising under the laws of the United States. The meaning of the Court's holding is clearly indicated by the view which was rejected. "The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or acts of Congress, still that point is material only because the Missouri law saw fit to make it so." 255 U. S. at 214.

In the *Standard Oil* case, a ruling by a state court that United States Army Post Exchanges were not federal agencies in deciding the applicability of a state sales tax which did not apply to sales to Government agencies, was held to be a decision of a federal question reviewable here. "For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States Government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by § 10, sales to post exchanges were not exempted from the tax." 316 U. S. at 483.

the *Kansas City Title* case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here.

10. In any event the decision below did not go off on a non-federal ground. It cannot be said of this case as was true of a case like *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 211, that the case "in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson,* 111 U. S. 200; *Chapman* v. *Goodnow,* 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear." We have seen that the issue that was framed after the tax collector's return to the rule was exclusively a question of constitutionality under the United States Constitution, and the judgment of the two State Courts was a determination of that issue. There never was any suggestion that the controversy involved merely a construction of the state law except a construction that necessarily raised a federal constitutional question. It was deemed to be a question under the Fifth Amendment of the Constitution until the Attorney General of the United States suggested that the Fourteenth Amendment was at stake. But even on that assumption, the case was decided on a federal and not on a non-federal ground, namely the invalidity of the State's claim because of want of due process under the Fourteenth Amendment. Since, however, the claim of invalidity was sustained we can take the case only on certiorari. § 277 (b) of the Judicial Code.

11. The question then is whether the federal ground was adequately assigned to satisfy our Rules 9 and 13 (9).[3]

[3] Rule 9: "Where an appeal is taken to this court from any court, the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately

This brings us again to the rationale of these rules. "The purpose is to enable the Court as well as opposing counsel, readily to perceive what points are relied on." *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86, 91. Is there any doubt that everybody knew what was the issue on which the Supreme Court of Louisiana passed and what was the issue on which the State of Louisiana and the Government desire us to reverse that decision? *Seaboard Air Line Ry. Co.* v. *Watson, supra,* illustrates the true functions of assignment of errors and affords an example of the kind of situations in which the rule comes into operation. It is not fair to the administration of justice—to the work of this Court and counsel taking part in its business—that appeal papers here should not enable us to know clearly and quickly what it is that is complained of and that we are asked to undo:

"The substitution of vague and general statement for the prescribed particularity sets the rule at naught. . . . And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the supreme court erred in not re-

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and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition."

Rule 13 (9): "When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and a designation of the parts of the record which he thinks necessary for the consideration thereof or a designation of those parts considered unnecessary, whichever is more convenient, with proof of service of the same on the adverse party. . . . The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. . . . The court will consider nothing but the points of law so stated. . . ."

versing the judgment of the trial court because 'in the trial of this case' the 'scope and effect' of the section deprived appellant of its property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does not identify any ruling at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents no question for our consideration." *Seaboard Air Line Ry. Co.* v. *Watson, supra* at 91.

In this case, unlike the *Watson* case, there was not a "vague and general statement," an "indefinite" allegation of error. From beginning to end all concerned knew the precise issue that this litigation raises—whether § 402 (b) (2) meets the guaranty of due process, in view of the dependence of the state act upon that federal provision. Surely we would have to take this case if Louisiana had specifically assigned as error the view that the Supreme Court of Louisiana took of the Fourteenth Amendment in relation to taxing community property. But since, as the Louisiana Supreme Court said, the issue under the Fourteenth Amendment is precisely the same in this situation as that under the Fifth Amendment, to throw out the case because "Fourteenth Amendment" was not written is to make our jurisdiction the slave of words.

12. If the decision below can really be said to rest on a non-federal ground, no assignment of errors could cure the defect. But it does not rest on a non-federal ground. It rests on a federal ground—the federal ground that is written on almost every page of the record.

13. Nor should we avoid jurisdiction by creating an issue which "the parties have not presented, briefed or argued" for the very good reason that it is not in the case. In brief, it is suggested that even assuming the tax on the whole community is valid, the question remains whether the appellees as legatees of half the community can be made to bear the whole tax. That issue is excluded from

the case. The amended plea of unconstitutionality did not raise a new issue but merely gave a new label—the Fourteenth Amendment—to the issue they tendered under the Fifth Amendment, dependence on which they reaffirmed. For the appellees, in the petition to prove the will, have assumed the full liability for whatever taxes are constitutionally due from the estate. We ought not to create a constitutional grievance which the parties themselves have never entertained in order to avoid adjudication of the only question which has been in the case from the beginning.

GOODYEAR TIRE & RUBBER CO., INC. ET AL. *v.* RAY-O-VAC COMPANY.

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

No. 262. Argued February 2, 3, 1944.—Decided February 28, 1944.

1. Concurrent findings of the District Court and the Circuit Court of Appeals in a patent infringement suit will not be set aside unless clearly erroneous. P. 278.
2. Anthony Patent No. 2,198,423, Claims 1, 2 and 3, for a leakproof dry cell for a flashlight battery, *held* valid and infringed. P. 278.
3. Defenses based on insufficiency of description of the invention and on file-wrapper estoppel are not supported by the evidence. P. 279.

136 F. 2d 159, affirmed.

CERTIORARI, 320 U. S. 727, to review the affirmance of a decree for the plaintiff (45 F. Supp. 927) in a suit for infringement of a patent.

Messrs. William E. Chilton and *Albert R. Golrick* for petitioners.

Messrs. Bernard A. Schroeder and *Gerhard A. Gesell*, with whom *Messrs. Russell Wiles* and *Charles J. Merriam* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case involves the validity and alleged infringement of the Anthony Patent No. 2,198,423, issued April 23, 1940. The District Court held the patent valid and infringed [1] and its judgment was affirmed by the Circuit Court of Appeals.[2]

The patent, a very narrow one in a crowded art, is for a leak-proof dry cell for a flashlight battery. The conventional dry cell embodies a cup-like zinc electrode acting as a container for a central carbon electrode, electrolyte, and depolarizing mix. The bottom enclosure is the terminal for one electrode, the top enclosure for the other. The electrolyte is a viscous liquid composed of ammonium chloride, zinc chloride, water and starch. Use of the battery causes erosion of the zinc and eventually the mixture leaks through the container. A short circuit, or long continuous use, causes the formation of solids as the zinc is eaten away. The resultant expansion of the cell contents, due to the weakness of the zinc walls, causes bulging, breaking, and seepage. The escaping liquid tends to injure the metal walls of the flashlight casing.

Dry cells have been used in flashlights for many years. The tendency of the cells to damage flashlight containers by leakage, bulging, and freezing in the container had long plagued the industry. So much so that most manufacturers attached warning notices to their flashlight batteries advising users not to allow them to remain in the flashlight for extended periods of non-use and to remove a cell promptly upon ascertaining that it was dead.

No patent in the prior art addressed itself to the problem of preventing both leakage and swelling in a dry cell. At the time of the Anthony application flashlight cells were commonly encased in a paper coating which might

[1] 45 F. Supp. 927.

[2] 136 F. 2d 159.

or might not be waterproofed, or in some other similar casing for purposes of insulation from the case. In the patent in suit Anthony calls attention to the existing difficulties and states that his invention is for an improved protective casing which will prevent fluids from leaking out of the cell and causing injury to the case or other dry cells within it. He also adverts to the tendency of the cells to swell after a certain time and associates this swelling with the leaking. He states that the object of his invention is to protect the side walls of the zinc cup by providing a strong metal sheath which will closely and rigidly confine the cell to a given length and diameter and, while providing such a sheath, to insulate it from both terminals so as to render unnecessary the use of an insulating cover or label to prevent the cell from short-circuiting by contact with the side walls of the case. To accomplish his objects Anthony used the ordinary type of dry cell having circuit terminals at opposite ends, one electrode being a cylindrical zinc cup, the other a centrally placed carbon electrode, in electrolyte and depolarizing mix, the bottom closure affording a terminal for one electrode and the top for the other. Around this conventional combination he placed an insulating material and an outside protecting metal sheath which would enclose the insulated side walls of the zinc cup and tightly embrace both upper and lower closures to prevent leakage.

The claims in suit are Nos. 1, 2, and 3. If 1 is good, 2 and 3 are also. We, therefore, quote 1:

"A leak-immunized flashlight dry-cell provided with circuit terminals at opposite ends, comprising: a hollow cylindrical zinc metal electrode containing electrolyte; a centrally disposed carbon electrode and depolarizing-mix in said electrolyte; a bottom closure for the cell affording a terminal for one of the electrodes; a top closure for the cell provided with a terminal for the other electrode,

electrically insulated from the first mentioned terminal; and a protecting sheet-metal sheath insulated from both of said electrodes and enclosing the side walls of said metal electrode and tightly embracing said closures so as to prevent leakage of the electrolyte from the unit."

The District Judge made findings, which have support in the evidence, to the following effect: That the problem presented was old and no solution was attained prior to Anthony's invention; that the respondent began marketing the patented cell in 1939 and was the first to guarantee its product against sticking in the flashlight case; that the cell met with immediate commercial success due to the advantages of its construction and not to extensive advertising; that its advantages were recognized by the Army and other governmental agencies and were demonstrated by reliable tests. In his opinion he examined the prior art and showed that none of the workers in the art had met the problems of leakage and swelling in the way suggested by Anthony and that most of the cited patents had not in fact been addressed to these problems.

With respect to the charge of infringement, the court found, on sufficient evidence: That the petitioners consciously copied the respondent's commercial cell, which was made in accordance with the claims of the patent; that the petitioners' cell infringed the claims in suit, since the petitioners' substitutions of structure and material were no more than the choice of mechanical alternatives and did not avoid the practice of the principle disclosed by the patent.

The Circuit Court of Appeals reexamined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts.[3] We think this is not such a case.

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[3] *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367.

Viewed after the event, the means Anthony adopted seem simple and such as should have been obvious to those who worked in the field, but this is not enough to negative invention.[4] During a period of half a century, in which the use of flashlight batteries increased enormously, and the manufacturers of flashlight cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered it commended itself to the public as evidenced by marked commercial success. These factors were entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability.[5] Accepting, as we do, the findings below, we hold the patent valid and infringed.

The petitioners renew here contentions, based on asserted insufficiency of description of the invention and on alleged file-wrapper estoppel, which the courts below overruled. We have considered these defenses but conclude that the proofs do not sustain them.

Decree affirmed.

MR. JUSTICE BLACK, dissenting:

Those who strive to produce and distribute goods in a system of free competitive enterprise should not be handicapped by patents based on a "shadow of a shade of an idea." *Atlantic Works* v. *Brady*, 107 U. S. 192, 200. The practice of granting patents for microscopic structural or

[4] *Loom Company* v. *Higgins*, 105 U. S. 580, 589, 591; *The Barbed Wire Patent*, 143 U. S. 275, 277, 283; *Krementz* v. *S. Cottle Co.*, 148 U. S. 556; *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 381; *Diamond Rubber Co.* v. *Consolidated Tire Co.*, 220 U. S. 428, 434–435.

[5] *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495–6; *Magowan* v. *New York Belting Co.*, 141 U. S. 332, 343; *Topliff* v. *Topliff*, 145 U. S. 156, 163, 164; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 143; *Potts* v. *Creager*, 155 U. S. 597, 609; *Minerals Separation, Ltd.* v. *Hyde*, 242 U. S. 261, 270; *Smith* v. *Snow*, 294 U. S. 1, 7, 14; *Paramount Publix Corp.* v. *Tri-Ergon Corp.*, 294 U. S. 464, 474.

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mechanical improvements inevitably must reduce the United States Patent Office to a mass production factory for unearned special privileges which serve no purpose except unfairly to harass the honest pursuit of business. If the patentee here has "discovered" anything, it is that the creamy substance in a dry cell will not leak through a steel jacket which covers and is securely fastened to the ends of the cell. For that alleged discovery this patent is today upheld. I do not deny that someone, somewhere, sometime, made the discovery that liquids would not leak through leak-proof solids. My trouble is that, despite findings to the contrary,[1] I cannot agree that this patentee is that discoverer. My disagreement is not based solely on the narrow ground that the record shows previous patents have been issued to others who put jackets of metal and other substances around dry cells. Antiquarians tell us that the use of solid containers to hold liquids predated the dawn of written history. That the problem of the quality and strength of the walls of such containers was one to which ancient people turned their attention appears from the widespread currency at an early age of the maxim that "new wine should not be put in old bottles." It is impossible for me to believe that Congress intended to grant monopoly privileges to persons who do no more than apply knowledge which has for centuries been the universal possession of all the earth's people—even those of the most primitive civilizations.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur in this opinion.

MR. JUSTICE JACKSON is of opinion the judgment below should be reversed for the reason that, invention being

[1] This Court in 1884 declared that "whether the thing patented amounts to a patentable invention" is a question of law to be decided by the courts. *Mahn* v. *Harwood*, 112 U. S. 354, 358. On numerous occasions both before and since that case, this Court has

doubtful, the Court of Appeals relied upon commercial success of the product without adequate findings or evidence as to whether such alleged success was due to the product or to the phenomenal increase in demand due to the war and to the advantages of marketing contracts with mail-order houses.

SECURITY FLOUR MILLS CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 276. Argued February 10, 1944.—Decided February 28, 1944.

1. The rule that a taxpayer (on the accrual basis) may not accrue an expense the amount of which is unsettled or the liability for which is contingent is applicable to a tax the liability for which he denies and payment of which he is contesting. P. 284.
2. In 1935 a taxpayer (on the accrual basis) made sales of flour at prices which included an amount sufficient to cover a federal processing tax. In the same year, the taxpayer obtained a temporary injunction against collection of the tax, on condition that the amount thereof be deposited *pendente lite*. In 1936 the tax was held invalid and the impounded funds were returned to the taxpayer. *Held* that payments made by the taxpayer in 1936, 1937 and 1938 to reimburse customers for the amount of the tax on such sales were not deductible from gross income for 1935. Pp. 283, 285.
3. Section 43 of the Revenue Act of 1934, which requires that deductions be taken for the taxable year in which the amount was paid or accrued, "unless in order to clearly reflect income the deductions or credits should be taken as of a different period," does not authorize or require that deduction of the payments here in question be taken as of the taxable year 1935. Pp. 284, 287.

135 F. 2d 165, affirmed.

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invalidated patents on the ground that the alleged discoveries failed to measure up to the legal standards for invention. See cases collected United States Supreme Court Digest (West 1943), Patents, Vol. 11, Par. 16–74.

CERTIORARI, 320 U. S. 724, to review the reversal of a decision of the Board of Tax Appeals, 45 B. T. A. 671, which set aside the Commissioner's determination of a tax deficiency.

Messrs. Robert C. Foulston and *John F. Eberhardt* for petitioner.

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

Messrs. J. B. Faegre and *Hayner N. Larson* filed a brief on behalf of the Russell-Miller Milling Co., as *amicus curiae,* urging reversal.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has held [1] that the Board of Tax Appeals erred in deciding [2] that the petitioner was entitled, in reporting its income tax for the year 1935, to deduct payments made by it in 1936, 1937, and 1938. Because of a conflict of decision [3] we granted certiorari.

The petitioner, which conducts a flour mill, reports its net income on the accrual basis. As a first domestic processor of wheat it was subject to the processing tax levied under the Agricultural Adjustment Act of 1933. In the early months of 1935 it paid processing taxes, and claimed, and was allowed, the amount so paid as a deduction from gross income in its federal income tax return for 1935. The amount thus paid is not involved.

Petitioner instituted a suit to enjoin the collection of processing taxes, and obtained a temporary injunction enjoining further collection on the condition that *pendente*

[1] 135 F. 2d 165.

[2] 45 B. T. A. 671.

[3] *Helvering* v. *Cannon Valley Milling Co.,* 129 F. 2d 642.

lite it file information returns and pay the amount of the tax into a depository. From May 1 to December 31, 1935 petitioner so paid $93,000 and accrued over $9,000 additional upon its books for processing tax for the last month. It also accrued about $1,000 as a reserve for possible increases in taxes earlier paid. On January 6, 1936, the taxing provisions of the Agricultural Adjustment Act were held unconstitutional by this court. Certain of the petitioner's vendees attempted to intervene in the injunction suit and to have impounded moneys returned to them. Petitioner resisted and the court denied the intervention and made an order directing the depository to pay to the petitioner the impounded money, which was done February 28, 1936.

The petitioner set up on its books a suspense account covering the items above mentioned under the title "Reserve for Processing Tax, Claims, etc." The petitioner refunded various sums to its customers, totaling over $45,000 in 1936, 1937, and 1938 to reimburse customers for processing tax included in the sales price of flour sold them in 1935 and not paid to the Collector of Internal Revenue as processing taxes. In its 1935 tax return petitioner deducted from gross income the total of the amounts impounded and accrued but not paid the Collector in the year 1935 as accrued tax liability. The Commissioner found a deficiency by disallowing the petitioner's deduction for taxes accrued but not paid in 1935.

The propriety of the claimed deduction depends upon the construction of §§ 23 (a), 41 and 43 of the Revenue Act of 1934.[4] Section 23 permits the deduction of ordinary and necessary expenses "paid or incurred during the taxable year in carrying on any trade or business." Section 41 declares the general rule that the taxpayer's annual accounting period shall be the fiscal year or calendar

[4] c. 277, 48 Stat. 680, 688, 694.

year, depending upon the method of accounting regularly employed, provided such method clearly reflects income. Section 43, on which the petitioner relies, provides:

"The deductions and credits provided for in this title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. . . ."

It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent, and this principle is fully applicable to a tax, liability for which the taxpayer denies, and payment whereof he is contesting.[5] Here the petitioner, in figuring its costs and its sales price to consumers, added the amount of the processing tax, but it collected its purchase price as such and designated no part of it as representing the tax. The petitioner received the purchase price as such. Its tax liability, if any, to the United States did not differ from other debts. Since it denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the Government's claim as an accrued liability. As it admittedly received the money in question in 1935 and could not deduct from gross income an accrued liability to offset it, the receipt, it would seem, must constitute income for that year.

Petitioner nevertheless insists that § 43 of the Revenue Act, which requires that deductions be taken for the taxable year in which the amount was paid or accrued, creates an exception applicable to this case by its concluding clause, "unless in order to clearly reflect the income the

[5] See *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, where this rule of law was reaffirmed and applied by the Board of Tax Appeals, the Fifth Circuit Court of Appeals, and by this court, and cases cited.

deductions or credits should be taken as of a different period." In short, the petitioner's position is that the Commissioner and the Board of Tax Appeals are authorized and required to make exceptions to the general rule of accounting by annual periods wherever, upon analysis of any transaction, it is found that it would be unjust or unfair not to isolate the transaction and treat it on the basis of the long term result. We think the position is not maintainable.

The Revenue Act of 1921, in §§ 214 (a) (6) and 234 (a) (4) [6] authorized the Commissioner to allow the deduction of losses in a year other than that in which sustained when, in his opinion, that was necessary clearly to reflect income. The qualifying clause of § 43 was first added as § 200 (d) of the Revenue Act of 1924.[7] The reports of both House and Senate Committees concerning this change said:

"The proposed bill extends that theory to all deductions and credits. The necessity for such a provision arises in cases in which a taxpayer pays in one year interest or rental payments or other items for a period of years. If he is forced to deduct the amount in the year in which paid, it may result in a distortion of his income which will cause him to pay either more or less taxes than he properly should." [8]

From these reports it is clear that the purpose of inserting the qualifying clause was to take care of fixed liabilities payable in fixed installments over a series of years. For example, a tenant would not be compelled to accrue, in the first year of a lease, the rental liability covering the entire term nor would he be permitted, if he saw fit to pay all the rent in advance, to deduct the whole payment as an expense of the current year. But we think it was not intended to upset the well-understood and consistently

[6] c. 136, 42 Stat. 227, 240, 255.

[7] 43 Stat. 253, 254.

[8] H. Rep. 179, 68th Cong., 1st Sess., pp. 10, 11; S. Rep. 398, 68th Cong., 1st Sess., pp. 10, 11.

applied doctrine that cash receipts or matured accounts due on the one hand, and cash payments or accrued definite obligations on the other, should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer.

The question is not whether the Board, within its discretion, made a determination of fact. Compare *Dobson* v. *Commissioner,* 320 U. S. 489. It is rather whether, as matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act.

"All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt." [9]

The rationale of the system is this: "It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation." [10]

This legal principle has often been stated and applied.[11] The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or

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[9] *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 363.

[10] *Id.,* p. 365.

[11] See e. g. *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, 120; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301, 306; *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 326; *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 624; *Brown* v. *Helvering,* 291 U. S. 193; *Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493, 498.

outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount.[12]

But the petitioner urges that § 43 has altered the rule so that a hybrid system, partly annual and partly transactional, may, within administrative discretion, be substituted for that of annual accounting periods. It urges that the change was due to the desire of Congress to prevent distortion of true income. This must mean distortion of true income, not of a given year, but, in the light of ultimate gain, from a series of transactions over a period of years, growing out of, or in some way related to, an initial transaction in the taxable year. The very section on which petitioner relies, however, reiterates the adherence of Congress to the system of annual periods of computation.

As we said in *Dixie Pine Products Co.* v. *Commissioner, supra,* referring to a section identical with § 43 now under consideration, "The provisions of the Revenue Act of 1936 worked no significant change over earlier Acts respecting the permissible basis of calculating annual taxable income."

We are of opinion that the purpose of the language which Congress used was not to substitute, whenever in the discretion of an administrative officer or tribunal such a course would seem proper, a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON are of opinion that the case is governed by *Dobson* v. *Commissioner,* 320 U. S. 489, and that the judgment should, for the reasons therein stated, be reversed.

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[12] See the cases cited Notes 5, 9 and 11.

STARK ET AL. *v.* WICKARD, SECRETARY OF AGRICULTURE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 211. Argued January 14, 1944.—Decided February 28, 1944.

1. Under the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture promulgated an order regulating the marketing of milk in the Greater Boston area. The order provided for fixing minimum prices to be paid to producers, and the prescribed formula authorized a deduction for certain payments to cooperatives. Producers, claiming that the Secretary, by the provisions for payments to cooperatives, was unlawfully diverting funds which belonged to producers, brought suit in the federal district court to enjoin the Secretary from carrying out the challenged provisions of the order. *Held* that the producers had standing to sue. Pp. 289, 305.
2. Although a judicial examination of the validity of the Secretary's action is not specifically authorized by the Act, authority therefor is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents. P. 307.
3. Under Article III of the Constitution, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the exertion of unauthorized administrative power. P. 310.
4. Whether the allegations of the complaint are sustainable is not considered; the Court determines only that the complainants are entitled to a judicial examination thereof. P. 311.

136 F. 2d 786, reversed.

CERTIORARI, 320 U. S. 723, to review the affirmance of a judgment dismissing the complaint in a suit to enjoin the Secretary of Agriculture from carrying out provisions of an order under the Agricultural Marketing Agreement Act of 1937.

Mr. Edward B. Hanify, with whom *Messrs. H. Brian Holland* and *Harry Polikoff* were on the brief, for petitioners.

Mr. Paul A. Freund, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Charles H. Weston* and *J. Stephen Doyle* were on the brief, for respondents.

Messrs. Reuben Hall and *Charles W. Wilson* filed a brief on behalf of the New England Milk Producers' Association, as *amicus curiae,* urging affirmance.

Mr. Justice Reed delivered the opinion of the Court.

This class action was instituted in the United States District Court for the District of Columbia, to procure an injunction prohibiting the respondent Secretary of Agriculture from carrying out certain provisions of his Order No. 4, effective August 1, 1941, dealing with the marketing of milk in the Greater Boston, Massachusetts, area. See Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. §§ 601 *et seq.,* and Order 4, United States Department of Agriculture, Surplus Marketing Administration, Title 7, Code of Federal Regulations, Part 904. The district court dismissed the suit for failure to state a claim upon which relief can be granted, and its judgment was affirmed by the Court of Appeals for the District of Columbia, 136 F. 2d 786. The respondent War Food Administrator was joined in this Court upon a showing that he had been given powers concurrent with those of the Secretary. See Executive Order No. 9334, filed April 23, 1943, 8 F. R. 5423, 5425. We granted certiorari because of the importance of the question to the administration of this Act. 320 U. S. 723.

The petitioners are producers of milk, who assert that by §§ 904.7 (b) (5) and 904.9 of his Order, the Secretary is unlawfully diverting funds that belong to them. The courts below dismissed the action on the ground that the Act vests no legal cause of action in milk producers, and since the decision below and the argument here were lim-

ited to that point, we shall confine our consideration to it.

The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit;[1] but in order to recover, the petitioners must go further and show that the act of the Secretary amounts to an interference with some legal right of theirs.[2] If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed. The petitioners place their reliance upon such rights as may be expressly or impliedly created by the Agricultural Marketing Agreement Act of 1937 and the Order issued thereunder.

Although this Court has previously reviewed the provisions of that statute at length and upheld its constitutionality,[3] some further reference to it is necessary to an understanding of the producer's interest in the funds dealt with by the Order.[4]

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[1] See 18 D. C. Code § 41, as amended, 49 Stat. 1921. The District of Columbia court may also exercise the same jurisdiction of United States district courts generally, 18 D. C. Code § 43, which have jurisdiction under the Judicial Code over cases arising under acts regulating interstate commerce. Judicial Code, § 24 (8), 28 U. S. C. § 41 (8); *Mulford* v. *Smith*, 307 U. S. 38; *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U. S. 259; *Robertson* v. *Argus Hosiery Mills*, 121 F. 2d 285.

[2] See *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137–8.

[3] See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588.

[4] The following clauses of the Act are necessary to a consideration of this case:

"Sec. 2. It is hereby declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in inter-

The immediate object of the Act is to fix minimum prices for the sale of milk by producers to handlers. It does not forbid sales at prices above the minimum. It contains

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state commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the post-war period, August 1919–July 1929.

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

"SEC. 8a (5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

"(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

"(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the for-

Footnote 4—Continued.

feitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

"(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

"(9) The term 'person' as used in this title includes an individual, partnership, corporation, association, and any other business unit."

"SEC. 8c (3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

"(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk

Footnote 4—Continued.

delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof."

. . . . . .

Among the provisions of subsection (7), referred to in § 8c (5), is authorization for terms described as follows:

"Sec. 8c (7) (D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

Sections 8c (8) and 8c (9) provide, with exceptions not here relevant that a marketing order must have the approval of the handlers of at least 50% of the volume of the commodity subject to the order unless the Secretary, with the approval of the President, determines that the proposed order is necessary to effectuate the declared policy of the Act and "is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy. . . ." § 8c (9) (B). Whether the handlers agree or not, an order must be

Footnote 4—Continued.

found to be "approved or favored" either by two-thirds of the producers in number or by volume of the commodity produced. Section 8c (19) authorizes the Secretary to hold a referendum to determine whether producers approve.

"SEC. 8c (13) (B) No order issued under this title shall be applicable to any producer in his capacity as a producer."

"SEC. 8c (14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15)."

"SEC. 8c (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to

an appropriate declaration of policy,[5] and it provides that the Secretary of Agriculture shall hold a hearing when he has reason to believe that a marketing order would tend to effectuate the purposes of the Act.[6] If he finds that an order would be in accordance with the declared policy, he must then issue it.[7] Sections 8c (5) and 8c (7) enumerate the provisions that the order may contain. Section 8c (5) (A) authorizes the Secretary to classify milk in accordance with the form or purpose of its use, and to fix minimum prices for each classification. These minima are the use value of the milk. This method of fixing prices was adopted because the economic value of milk depends upon the particular use made of it.[8] It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler might happen to make of his milk; accordingly, § 8c (5) (B) authorizes provision to be made for the payment to producers of a uniform price [9] for the milk delivered irrespective of the use to which the milk is put by the individual handler. Section 8c (5) (C) authorizes the Secretary to set up the necessary machinery to accomplish these purposes.

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take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

[5] § 2, n. 4, *supra.*

[6] § 8c (3), n. 4, *supra.*

[7] § 8c (4), n. 4, *supra.*

[8] See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 549–50.

[9] "Uniform price" means weighted average of minimum prices.

By Order No. 4,[10] the Secretary of Agriculture did fix minimum prices for each class of milk and required each

[10] The preamble to the order recites the holding of hearings and compliance with § 8c (9) of the Act. Section 904.0 of the Order contains the Secretary's findings and § 904.1 the definitions of terms.

"SEC. 904.1 (6) The term 'handler' means any person, irrespective of whether such person is a producer or an association of producers, wherever located or operating, who engages in such handling of milk, which is sold as milk or cream in the marketing area, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce, in milk and its products."

Section 904.2 enumerates the duties of the market administrator. Section 904.3 classifies milk into Class I milk and Class II milk according to its utilization. Generally speaking, Class I milk is that which is utilized for sale as milk containing from ½ of 1% to 16% butterfat or as chocolate or flavored milk, while Class II includes all other uses.

Section 904.4 provides:

"SEC. 904.4. MINIMUM PRICES. (a) *Class I prices to producers.* Each handler shall pay producers, in the manner set forth in Sec. 904.8, for Class I milk delivered by them, not less than the following prices:

. . . . . .

"(b) *Class II prices.* Each handler shall pay producers, in the manner set forth in Sec. 904.8, for Class II milk delivered by them not less than the following prices per hundredweight: . . ."

Section 904.5 provides for necessary informational reports by handlers, and § 904.6 deals with the application of the Order to exceptional types of handlers. Section 904.7, dealing with computation of the weighted average, read in its applicable portions as of July 28, 1941, as follows:

"SEC. 904.7. DETERMINATION OF UNIFORM PRICES TO PRODUCERS. (a) *Computation of value of milk for each handler.* For each delivery period the market administrator shall compute . . . the value of milk sold, distributed, or used by each handler . . . in the following manner:

"(1) Multiply the quantity of milk in each class by the price applicable pursuant to paragraphs (a), (b), and (c), of Sec. 904.4; and

"(2) Add together the resulting value of each class.

"(b) *Computation and announcement of uniform prices.* The market administrator shall compute and announce the uniform prices

handler in the Boston area to pay not less than those minima to producers, 7 C. F. R. 1941 Supp., § 904.4, less

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per hundredweight of milk delivered during each delivery period in the following manner:

"(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each handler from whom the market administrator has received at his office, prior to the 11th day after the end of such delivery period, the report for such delivery period and the payments required by Sec. 904.8 (b) (3) and (g) and (h) for milk received during each delivery period since the effective date of the most recent amendment hereof;

. . . . .

"(4) Subtract the total amount to be paid to producers pursuant to Sec. 904.8 (b) (2);

"(5) Subtract the total of payments required to be made for such delivery period pursuant to Sec. 904.9 (b);

"(6) Divide by the total quantity of milk which is included in these computations. . . .

"(7) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in Sec. 904.8 (b) (3);

. . . . .

"(9) On the 12th day after the end of each delivery period, mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, (c) the names of the handlers whose milk is included in the computations, and (d) the Class II price."

As of October 28, 1941, Subsection (5) was revoked and the subsections following it were renumbered, and the deduction theretofore required by it was effected by amending Subsection (7) (new Subsection (6)) to read as follows:

"(6) Subtract not less than 5½ cents nor more than 6½ cents for the purpose of retaining a cash balance in connection with the payments set forth in §§ 904.8 (b) (3) and 909.9 (b);"

See n. 16, *infra*.

Section 904.8 (a) and (b), dealing with the method of making payment, reads:

"Sec. 904.8 Payments for Milk. (a) *Advance payments.* On or before the 10th day after the end of each delivery period, each handler shall make payment to producers for the approximate value of milk

specified deductions. §§ 904.7 (b), 904.8. In addition, the order exercised the authority granted by the statute to

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received during the first 15 days of such delivery period. In no event shall such advance payment be at a rate less than the Class II price for such delivery period.

"(b) *Final payments.* On or before the 25th day after the end of each delivery period, each handler shall make payment, subject to the butterfat differential set forth in paragraph (d) of this section, for the total value of milk received during such delivery period as required to be computed pursuant to Sec. 904.7 (a), as follows:

"(1) To each producer, except as set forth in subparagraph (2) of this paragraph at not less than the blended price per hundredweight, computed pursuant to Sec. 904.7 (b), subject to the differentials set forth in paragraph (e) of this section, for the quantity of milk delivered by such producer;

"(2) To any producer, who did not regularly sell milk for a period of 30 days prior to February 9, 1936, to a handler or to persons within the marketing area, at not less than the Class II price in effect for the plant at which such producer delivered milk, except that during the May, June, and September delivery periods the price pursuant to Sec. 904.4 (b) (3) shall apply, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of 2 full calendar months following the first day of the next succeeding calendar month; and

"(3) To producers, through the market administrator, by paying to, on or before the 23rd day after the end of each delivery period, or receiving from the market administrator on or before the 25th day after the end of each delivery period, as the case may be, the amount by which the payments required to be made pursuant to subparagraphs (1) and (2) of this paragraph are less than or exceed the value of milk as required to be computed for such handler pursuant to Sec. 904.7 (a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such delivery period."

. . . . .

Other clauses of § 904.8 deal with price differentials not here pertinent.

Section 904.9 authorizes the payments to cooperatives which are questioned here. Eligibility requirements are set out in § 904.9 (a), which then provides:

"(1) Any such cooperative association shall receive an amount computed at not more than the rate of 1½ cents per hundredweight

require the use of a weighted average in reaching the uniform price to be paid producers, as described in the preceding paragraph. §§ 904.7, 904.8.

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of milk marketed by it on behalf of its members in conformity with the provision of this order, the value of which is determined pursuant to Sec. 904.7 (a), and with respect to which a handler has made payments as required by Sec. 904.8 (b) (3) and Sec. 904.10: *Provided*, That the amount paid shall not exceed the amount which handlers are obligated to deduct from payments to members under subsection (e) hereof and are not used in paying patronage dividends or other payments to members with respect to milk delivered except in fulfilling the guarantee of payments to producers; and that in cases where two or more associations participate in the marketing of the same milk, payment under this paragraph shall be available only to the association which the individual producer has made his exclusive agent in the marketing of such milk.

"(2) Any such cooperative association shall receive an amount computed at the rate of 5 cents per hundredweight on Class I milk received from producers at a plant operated under the exclusive control of member producers, which is sold to proprietary handlers. This amount shall not be received on milk sold to stores, to handlers, in which the cooperative has any ownership, or to a handler with which the cooperative has such sales arrangements that its milk not sold as Class I milk to such handler is not available for sale as Class I milk to other handlers."

Section 904.9 (b) contains the direction for payment out of the cash balance created by § 904.7 (b) (6), as amended, *supra*.

Section 904.9:

"(b) PAYMENT TO QUALIFIED COOPERATIVE ASSOCIATIONS. The market administrator shall, upon claim submitted in form as prescribed by him, make payments authorized under paragraph (a), or issue credit therefor out of the cash balance credited pursuant to Sec. 904.7 (b) (5), on or before the 25th day after the end of each delivery period, subject to verification of the receipts and other items on which the amount of such payment is based."

The deductions from payments by handlers to cooperative member producers, referred to in § 904.9 (a) (1), quoted *supra*, are authorized by § 904.9 (e), as follows:

"(e) *Authorized member deductions.* In the case of producers whose milk is received at a plant not operated by a cooperative association of which such producers are members and which is receiving payments

Under the Order, the handler does not make final settlement with the producer until the blended price [11] has been set, although he must make a part payment on or before the tenth of each month. § 904.8. But within eight days after the end of each calendar month—the so-called "delivery period," § 904.1 (9)—the handler must report his sales and deliveries, classified by use value, § 904.5, to a "market administrator." § 904.1 (8). On the basis of these reports, the administrator computes the blended price and announces it on the twelfth day following the end of the delivery period. § 904.7 (b). On the twenty-fifth day, the handlers are required to pay the balance due of the blended price so fixed to the producers. § 904.8 (b).

Were no administrative deductions necessary, the blended price per hundredweight of milk could readily be determined by dividing the total value of the milk used in the marketing area at the minimum prices for each classification by the number of hundredweight of raw milk used in the area.[12] However, the Order requires several adjustments for purposes admittedly authorized by statute, so that the determination of the blended price as actually made is drawn from the total use value less a sum which the administrator is directed to retain to meet various incidental adjustments.[13] In practice, each handler

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pursuant to this section, each handler shall make such deductions from the payments to be made to such producers pursuant to Sec. 904.8 as may be authorized by such producers and, on or before the 25th day after the end of each delivery period, pay over such deductions to the association in whose favor such authorizations were made."

Section 904.10 requires each handler to pay to the market administrator not more than 2 cents per hundredweight of milk delivered to him in order to meet costs of administration. Section 904.11 covers the effective time, suspension, or termination of the order.

[11] "Blended price" means the uniform price less administrative deductions.

[12] Cf. 7 C. F. R. 1941 Supp. § 904.7 (a).

[13] See 7 C. F. R. 1941 Supp. § 904.7 (b).

discharges his obligation to the producers of whom he bought milk by making two payments: one payment, the blended price, is apportioned from the values at the minimum price for the respective classes less administrative deductions and is made to the producer himself; [14] the other payment is equal to these deductions and is made, in the language of the Order, "to the producer, through the market administrator," in order to enable the administrator to cover the differentials and deductions in question.[15] It is the contention of the petitioners that by § 904.7 (b) (6)[16] of the Order the Secretary has directed the administrator to deduct a sum for the purpose of meeting payments to cooperatives as required by § 904.9, and that the Act does not authorize the Secretary to include in his order provision for payments of that kind or for deductions to meet them. Apparently, this deduction for payments to cooperatives is the only deduction that is an unrecoverable charge against the producers. The other items deducted under § 904.7 (b) are for a revolving fund or to meet differentials in price because of location, seasonal delivery, *et cetera.*

These producer petitioners allege that they have delivered milk to handlers in the "Greater Boston," Massachusetts, marketing area under the provisions of the Order. They state that they are not members of a cooperative association entitled under the Order to the contested payments and that, as producers, many of them voted against the challenged amendment on the producers' referendum under §§ 8c (9) and 8c (19) of the Act. These allegations

[14] 7 C. F. R. 1941 Supp. §§ 904.7 (b), 904.8 (b) (1).

[15] 7 C. F. R. 1941 Supp. § 904.8 (b) (3). The operations of the settlement fund are described in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 571.

[16] This section has superseded § 904.7 (b) (5) in effect at the time this suit was brought with reference to the deduction in issue. 6 F. R. 5482, effective October 28, 1941. See n. 10, *supra.*

are admitted by the defense upon which dismissal was based, namely, that the petition fails to state a claim upon which relief could be granted. From the preceding summary of the theory and plan of the statutory regulation of minimum prices for milk affecting interstate commerce, it is clear that these petitioners have exercised the right granted them by the statute and Order to deliver their milk to "Greater Boston" handlers at the guaranteed minimum prices fixed by the Secretary of Agriculture in the Order. § 904.4. Upon accepting that delivery the handler was required by the Order to pay to these producers their minimum prices in the manner set forth in § 904.8. Simply stated, this section required the handler to pay directly to the producer the blended price as determined by the administrator and to pay to the producers through the administrator for use in meeting the deductions authorized by the order of the Secretary and approved by two-thirds of the producers, § 8c (9) (b), the difference between the blended price and the minimum price. The Order directed the administrator to deduct from the funds coming into his hands from the producers' sale price the payments to cooperatives. § 904.9.

It is this deduction which the producers challenge as beyond the Secretary's statutory power. The respondents answer that the petitioners have not such a legal interest in this expenditure or in the administrator's settlement fund as entitles them to challenge the action of the Secretary in directing the disbursement. The Government says that as the producers pay nothing into the settlement fund and receive nothing from it, they have no legally protected right which gives them standing to sue. There is, of course, no question but that the challenged deduction reduces *pro tanto* the amount actually received by the producers for their milk.

By the statute and Order, the Secretary has required all area handlers dealing in the milk of other producers to

pay minimum prices as just described. §§ 904.1 (6), 904.4; Act, § 8c (14). The producer is not compelled by the Order to deliver (Act § 8c (13) (B)) but neither can he be required to market elsewhere; and if he finds a dealer in the area who will buy his product, the producer by delivery of milk comes within the scope of the Act and the Order. The Order fixing the minimum price obviously affects by direct Governmental action the producer's business relations with handlers. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, 422. Cf. *Chicago Junction Case,* 264 U. S. 258, 267. The fact that the producer may sell to the handler for any price above the minimum is not of moment in determining whether or not the statute and Order secure to him a minimum price. Should the producer sell his milk to a handler at prices in excess of the minimum, the handler would nevertheless be compelled to pay into the fund the same amount. The challenged deduction is a burden on every area sale. §§ 904.7 (a), 904.8 (b). In substance petitioners' allegation is that in effect the Order directed without statutory authority a deduction of a sum to pay the United States a sales tax on milk sold. The statute and Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement.[17] For example, the Order could not bar any qualified producers in the milk shed from selling to area handlers. Like the instances just cited

[17] *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 568; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 545. *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323, and *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, do not look in the contrary direction. Both assume claims created by statute in the petitioners and deny a judicial remedy to those claims on the ground that "Congress . . . has foreclosed resort to the courts for enforcement of the claims asserted by the parties." 320 U. S. 300 and 327.

from railway labor cases, *supra*, n. 17, the petitioners here voluntarily bring themselves within the coverage of the Act. It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with unlawful requirements of administrators. Upon purchase of his milk by a handler, the statute endows the producer with other rights, *e. g.*, the right to be paid a minimum price. Order, § 904.4.

The mere fact that Governmental action under legislation creates an opportunity to receive a minimum price does not settle the problem of whether or not the particular claim made here is enforcible by the District Court. The deduction for cooperatives may have detrimental effect on the price to producers and that detriment be *damnum absque injuria.*[18] It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally.[19] Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.[20]

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[18] *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 87; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 314–15; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478; *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 135; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295, 303.

[19] This distinction has long been recognized. Chief Justice Marshall phrased it in vivid language as early as *Marbury* v. *Madison*, 1 Cranch 137, 165–66, a fragment only of which follows: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Perkins* v. *Lukens Steel Co.*, 310 U. S 113, 125; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488.

[20] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110.

We deem it clear that on the allegations of the complaint these producers have such a personal claim as justifies judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations, which this Court upheld in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. In the present case a reexamination of the preceding statement of facts and summary of the statute and Order will show that delivering producers are assured minimum prices for their milk. § 904.4. The Order directs the handler to pay that minimum as follows:

A. By § 904.8 (a) the handler is to make a preliminary part payment of the blended price and later, § 904.8 (b) (1) the handler makes the final payment to the producer of the blended price computed as the Order directs. It is clear that the Order compels the handler to pay not only the blended price, which is always less than the uniform minimum price, but the entire minimum price, because § 904.8 (b) directs the handler's payment of the entire minimum value as ascertained by § 904.7 (a) (1) and (2). The blended price is reached by subtracting among other items the cooperative payment, here in question, from the minimum price. § 904.7 (b) (5).

B. The balance of the minimum price, which the handler owes to the producer, he must pay "to the producer, through the market administrator" by payment into the settlement or equalization fund two days ahead of the final date for payment of the blended price. § 904.8 (b) (3). This balance of the minimum purchase price is then partly used by the administrator to pay the cooperatives. § 904.9 (b). The handler is simply a conduit from the administrator who receives and distributes the minimum prices. The situation would be substantially the same if an administrator received as trustee for the producers the purchase price of their milk, paid expenses incurred in the

operation, and paid the balance to the producers. Under such circumstances we think the producers have legal standing to object to illegal provisions of the Order.

However, even where a complainant possesses a claim to executive action beneficial to him, created by federal statute, it does not necessarily follow that actions of administrative officials, deemed by the owner of the right to place unlawful restrictions upon his claim, are cognizable in appropriate federal courts of first instance. When the claims created are against the United States, no remedy through the courts need be provided. *United States* v. *Babcock,* 250 U. S. 328, 331, and cases cited; *Work* v. *Rives,* 267 U. S. 175, 181; *Butte, A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, 142, 143. To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies. Under the unusual circumstances of the historical development of the Railway Labor Act, this Court has recently held that an administrative agency's determination of a controversy between unions of employees as to which is the proper bargaining representative of certain employees is not justiciable in federal courts. *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323. Under the same Act it was held on the same date that the determination by the National Mediation Board of the participants in an election for representatives for collective bargaining likewise was not subject to judicial review. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297. This result was reached because of this Court's view that jurisdictional disputes between unions were left by Congress to mediation rather than adjudication. 320 U. S. 302 and 337. That is to say, no personal right of employees, enforcible in the courts, was created in the particular instances under consideration. 320 U. S. 337. But where rights of collective bargaining, created by the

same Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially. 320 U. S. 330, 331. Cf. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515.

It was pointed out in the *Switchmen's* case that:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U. S. at 300. The only opportunity these petitioners had to complain of the contested deduction was to appear at hearings and to vote for or against the proposed order. Act, § 8c (3), 8c (9) and 8c (19); Order, preamble. So long as the provisions of the Order are within the statutory authority of the Secretary such hearings and balloting furnish adequate opportunity for protest. *Morgan* v. *United States,* 298 U. S. 468, 480. But where as here the issue is statutory power to make the deduction required by Order, § 904.9, under the authority of § 8c (7) (D) of the Act, a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack on the inclusion in the Order of provisions entirely outside of the Secretary's delegated powers.

Without considering whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a federal agency, as we have here, and yet limit its enforceability to administrative determination, despite the existence of federal courts of general jurisdiction established under Article III of the Constitution, the Congressional grant of jurisdiction of this proceeding appears plain. There is no

direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered.

The Act bears on its face the intent to submit many questions arising under its administration to judicial review. §§ 8a (6), 8c (15) (A) and (B). It specifically states that the remedies specifically provided in § 8a are to be in addition to any remedies now existing at law or equity. § 8a (8). This Court has heretofore construed the Act to grant handlers judicial relief in addition to the statutory review specifically provided by § 8c (15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on handlers which directly affect such handlers. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 560–61. In the *Rock Royal* case the Government had contended that the handlers had no legal standing in the suit for enforcement to attack provisions of the order relating to handlers. While we upheld the contention of the Government as to the lack of standing of handlers to object to the operation of the producer settlement fund on the ground that the handlers had no "financial interest" in that fund, we recognized the standing of a proprietary handler to question the alleged discrimination shown in favor of the co-operative handlers. The producer settlement fund is created to meet allowable deductions by the payment of a part of the minimum price to producers through the market administrator. See note 15, *supra*. *Rock Royal* pointed out that handlers were without standing to question the use of the fund, because handlers had no financial interest in the fund or its use. It is because every dollar of deduction comes from the producer that he may challenge the use of the fund. The petitioners' complaint is not

that their blended price is too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price.

With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue, *United States* v. *Griffin*, 303 U. S. 226, 238; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 182; cf. *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 404, 412. The ruling in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is not authority to the contrary. It was there held that the statute placed the power in the Interstate Commerce Commission to hear the complaint stated, not in the state court where it was brought. The Commission award was then to be enforced in court. P. 438. Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law,[21] the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.[22] This permits the

[21] *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137.

[22] *Marbury* v. *Madison*, 1 Cranch 137, 165; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109–10; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514; *Morgan* v. *United States*, 298 U. S. 468, 479; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489; *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418.

courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. *United States* v. *Morgan,* 307 U. S. 183, 190–91. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid act. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533. Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. Cf. *Landis* v. *North American Co.,* 299 U. S. 248. Should

some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment.

It hardly need be added that we have not considered the soundness of the allegations made by the petitioners in their complaint. The trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the petitioners' contention. We merely determine the petitioners have shown a right to a judicial examination of their complaint.

Reversed.

MR. JUSTICE BLACK is of the view that the judgment should be affirmed for the reasons given in the opinion of the United States Court of Appeals for the District of Columbia.

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

MR. JUSTICE FRANKFURTER, dissenting:

The immediate issue before us is whether these plaintiffs, milk producers, can in the circumstances of this case go to court to complain of an order by the Secretary of Agriculture fixing rates for the distribution of milk within the Greater Boston marketing area. The solution of that question depends, however, upon a proper approach toward such a scheme of legislation as that formulated by Congress in the Agricultural Marketing Agreement Act of 1937.

Apart from legislation touching the revenue, the public domain, national banks and patents, not until the Interstate Commerce Act of 1887 did Congress begin to place economic enterprise under systems of administrative control. These regulatory schemes have varied in the range

of control exercised by government; they have varied no less in the procedures by which the control was exercised. More particularly, these regimes of national authority over private enterprise reveal great diversity in the allotment of power by Congress as between courts and administrative agencies. Congress has not made uniform provisions in defining who may go to court, for what grievance, and under what circumstances, in seeking relief from administrative determinations. Quite the contrary. In the successive enactments by which Congress has established administrative agencies as major instruments of regulation, there is the greatest contrariety in the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action.

Except in those rare instances, as in a claim of citizenship in deportation proceedings, when a judicial trial becomes a constitutional requirement because of "The difference in security of judicial over administrative action," *Ng Fung Ho* v. *White*, 259 U. S. 276, 285, whether judicial review is available at all, and, if so, who may invoke it, under what circumstances, in what manner, and to what end, are questions that depend for their answer upon the particular enactment under which judicial review is claimed. Recognition of the claim turns on the provisions dealing with judicial review in a particular statute and on the setting of such provisions in that statute as part of a scheme for accomplishing the purposes expressed by that statute. Apart from the text and texture of a particular law in relation to which judicial review is sought, "judicial review" is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts. The procedural provisions in more than a score of these regulatory measures prove that the manner in which Congress has distributed responsibility for the enforcement of its laws between courts and administrative agencies runs a gamut all the way from authorizing a

judicial trial *de novo* of a claim determined by the administrative agency to denying all judicial review and making administrative action definitive.

Congress has not only devised different schemes of enforcement for different Acts. It has from time to time modified and restricted the scope of review under the same Act. Compare § 16 of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384–385, with § 13 of the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 539, 554–5, and 49 U. S. C. § 16 (12), and the latter with enforcement of reparation orders, 49 U. S. C § 16 (2). Moreover the same statute, as is true of the Interstate Commerce Act, may make some orders not judicially reviewable for any purpose, see *e. g., United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, or reviewable by some who are adversely affected and not by others, *e. g., Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295, 305–308. The oldest scheme of administrative control—our customs revenue legislation—shows in its evolution all sorts of permutations and combinations in using available administrative and judicial remedies. See, for instance, *Elliott* v. *Swartwout,* 10 Pet. 137; *Cary* v. *Curtis,* 3 How. 236; *Murray's Lessee* v. *Hoboken Land Co.,* 18 How. 272; *Hilton* v. *Merritt,* 110 U. S. 97; for a general survey, see Freund, *Administrative Powers over Persons and Property,* §§ 260–62. And only the other day we found the implications of the Railway Labor Act (c. 347, 44 Stat. (part 2) 577, as amended, c. 691, 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*) to be such that courts could not even exercise the function of keeping the National Mediation Board within its statutory authority. *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297. Were this list of illustrations extended and the various regulatory schemes thrown into a hotchpot, the result would be hopeless discord. And to do so would be to treat these legislative schemes as though they were part of a single body of law instead of each being a self-contained scheme.

The divers roles played by judicial review in the administration of regulatory measures other than the Agricultural Marketing Act cannot tell us when and for whom judicial review of administrative action can be had under that Act. The fact that certain classes of individuals adversely affected by a ruling of the Interstate Commerce Commission can and other classes cannot obtain redress in court, does not tell us what classes may and what classes may not obtain judicial redress for action by the Secretary of Agriculture which affects these respective classes adversely. And to cite the *Switchmen's* case, *supra,* in support of this case is to treat our decisions too lightly. In the numerous cases either granting or denying judicial review, grant or denial was reached not by applying some "natural law" of judicial review nor on the basis of some general body of doctrines for construing the diverse provisions of the great variety of federal regulatory statutes. Judicial review when recognized—its scope and its incidence—was derived from the materials furnished by the particular statute in regard to which the opportunity for judicial review was asserted. This is the lesson to be drawn from the prior decisions of this Court on judicial review, and not any doctrinaire notions of general applicability to statutes based on different schemes of administration and conveying different purposes by Congress in the utilization of administrative and judicial remedies for the enforcement of law. However useful judicial review may be, it is for Congress and not for this Court to decide when it may be used—except when the Constitution commands it. In this case there is no such command. Common-law remedies withheld by Congress and unrelated to a new scheme for enforcing new rights and duties should not be engrafted upon remedies which Congress saw fit to particularize. To do so impliedly denies to Congress the constitutional right of choice in the selection of reme-

dies, and turns common-law remedies into constitutional necessities simply because they are old and familiar.

When recently the Agricultural Marketing Act was in litigation before us, we sustained its constitutionality and defined its scope in the light of its history, its purposes and its provisions. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. We held in that case that a milk handler cannot challenge in court such an order as the one which is now assailed. Again we must turn to the history, the purposes and the provisions of the Act to determine whether Congress gave the producer the right of judicial relief here sought.

In 1931 and 1932, prices of manufactured dairy products reached the lowest level in twenty-five years. Because of their relatively weak bargaining position, milk producers suffered most seriously. See Mortenson, *Milk Distribution as a Public Utility*, p. 6; Black, *The Dairy Industry and the AAA*, c. III; *State Milk and Dairy Legislation* (U. S. Gov't Printing Office, 1941) p. 3. Accordingly, Congress decided that the public interest in the handling of milk in interstate commerce could no longer be left to the haggling of a disorderly market, mitigated by inadequate organization within the industry. The Agricultural Adjustment Act of 1933 (c. 25, 48 Stat. 31) was the result. The "essential purpose" of the series of enactments thus initiated was to raise the producer's prices. Sen. Rep. No. 1011, 74th Cong., 3d Sess., p. 3. The Act of 1933 was amended in 1935 (c. 641, 49 Stat. 750), and partially reenacted and amended by the Agricultural Marketing Agreement Act of 1937, with which we are here concerned. c. 296, 50 Stat. 246, c. 567, 50 Stat. 563, 7 U. S. C. § 601 *et seq.*

An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part

must be related to the scheme as a whole. The legislation is a self-contained code, and within it must be found whatever remedies Congress saw fit to afford. For the Act did not give new remedies for old rights. It created new rights and new duties, and precisely defined the remedies for the enforcement of duties and the vindication of rights. Of course the statute concerns the interests of producers, handlers and consumers. But it does not define or create any legal interest for the consumer, and it specifically provides that "No order issued under this title shall be applicable to any producer in his capacity as producer." § 8c (13) (B).

The statute as an entirety makes it clear that obligations are imposed on handlers alone. Section 8c (5)(A) authorizes the Secretary to classify milk according to the form in which or the purpose for which it is used. Section 8c (5)(B)(ii) directs the Secretary to provide for the payment to producers of a uniform price "irrespective of the uses made of such milk by the individual handler to whom it is delivered." This latter, known as the "blended price," is computed under the Secretary's Order No. 4 of July 28, 1941, by multiplying the use value of the milk by the total quantity, making specified deductions and additions, and then dividing the resulting sum by the total quantity of the milk. § 904.7 (b). A deduction for payments to cooperatives which enters into this computation is the object of petitioner's attack.

It is apparent that the minimum "blended price" which the producer receives may be different than the minimum "use value" fixed by the Secretary or his Administrator which the handler must pay. Thus § 8c (5)(C) authorizes provision for necessary adjustments. The mechanics of these adjustments are described in the Secretary's Order No. 4. In short, the handler who sells or uses his milk so that its value is more than the minimum "blended price" he pays the producer, must pay the excess to a settlement

fund, and the handler who puts his milk to a lower value use than the minimum "blended price" he pays in turn receives the difference out of the fund. § 904.8 (b).

Violation of any order by a handler makes him subject to criminal proceedings. § 8c (14). Thus, while the Act and the Order may affect the interests of producers as well as those of handlers, legally they operate directly against handlers only. The corrective processes provided by the Act reflect this situation. Section 8c (15) permits a handler to challenge an order before the Secretary, and if dissatisfied, he may bring suit in equity before a district court. Provision for judicial remedies for consumers and producers is significantly absent. Such omission is neither inadvertent nor surprising. It would be manifestly incongruous for an Act which specifically provides that no order shall be directed at producers to give to producers the right to attack the validity of such an order in court.

To create a judicial remedy for producers when the statute gave none is to dislocate the Congressional scheme of enforcement. For example, § 8c (15) (B) provides that the pendency of a proceeding for review instituted by a handler shall not impede or delay proceedings brought under § 8a (6) for compliance with an order. Because there is no provision for court review of an order on a producer's position naturally there is no corresponding provision to guard against such interference with enforcement of an order. By giving producers the right to sue although Congress withheld that right, the suspension of a milk order pending disposition of a producer's suit will now depend upon the discretion of trial judges. And technical details concerning the milk industry that were committed to the Secretary of Agriculture are now made subjects of litigation before ill-equipped courts.

By denying them access to the courts Congress has not left producers to the mercy of the Secretary of Agriculture. Congress merely has devised means other than judicial

for the effective expression of producers' interests in the terms of an order. Before the Secretary may issue an order he is required to "give due notice of and an opportunity for a hearing upon a proposed order." § 8c (3). At such a hearing all interested persons may submit relevant evidence, and the procedure makes adequate provision for notice to those who may be affected by an order. See *Administrative Procedure and Practice in the Department of Agriculture under the Agricultural Marketing Agreement Act of 1937* (U. S. Department of Agriculture, 1939), p. 11 *et seq.* Nor are these the only or the most effective means for safeguarding the producer's interest. While an order may be issued despite the objection of handlers of more than 50% of the volume of the commodity covered by the order, no order may issue when not approved by at least two-thirds—either numerically or according to volume of production—of the producers. § 8c (9).

The fact that Congress made specific provision for submission of some defined questions to judicial review would hardly appear to be an argument for inferring that judicial review even of broader scope is also open as to other questions for which Congress did not provide judicial review. The obvious conclusion called for is that as to such other questions, judicial review was purposefully withheld. In the frame of this statute such an omission should not be treated as having no meaning, or rather as meaning that an omission is to be given the same effect as an inclusion. Nor does § 8a (8) referring to remedies "existing at law or in equity" touch our problem. That only adds to the remedies in § 8a (5)–(7) for the enforcement of the Act. It in no way qualifies or expands the express provisions of the statute in § 8c (15) for judicial review of such an order as the present—specification of the class of persons who are given the right to resort to courts and narrow limitation of the scope of judicial review. The remedy of review here sought by producers is by § 8c (15) explicitly

restricted to handlers; and such review is not like that before the Court, a conventional suit in equity, but is a procedure for review of an adverse ruling in a price proceeding before the Secretary of Agriculture. It is a review of an administrative review, not an independent judicial determination.

An elaborate process of implications should not be invented to escape the plain meaning of § 8c (15), and to dislocate a carefully formulated scheme of enforcement. That is not the way to construe such legislation, that is, if Chief Justice Taft was right in characterizing as "a conspicuous instance of his [Chief Justice White's] unusual and remarkable power and facility in statesmanlike interpretation of statute law," 257 U. S. xxv, the doctrine established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and more particularly the way in which § 22 of the Act to Regulate Commerce was therein construed to effectuate the purposes of that Act. 204 U. S. at 446–447.

The Court is thus adding to what Congress has written a provision for judicial relief of producers. And it sanctions such relief in a case in which petitioners have no standing to sue on any theory. The only effect of the deduction which is challenged by the producers is to fix a minimum price to which they are entitled perhaps lower than that which might otherwise have been determined. But the Act does not prevent their bargaining for a price higher than the minimum, and we are advised by the Government of what is not denied by petitioners, that such arrangements are by no means unusual. This Court has held that a consumer has no standing to challenge a minimum price order like the one before us. *Atlanta* v. *Ickes*, 308 U. S. 517; cf. *Sprunt & Son* v. *United States*, 281 U. S. 249. Surely a producer who may bargain for prices above the minimum is in no better legal position than a consumer who urges that too high a minimum has

been improperly fixed. The Commonwealth of Massachusetts which purchased milk for its public institutions valued at $105,232.97 in 1940, and $117,584.50 in 1941, has hardly a less substantial interest in the minimum price than that of the petitioners. And yet Massachusetts has no standing to object to the minimum fixed by an order.

The alleged lower minimum "blended price" is the sum and substance of petitioners' complaint. If that gives them no standing to sue nothing does. An attack merely on the method by which the blended price was reduced may present an interesting abstract question but furnishes no legal right to sue. The producers have nothing to do with the settlement fund. They receive the blended price in any event. Even assuming that the Administrator may have fixed a blended price in ways that may argue an inconsistency between what he has done and what Congress told him to do, any resulting disadvantage to a producer is wholly unrelated to the settlement fund. That fund is contributed by handlers and paid to handlers. If handlers may not attack payments to cooperatives, as this Court held in *United States* v. *Rock Royal Co-op., supra* at 561, with all deference I am unable to see how producers can be in a better position to attack such payments. This suit was rightly dismissed.

THE HECHT COMPANY *v.* BOWLES, PRICE ADMINISTRATOR.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 316. Argued February 3, 4, 1944.—Decided February 28, 1944.

1. Under § 205 (a) of the Emergency Price Control Act of 1942, the grant of an injunction, upon application of the Administrator and a showing that the defendant has engaged in acts or practices violative of § 4 of the Act, is not mandatory but is in the discretion of the court. P. 328.
2. The discretion of the court under § 205 (a) must be exercised in the light of the large objectives of the Act; for in these cases the standards of the public interest, not the requirements of private litigation, measure the propriety and need of injunctive relief. P. 331.
3. Whether upon the facts of this case the District Court's refusal of an injunction was an abuse of discretion is not decided; and the cause is remanded to the Court of Appeals for determination of that question. P. 331.

137 F. 2d 689, reversed.

CERTIORARI, 320 U. S. 727, to review the reversal of an order dismissing the complaint, 49 F. Supp. 528, in a suit by the Price Administrator for an injunction to restrain the defendant from violations of price regulations.

Mr. Charles A. Horsky, with whom *Mr. Spencer Gordon* was on the brief, for petitioner.

Mr. Chester T. Lane, with whom *Solicitor General Fahy,* and *Messrs. Richard H. Field, Thomas I. Emerson,* and *David London* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sec. 205 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Supp. II, §§ 901, 925) provides: "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any

acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The question in this case is whether the Administrator, having established that a defendant has engaged in acts or practices violative of § 4 of the Act is entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief.

Sec. 4 (a) of the Act makes it unlawful for a person to sell or deliver any commodity in violation of specified orders or regulations of the Administrator. A regulation issued under § 2 of the Act and effective in May, 1942 (7 Fed. Reg. 3153) provided that no person should sell or deliver any commodity at a price higher than the authorized maximum price (§ 1499.1) as fixed or determined by the regulation.[1] Since maximum prices were fixed with

[1] Sec. 1499.2 provided in part: "Except as otherwise provided in this General Maximum Price Regulation, the seller's maximum price for any commodity or service shall be: (a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942: The highest price charged by the seller during such month—(1) For the same commodity or service; or (2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or (b) In those cases in which the seller did not deal in the same or similar commodities or services during March 1942: The highest price charged during such month by the most closely competitive seller of the same class—(1) For the same commodity or service; or (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it. 'Highest Price Charged During March 1942'. For the

reference to earlier base periods, the regulation also provided for the preservation and examination of existing records.[2] And provision was likewise made for the keeping of current records reflecting sales made under the regulation [3] and for the filing of maximum prices with the Administrator.[4]

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purposes of this General Maximum Price Regulation, the highest price charged by a seller 'during March 1942' shall be: (a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or (b) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month."

The seller's maximum price for a commodity which cannot be priced under § 1499.2 was to be determined by the seller pursuant to a formula prescribed in § 1499.3.

[2] Sec. 1499.11 entitled "Base-period records" provided in part: "Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall: (a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and (b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing: (1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and (2) All his customary allowances, discounts, and other price differentials."

[3] Sec. 1499.12 entitled "Current records" provided: "Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this Gen-

There is no substantial controversy over the facts. Petitioner operates a large department store in Washington, D. C. and did a business of about $20,000,000 in 1942. There are 107 departments in the store and each sells a separate line of merchandise. In the fall of 1942 the Administrator started an investigation to determine whether petitioner was complying with the Act and the regulation. The investigation was a "spot check," confined to seven departments. In each of the seven departments violations were disclosed. As a result this suit was brought. The complaint charged violations of the maximum price provisions of the regulation and violations of the regulations governing the keeping of records and reporting to the Administrator. The Administrator prayed for an injunction enjoining petitioner from selling, delivering or offering for sale or delivery any commodity in violation of the regulation and from failing to keep complete and accurate records as required by the regulation. In its answer petitioner pleaded among other things that any failure or neglect to comply with the regulation was involuntary and was corrected as soon as discovered.

Numerous violations both as respects prices and records were discovered. Thus in six of the seven departments investigated there had occurred between May and October,

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eral Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services."

[4] Sec. 1499.13 (b) provided: "On or before June 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity."

1942 some 3,700 sales in excess of the maximum prices with overcharges of some $4,600. The statements filed with the Administrator were deficient, some 400 items of merchandise being omitted. And there were over 300 items with respect to which no records were kept showing how the maximum prices had been determined.

There is no doubt, however, of petitioner's good faith and diligence. The District Court found that the manager of the store had offered it as a laboratory in which the Administrator might experiment with any regulation which might be issued. Prior to the promulgation of the regulation the petitioner had created a new section known as the price control office. That office undertook to bring petitioner into compliance with the requirements of the regulation in advance of its effective date. The head of that office together with seven assistants devoted full time to that endeavor. But the store had about 2,000 employees and over one million two hundred thousand articles of merchandise. In the furniture departments alone there were over fifty-four thousand transactions in the first ten months of 1942. Difficulties were encountered in interpreting the regulation, in determining the exact nature of an article and whether it had been previously sold and at what price, etc. The absence of adequate records made it difficult to ascertain prices during the earlier base-period. Misunderstanding of the regulation, confusion on the part of employees not trained in such problems of interpretation and administration, the complexity of the problem, and the fallibility of humans all combined to produce numerous errors. But the District Court concluded that the "mistakes in pricing and listing were all made in good faith and without intent to violate the regulations."

The District Court also found that the mistakes brought to light "were at once corrected, and vigorous steps were taken by The Hecht Company to prevent recurrence of

these mistakes or further mistakes in the future." The company increased its price control office to twenty-eight employees. New methods of internal control were instituted early in November, 1942 with the view of avoiding future violations. That new system of control "greatly improved" the situation. Petitioner undertook to make repayment of all overcharges brought to light by the investigation in case of customers who could be identified. It proposed to contribute the remaining amount of such overcharges to some local charity. The District Court concluded that the issuance of an injunction would have "no effect by way of insuring better compliance in the future" and would be "unjust" to petitioner and not "in the public interest." It accordingly dismissed the complaint. 49 F. Supp. 528. On appeal the Court of Appeals for the District of Columbia reversed that judgment, one judge dissenting. 137 F. 2d 689. That court held that the findings of the District Court were supported by substantial evidence, except that it did not consider whether the evidence supported the findings that an injunction would not insure better compliance in the future and would be unjust to petitioner. In its view the latter findings were immaterial. For it construed § 205 (a) of the Act to require the issuance of an injunction or other order as a matter of course, once violations were found.

The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Act.

Respondent insists that the mandatory character of § 205 (a) is clear from its language, history and purpose. He argues that "shall be granted" is not permissive, that since the same section provides that the Administrator "may" apply for an injunction and that, if so, the injunction "shall" be granted, "may" and "shall" are each used in the ordinary sense. It is pointed out that when the bill (for which the Act in its final form was substituted)

passed the House, § 205 (a) provided that "upon a proper showing" an injunction or other order "shall be granted without bond." [5] The words "upon a proper showing" were stricken in the Senate and were replaced by the words "upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices." And the Senate Report in its analysis of § 205 (a) stated that "upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices, a temporary or permanent injunction, restraining order or other order is to be granted without bond." S. Rep. No. 931, 77th Cong., 2d Sess., p. 25. Further support for the view that the issuance of an injunction is mandatory once violations are shown is sought in the pattern of federal legislation which provides relief by injunction in aid of law enforcement. Some of those statutes [6] contain provisions quite close to the language of § 205 (a). Others provide that an injunction or restraining order shall be granted "upon a proper showing" [7] or that federal district courts shall have jurisdiction to restrain violations "for cause shown." [8] The argument is that when Congress desired to give the district courts discretion to grant or withhold relief by injunction it chose apt words to make its desire plain.

We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction under § 205 (a).

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[5] H. R. 5479, 77th Cong., 1st Sess.

[6] "Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond." Investment Company Act of 1940, 54 Stat. 842, 15 U. S. C. § 80a–41; Investment Advisers Act of 1940, 54 Stat. 853, 15 U. S. C. § 80b–9.

[7] Securities Act of 1933, 48 Stat. 86, 15 U. S. C. § 77t (b); Securities Exchange Act of 1934, 48 Stat. 899, 15 U. S. C. § 78u (e).

[8] Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. § 217.

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But we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks.

It seems apparent on the face of § 205 (a) that there is some room for the exercise of discretion on the part of the court. For the requirement is that a "permanent or temporary injunction, restraining order, or other order" be granted. Though the Administrator asks for an injunction, some "other order" might be more appropriate, or at least so appear to the court. Thus in the present case one judge in the Court of Appeals felt that the District Court should not have dismissed the complaint but should have entered an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief if violations recurred. It is indeed not difficult to imagine that in some situations that might be the fairest course to follow and one which would be as practically effective as the issuance of an injunction. Such an order, moreover, would seem to be a type of "other order" which a faithful reading of § 205 (a) would permit a court to issue in a compliance proceeding. However that may be, it would seem clear that the court might deem some "other order" more appropriate for the evil at hand than the one which was sought. We cannot say that it lacks the power to make that choice. Thus it seems that § 205 (a) falls short of making mandatory the issuance of an injunction merely because the Administrator asks it.

There is, moreover, support in the legislative history of § 205 (a) for the view that "shall be granted" is less mandatory than a literal reading might suggest. We have already referred to a portion of the Senate Report which lends some support to the position of the Administrator. But in another portion of that Report there is the following reference to suits to enjoin violations of the Act: "In common with substantially all regulatory statutes, the

bill authorizes the official charged with the duty of administering the act to apply to any appropriate court, State or Federal, for an order enjoining any person who has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the bill. Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." S. Rep. No. 931, *supra,* p. 10. A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

We do not stop to compare the provisions of § 205 (a) with the requirements of other federal statutes governing administrative agencies which, it is said, make it mandatory that those agencies take action when certain facts are shown to exist.[9] We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven,* 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private

[9] National Labor Relations Act, 49 Stat. 453, 29 U. S. C. § 160 (c); Clayton Act, 38 Stat. 734, 15 U. S. C. § 21; Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45 (b).

claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of § 205 (a) compel it. It should be noted, moreover, that § 205 (a) governs the procedure in both federal and state courts. For § 205 (c) gives the state courts concurrent jurisdiction with federal district courts of civil enforcement proceedings. It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of § 205 (a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. *United States* v. *Morgan,* 307 U. S. 183, 194 and cases cited.

We do not mean to imply that courts should administer § 205 (a) grudgingly. We repeat what we stated in *United States* v. *Morgan, supra,* 191, respecting judicial review of administrative action: ". . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in

the attainment of the common aim." The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under § 205 (a) must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases. That discretion should reflect an acute awareness of the Congressional admonition that "of all the consequences of war, except human slaughter, inflation is the most destructive" (S. Rep. No. 931, *supra,* p. 2) and that delay or indifference may be fatal. Whether the District Court abused its discretion in dismissing the complaint is a question which we do not reach. The judgment must be reversed and the cause remanded to the Court of Appeals for that determination.

Reversed.

MR. JUSTICE FRANKFURTER agrees that § 205 (a) of the Emergency Price Control Act, apart from dispensing with any requirement for a bond, does not change the historic conditions for the exercise by courts of equity of their power to issue injunctions, according to which the Court of Appeals should now dispose of this cause.

MR. JUSTICE ROBERTS is of opinion that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

J. I. CASE CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 67. Argued January 3, 1944.—Decided February 28, 1944.

1. In view of the continuing character of the obligation imposed on the employer by the order of the National Labor Relations Board, the subsequent expiration of the contracts in question and the employer's entry into a collective bargaining agreement did not render the case moot. P. 334.
2. That an employer has individual contracts of employment, covering wages, hours and working conditions, with a majority of his employees, which contracts were valid when made and are unexpired, does not preclude exercise by the employees of their right under the National Labor Relations Act to choose a representative for collective bargaining nor warrant refusal by the employer to bargain with such representative in respect of terms covered by the individual contracts. P. 339.

   The relation in general of individual contracts to collective bargaining is discussed.
3. The Board has no power to adjudicate the validity or effect of the contracts here in question, except as to their effect on matters within its jurisdiction. P. 340.
4. Since the desist order literally goes beyond what the Board intended, its language is modified accordingly. P. 341.

134 F. 2d 70, modified and affirmed.

CERTIORARI, 320 U. S. 210, to review a decree which granted enforcement of an order of the National Labor Relations Board, 42 N. L. R. B. 85.

Mr. Clark M. Robertson, with whom *Messrs. John C. Gall, Ben T. Reidy,* and *Howard R. Johnson* were on the brief, for petitioner.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Messrs. Valentine Brookes, Robert B. Watts,* and *Jacob I. Karro,* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This cause was heard by the National Labor Relations Board on stipulated facts which so far as concern present issues are as follows:

The petitioner, J. I. Case Company, at its Rock Island, Illinois, plant, from 1937 offered each employee an individual contract of employment. The contracts were uniform and for a term of one year. The Company agreed to furnish employment as steadily as conditions permitted, to pay a specified rate, which the Company might redetermine if the job changed, and to maintain certain hospital facilities. The employee agreed to accept the provisions, to serve faithfully and honestly for the term, to comply with factory rules, and that defective work should not be paid for. About 75% of the employees accepted and worked under these agreements.

According to the Board's stipulation and finding, the execution of the contracts was not a condition of employment, nor was the status of individual employees affected by reason of signing or failing to sign the contracts. It is not found or contended that the agreements were coerced, obtained by any unfair labor practice, or that they were not valid under the circumstances in which they were made.

While the individual contracts executed August 1, 1941 were in effect, a C. I. O. union petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees. On December 17, 1941 a hearing was held, at which the Company urged the individual contracts as a bar to representation proceedings. The Board, however, directed an election, which was won by the union. The union was thereupon certified as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment.

The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts while they remained in effect. It offered to negotiate on matters which did not affect rights under the individual contracts, and said that upon the expiration of the contracts it would bargain as to all matters. Twice the Company sent circulars to its employees asserting the validity of the individual contracts and stating the position that it took before the Board in reference to them.

The Board held that the Company had refused to bargain collectively, in violation of § 8 (5) of the National Labor Relations Act; and that the contracts had been utilized, by means of the circulars, to impede employees in the exercise of rights guaranteed by § 7 of the Act, with the result that the Company had engaged in unfair labor practices within the meaning of § 8 (1) of the Act. It ordered the Company to cease and desist from giving effect to the contracts, from extending them or entering into new ones, from refusing to bargain and from interfering with the employees; and it required the Company to give notice accordingly and to bargain upon request.

The Circuit Court of Appeals, with modification not in issue here, granted an order of enforcement. The issues are unsettled ones important in the administration of the Act, and we granted certiorari. In doing so we asked counsel, in view of the expiration of the individual contracts and the negotiation of a collective contract, to discuss whether the case was moot. In view of the continuing character of the obligation imposed by the order we think it is not, and will examine the merits.

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an

accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.[1]

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee

[1] See Hamburger, The Extension of Collective Agreements to Cover Entire Trade and Industries (1939) 40 International Labor Review 153; Methods of Collaboration between Public Authorities, Workers' Organizations, and Employers' Organizations (International Labour Conference, 1940) p. 112.

are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Concurrent existence of these two types of agreement raises problems as to which the National Labor Relations Act makes no express provision. We have, however, held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *Labor Board,* 309 U. S. 350. But it is urged that where, as here, the contracts were not unfairly or unlawfully obtained, the court indicated a contrary rule in *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 44–45, and *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515. Without reviewing those cases in detail, it may be said that their decision called for nothing and their opinions contain nothing which may be properly read to rule the case before us. The court in those cases recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements, which is the problem now before us.

Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out

terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.[2]

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

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[2] Cf. *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; *Labor Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 297–98; *Labor Board* v. *Brashear Freight Lines,* 119 F. 2d 379; Hoeniger, The Individual Employment Contract and Individual Bargain, 10 Fordham L. Rev. 14, 22–25.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being

paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Hence we find that the contentions of the Company that the individual contracts precluded a choice of representatives and warranted refusal to bargain during their duration were properly overruled. It follows that representation to the employees by circular letter that they had such legal effect was improper and could properly be prohibited by the Board.

One minor matter remains for consideration. The literal terms of the Board's order require the Company to "cease and desist from (a) giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof, or entering into any similar form of contract with its employees for any period subsequent to the date of this decision," and to give written notice to each to that effect and that "such contract will not in any manner be enforced or attempted to be enforced" and that "such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract."

These provisions, it has been argued, go beyond the Board's power, leave employees free to bring but the Company powerless to defend actions on the contract, and prohibit making future contracts even when not obnoxious to the law or to any collective agreement.

The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction. *National Licorice Co.* v. *Labor Board, supra.* The Board, however, would construe the order more narrowly than its terms suggest. It says, "The provision in question, as we have seen, is based upon the finding that the contracts were utilized as a means of interfering with rights guaranteed by the Act and constituted an obstacle to collective bargaining. Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits from the contracts heretofore utilized to forestall collective bargaining and deter self-organization, and from entering into new contracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence. The paragraph does not prevent petitioner from contracting with individual employees under circumstances which negative any

intent to interfere with the employees' rights under the Act. . . . Thus construed, the challenged requirement is but a reasonable safeguard . . ."

We agree, but the literal language of the order may well be read in quite different meaning, especially when separated from findings and standing alone in the Court's enforcement order. It then becomes the language of the Court, and the Court would not be bound to look upon the Board's construction as its own. Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. Where, as here, the literal language of the order goes beyond what the Board admits was intended, correction should be made. Paragraphs 1 (a) and 2 (a) of the decree of the court below are hereby modified, by adding the words in italics, to read as follows:

"1. Cease and desist from:

"(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof *to forestall collective bargaining or deter self-organization,* or entering into any similar form of contract with its employees for any period subsequent to the date of this Decree *for such purpose or with such effect.*

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Give separate written notice to each of its employees who signed an individual contract of employment or any modification, continuation, extension, or renewal

thereof, or any similar form of contract for any period subsequent to the date of this Decree, that such contract will not in any manner be enforced or attempted to be enforced *to forestall collective bargaining or deter self-organization,* that the employee is not required or expected by virtue of such contract to deal with respondent individually *in respect to rates of pay, wages, hours of employment, or other conditions of employment,* and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract *or to any defenses thereto by the employer.*"

As so modified the decree is

Affirmed.

MR. JUSTICE ROBERTS is of opinion that the judgment should be reversed.

ORDER OF RAILROAD TELEGRAPHERS *v.* RAILWAY EXPRESS AGENCY, INC.

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

No. 343. Argued November 10, 1943.—Decided February 28, 1944.

1. Failure of the carrier to give notice, to the representative of the employees, of an intended change affecting rates of pay of certain individual employees was in violation of § 6 of the Railway Labor Act of 1926, applicable to the collective agreement in question, and rendered ineffective the individual agreements entered into; and the award of the Adjustment Board, based on the collective agreement, was in accordance with law. P. 346.
2. An award of the Adjustment Board under the Railway Labor Act, *held* enforcible in a proceeding in the federal district court begun within two years of the date of the award, and not barred by a state statute of limitation of six years (even if applicable) merely because the claims became six years old while proceedings were pending before the Board. P. 348.

137 F. 2d 46, reversed.

CERTIORARI, 320 U. S. 727, to review the reversal of a judgment for the plaintiff in a suit to enforce an award of the Adjustment Board under the Railway Labor Act.

Mr. William G. McRae, with whom *Mr. Leo J. Hassenauer* was on the brief, for petitioner.

Mr. Blair Foster, with whom *Messrs. A. M. Hartung* and *H. S. Marx* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This hoary litigation presents the question whether a carrier by contracts with individual employees made in 1930 could supersede or expand terms of an agreement collectively bargained between the employer and the union in 1917, in view of the provisions of the Railway Labor Act of 1926, which was applicable when the controversy arose.

Petitioner was a union designated to represent certain crafts and classes of employees of carriers by railroad. Employees here involved are agents at stations on the Seaboard Airline Railroad, who primarily are employees of the railway and secondarily of the railway express agency; they receive compensation from each employer. For some years they were represented by the union in bargaining collective agreements with predecessor express companies. The last was executed in 1917 and was assumed by this respondent March 1, 1929.

In 1930, the Express Company began to handle new business consisting mainly of carload shipments of perishables which formerly had been handled by the railroad company as freight. The Express Company thought the change in volume and character of its shipments warranted an adjustment of rates of pay applicable to certain of the agencies where the shipments originated. The Railway Labor Act of 1926, then in effect, provided that

carriers and representatives of employees should give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and should agree upon time and place of conference.[1] The collective agreement also provided that no change should be made in its terms "until after 30 days' notice in writing has been given." The Express Company gave no such notice to the union signatory to the 1917 collective agreement. Instead, it gave individual notices to the agents that their compensation for such shipments would be $5.00 per car, the notices on one division going out on March 25, and those on another, April 8, and all becoming effective April 10, 1930. The agents involved, after various objections and negotiations, individually accepted the rate, although there is controversy as to whether their acceptance was wholly voluntary. For purposes of decision, however, we assume voluntary assent and that but for provisions of the Railway Labor Act valid individual contracts resulted.

The local chairman of the union protested and insisted that collective bargaining must control the compensation of the agents. The Express Company declined to accede to the claims, and the union's claim that the agents must be compensated under the collective agreement remained unadjusted. Attempts to adjust were renewed by the general chairman, but no voluntary Board of Adjustment was agreed upon as provided under § 3 of the 1926 Act.[2]

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[1] § 6, 44 Stat. 582. This provided: "Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. . . ." The 1934 Act contains a similar provision. § 6, 48 Stat. 1197, 45 U. S. C. § 156.

[2] 44 Stat. 578.

The statutory Board was created in 1934,[3] the Company refused to join the union in a petition, and the union on October 8, 1935, gave notice of its intention to refer the dispute to the Board. The Company challenged the Board's jurisdiction, a hearing was had, the bi-partisan board deadlocked, a referee was named, and in 1936 objections to jurisdiction were overruled and a hearing on the merits was directed. After the hearing the Board again deadlocked, again a referee was chosen, and on December 15, 1937, an award sustaining the claims that the agents were entitled to the compensation provided by the collectively bargained agreement was made, accompanied by a holding that the individual contracts were ineffective. The Company failed to comply with the award and in December 1939, after almost two years, the present action was commenced in the United States District Court. The district courts are given jurisdiction to enforce awards of the Board, its orders and findings being declared to be "prima facie evidence of the facts therein stated." Laws 1934, c. 691, § 3, First (p), 48 Stat. 1192. In June 1942 decision was rendered by which the district court enforced the Adjustment Board's award. The Circuit Court of Appeals reversed upon the ground that the collective agreement had been superseded validly by the individual contracts and upon the further ground that the claims under collective agreements were barred by the statute

[3] Act of 1934, § 3, 48 Stat. 1189. § 3, First (i) provides: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

of limitations.[4] These questions are unsettled ones important to the administration of the current Railway Labor Act, and we granted certiorari.[5]

1. The Company contends that special voluntary individual contracts as to rates of pay, rules, and conditions of employment may validly be made, notwithstanding the existence of a collective agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually. It is said, however, that in this case the agreements affect relatively few agents and that those are specially and uniquely situated. This apparently is true, for the application of the collective agreement results in an award of some $40,000 to one agent over the period and less than $2,000 to all of the others, and most of the awards are for a few hundred dollars.

Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.[6] From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures.[7] It is insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure.

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[4] 137 F. 2d 46.

[5] 320 U. S. 727.

[6] Cf. *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 523–26.

[7] See Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109; Daugherty, Labor Problems in American Industry (1933) p. 415; Taylor, Labor Problems and Labor Law (1938) p. 85 *et seq.;* Golden and Ruttenberg, The Dynamics of Industrial Democracy (1942) pp. 23–26, 82 *et seq.*

Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. Collective bargains need not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits. Had this proposed rate of pay been submitted to the collective bargaining process it might have been settled thereby or might have resulted in an agreement that the Company should be free to negotiate with the agents severally. But the Company did not observe the right of the representatives of the whole unit to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.

The decision in *J. I. Case Co.* v. *Labor Board, ante,* p. 332, considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here.

We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law.

2. The Circuit Court of Appeals held the claims barred by the state six-year statute of limitations applicable in the forum. It is true that the enforcement of the award results in entering judgment in 1942 on claims that began to accrue in 1930 and some of which ceased to accrue over six years before the suit in the District Court was commenced. It also is true that some of these have accrued in large amounts.

If the action brought in 1939 had been a common-law action to recover wages, like that in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, a quite different question of limitations would be presented. The action as brought, however, was not a common-law action but one of statutory origin to enforce the award of an administrative tribunal. A special two-year limitation from the time of award was prescribed by the federal statute,[8] and this action was brought within that period. It is clear that as an action to enforce the award the suit was not barred, and it must therefore have been the opinion of the Circuit Court of Appeals that the statute barred the administrative tribunal from making an award on claims so old. There is no federal statute of limitations applicable to unadjusted claims which the Adjustment Board may consider. It is difficult to see how state statutes of limitations can restrict the power of the federal administrative tribunal to consider and adjust claims. Moreover, even if the six-year statute did apply to the claims under the collective contract, as we think it did not, proceedings on these claims were initiated before the Board well within that time.

If, therefore, these claims are barred, it must be because the time occupied in their litigation before the Adjustment Board operates to defeat them. A state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period.

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of

[8] Act of 1934, § 3, First (q), 48 Stat. 1192, 45 U. S. C. § 153, First (q): "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued.

Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed. We find no basis for applying a state statute of limitations to cut off the right of the Adjustment Board to consider the claims or to absolve the courts from the duty to enforce an award.

The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE ROBERTS is of opinion that the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 137 F. 2d 46.

ANDERSON, RECEIVER, *v.* ABBOTT, ADMINISTRATRIX, ET AL.

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

No. 3. Argued February 8, 1943. Reargued January 12, 13, 1944.—Decided March 6, 1944.

1. Upon the facts, *held* that shareholders of a bank-stock holding company were liable for an assessment on shares of a national bank in the portfolio of the holding company. Construing Federal Reserve Act, § 23; National Bank Act, § 12. P. 356.

So held of shareholders who acquired their holding-company shares by purchase as well as of others who acquired their holding-company shares by transfer of bank shares.

2. A judgment against the holding company in a prior suit by the receiver of the national bank was not *res judicata* of the claim against the shareholders of the holding company for the balance due on the assessment. Nor by instituting the prior suit against the holding company did the receiver make an election which barred the subsequent proceeding against the shareholders of the holding company. P. 354.
3. Findings in which the District Court and the Circuit Court of Appeals concurred, and in respect of which no clear error is shown, accepted here. P. 356.
4. Where a transferor of shares of a national bank retains through his transferee his investment position in the bank, including control, he can not escape the statutory liability if his transferee does not have resources commensurate with the risks of those holdings. In such case, the transferor remains liable as a "stockholder" or "shareholder," within the meaning of the applicable statutes, to the extent of his interest in the underlying shares of the bank. This result is necessary lest the protection afforded by the double liability provisions be lost through transfers to impecunious or not fully responsible holding or operating companies whose stock is owned by the transferor. P. 357.
5. Whether the transfer is made in avoidance of the double liability, or for business reasons which may be considered wholly legitimate, the result is the same, since in either event depositors are deprived of the benefit of double liability. P. 357.
6. The holding-company device here used could be so readily utilized to circumvent the statutory policy of double liability that the stockholders of the holding company rather than the depositors of the subsidiary banks must take the risk of the financial success of the undertaking. P. 359.
7. Stockholders of the holding company are bound by the decision of the directors which determined, within the scope of the corporate charter, the kind and quality of the corporate undertaking. P. 361.
8. That stockholders of the holding company may have claims against an officer or director for mismanagement does not relieve them from liability to the depositors of the subsidiary banks. P. 361.
9. The question of the liability of shareholders of a holding company for assessments in respect of national bank shares held by it is a federal question, unaffected by the law of the State of incorporation of the holding company. P. 365.

10. The innocence and good faith of investors in the holding company are not available to them as defenses in this suit. P. 366.
11. Courts will not allow the interposition of a corporation to defeat a legislative policy. P. 362.
12. The liability of the shareholders of the holding company is to be measured by the number of shares of stock of the national bank, whether several or only fractional, represented by each share of stock of the holding company; and the assessment liability of each share of stock of the holding company must be a like proportion of the assessment liability of the shares of the bank represented by the former. P. 368.

127 F. 2d 696, reversed.

CERTIORARI, 317 U. S. 619, to review the affirmance of a judgment dismissing the complaint, 32 F. Supp. 328, in a suit by a receiver of a national bank against shareholders of a holding company to recover the balance of an assessment of double liability on shares held by the holding company.

Mr. Robert S. Marx, with whom *Messrs. Frank E. Wood, Edward M. Brown, Harry Kasfir,* and *John F. Anderson* were on the briefs, for petitioner.

Mr. William W. Crawford made the original argument and *Mr. Allen P. Dodd* the reargument—*Messrs. Henry E. McElwain, Jr., Richard P. Dietzman, James W. Stites, Edward P. Humphrey,* and *Lafon Allen* were with them on the briefs—for respondents.

Mr. Henry M. Johnson filed a brief on behalf of Susie E. Tellman and other purchasers of holding-company shares, as *amici curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary question in this case is whether on these facts shareholders of a bank-stock holding company are liable under § 23 of the Federal Reserve Act, 12 U. S. C.

§ 64, and § 12 of the National Bank Act, 12 U. S. C. § 63, for an assessment on shares of a national bank in the portfolio of the holding company.

The essential facts [1] may be briefly stated.

BancoKentucky Company was organized under the laws of Delaware in July, 1929. It had broad charter powers in the field of finance. It was organized by the management of the National Bank of Kentucky and of the Louisville Trust Company—banking houses doing business at Louisville. Banco perfected the desired alliance between them by acquiring most of their shares [2] in exchange for its shares. The Bank, the Trust Company, and Banco each had the same directors and certain common officers. Some of the shareholders who made the exchange also purchased additional shares of Banco stock at $25 per share. Banco stock was also sold at that price on the market to those who did not own any shares in the Bank or the Trust Company. All told some $9,900,000 in cash was realized by Banco from the sale of its shares—about $6,000,000 of which was financed on loans from the Bank and from the Trust Company. Banco's stock certificates stated that the shares were "full-paid and non-assessable." Its certificate of incorporation provided that the stockholders' property should "not be subject to the payment of corporate debts to any extent whatever."

The closing date for the exchange of shares was September 19, 1929. Beginning about September 25, 1929, Banco acquired a majority stock interest in each of five

[1] Further details concerning the financial transactions indirectly involved in this litigation may be found in *Atherton* v. *Anderson,* 86 F. 2d 518, 99 F. 2d 883; *BancoKentucky's Receiver* v. *Louisville Trust Co.'s Receiver,* 263 Ky. 155, 92 S. W. 2d 19.

[2] The shares of the Bank and the Trust Company had been earlier transferred to trustees who issued Trustees' Participation Certificates. It was these certificates which Banco received from the shareholders of the two banks in exchange for its shares. The command which Banco had over the underlying shares is described in *Laurent* v. *Anderson,* 70 F. 2d 819.

banks in Kentucky and two banks in Ohio, and a minority stock interest in another bank in Kentucky. Of these eight banks, two were national. The shares of the state, as well as the national, banks in the group carried a double liability.[3] The price paid for the shares in these banks was about $11,500,000—of which some $6,500,000 was paid in cash and $5,000,000 in Banco's shares. Not all of Banco's funds were invested in bank shares. It acquired for $2,000,000 a $2,000,000 note of its president.[4] It purchased 625 shares of a life insurance company for $25,000 cash. It purchased and retired 106,000 of its own shares at a cost of over $2,300,000—some $275,000 less than Banco received for them. It received dividends of about $1,180,000 on the bank stocks owned by it and paid them out at once as dividends on its own shares. It borrowed $2,600,000 from a New York bank and paid back $1,000,000. With $600,000 of that loan it purchased from the Bank certain dubious assets[5]—a transaction which the

[3] See Ky. Rev. Stat. 1942, § 287.360; Ohio Code Ann. 1940, § 710–75. At or about the time of Banco's failure the shares in the other banks were sold or disposed of at rather nominal prices. It appears that the closing of the Bank was followed by heavy runs on these other banks; and the local interests in most of the cities where the banks were located were willing to support the banks to keep them open if Banco would surrender control. Banco, it seems, was also anxious to avoid double liability on those shares.

[4] The president of Banco was also president of the Bank. This note was acquired in November, 1929, from Wakefield & Co. It was secured by 60,000 shares of Banco stock and 22,500 shares of stock of Standard Oil of Kentucky. Nothing was ever paid on the note. Nothing was realized on the Banco stock. Some $440,000 was realized on the Standard Oil stock. In December 1930 the president of Banco and maker of the note filed a voluntary petition in bankruptcy. He was discharged. Wakefield & Co. made an assignment for the benefit of creditors in 1931 and apparently no dividends have yet been paid its creditors.

[5] These were a Murray Rubber note in the amount of $580,000 and a note of Lewis C. Humphrey for $20,000—of which the bank examiner had been quite critical for some time.

Kentucky court later set aside. *BancoKentucky's Receiver* v. *National Bank of Kentucky's Receiver,* 281 Ky. 784, 137 S. W. 2d 357. It was negotiating for the purchase of the shares of an investment banking house when that house, the Bank and the Trust Company failed. That was in November, 1930—a little more than a year after Banco began its financial career. In November, 1930 a receiver was appointed for the Bank and one for Banco. In February, 1931 the Comptroller of the Currency made an assessment on the shareholders of the Bank in the amount of $4,000,000 payable on or before April 1, 1931. And in March, 1931 the receiver of the Bank notified the stockholders of Banco that he had demanded payment of the assessment from the receiver of Banco and that he intended to proceed against them for collection of the assessment to the extent that he was unable to collect from Banco. In October, 1931 the receiver of the Bank brought an action against Banco as holder of substantially all of the Bank's shares. He obtained a judgment (*Keyes* v. *American Life Ins. Co.,* 1 F. Supp. 512) which was affirmed on appeal. *Laurent* v. *Anderson,* 70 F. 2d 819. Some $90,000 was paid on that judgment. The receiver of the Bank thereupon brought this suit against those stockholders of Banco who resided in the Western District of Kentucky in which he seeks to recover from each his proportionate part of the balance of the assessment. Similar suits against other stockholders were brought in federal district courts in other states. The District Court, after a trial, dismissed the bill. 32 F. Supp. 328. The Circuit Court of Appeals affirmed that judgment. 127 F. 2d 696. The case is here on certiorari.

I.

We are met at the outset with the contention that the decision in *Laurent* v. *Anderson, supra,* holding Banco liable on the assessment, is *res judicata* of the present claim;

and that petitioner by bringing that suit made an election which bars the present action. We do not agree. Either the record owner or the actual owner of shares of a national bank may be liable on the statutory assessment.[6] *Richmond* v. *Irons,* 121 U. S. 27, 58; *Keyser* v. *Hitz,* 133 U. S. 138, 149; *Pauly* v. *State Loan & Trust Co.,* 165 U. S. 606; *Lantry* v. *Wallace,* 182 U. S. 536; *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162; *Early* v. *Richardson,* 280 U. S. 496; *Forrest* v. *Jack,* 294 U. S. 158. A receiver may sue both—partial satisfaction of the judgment against one being a *pro tanto* discharge of the other. *Ericson* v. *Slomer,* 94 F. 2d 437. And see *Continental National Bank & Trust Co.* v. *O'Neil,* 82 F. 2d 650. The basis of liability of each is different—apparent or titular ownership in one case, actual or beneficial ownership in the other. Hence the issues involved in each suit are not the same.[7] See *Reconstruction Finance Corp.* v. *Pelts,* 123 F. 2d 503; *Reconstruction Finance Corp.* v. *Barrett,* 131 F. 2d 745, 748. If the receiver were barred from proceeding against one because he had already proceeded against the other, creditors of banks would be deprived of the full benefits of these statutes. The wisdom of the receiver's first suit rather than the fixed statutory liability would be the measure of their protection. There is no justification for such an impairment of the statutory scheme. The rules of election applicable to suits on contracts made by agents of undisclosed principals

[6] Provisions for the termination of double liability on shares of national banks are contained in the Act of June 16, 1933, 48 Stat. 189, and the Act of August 23, 1935, 49 Stat. 708, 12 U. S. C. § 64a.

[7] It is true that the court in *Laurent* v. *Anderson, supra,* stated that Banco was "in every sense the true and beneficial owner" of the shares of the Bank. 70 F. 2d p. 824. But it is apparent from the opinion that the court was answering the contention that the trustees of the participation certificates were responsible for the assessment. Banco's defense was based on § 63 of the National Bank Act. It argued that under that section only funds in the hands of the trustees were liable That argument was rejected by the court.

(*Pittsburgh Terminal Coal Corp.* v. *Bennett*, 73 F. 2d 387, 389) have been pressed upon us. But they have no application to suits to enforce a liability which has this statutory origin. Cf. *Christopher* v. *Norvell*, 201 U. S. 216, 225.

II.

The District Court found, and the Circuit Court of Appeals agreed, that Banco was organized in good faith and was not a sham; that it was not organized for a fraudulent purpose or to conceal enterprises conducted for the benefit of the Bank; that it was not a mere holding company; that it was not formed as a means for avoiding double liability on the stock of the Bank; and that the soundness of the Bank and its ability to meet the obligations could not be questioned until after the formation of Banco. Some of these findings have been challenged. But we do not stop to examine the evidence. We accept those findings, as they were concurred in by two courts and no clear error is shown. *Brewer-Elliott Oil Co.* v. *United States*, 260 U. S. 77, 86; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477. We conclude, however, that the courts below erred in dismissing the bill.

It is clear by reason of *Early* v. *Richardson, supra*, that if a stockholder of the Bank had transferred his shares to his minor children, he would not have been relieved from liability for this assessment. And see *Seabury* v. *Green*, 294 U. S. 165. That follows because of the policy underlying these statutes. One who is legally irresponsible cannot be allowed to serve as an insulator from liability, whether that was the purpose or merely the effect of the arrangement. A father who transfers his shares to his minor children has not found a substitute for his liability. See *Weston's Case*, 5 Ch. App. 614. It does not matter that the transfer was in good faith, without purpose of evasion and at a time when the bank was solvent. *Early* v. *Richardson, supra*. The vice of the arrangement is

found in the nature of the transferee and his relationship to the transferor. Cf. *Nickalls* v. *Merry,* 7 Eng. & Irish App. 530. The same result will at times obtain where the transferee is financially irresponsible. This does not mean that every stockholder of a national bank who sells his shares remains liable because his transferee turns out to be irresponsible or impecunious. It is clear that he does not. *Earle* v. *Carson,* 188 U. S. 42, 54–55. But where after the sale he retains through his transferee an investment position in the bank, including control, he cannot escape the statutory liability if his transferee does not have resources commensurate with the risks of those holdings. In such a case he remains liable as a "stockholder" or "shareholder" within the meaning of these statutes to the extent of his interest in the underlying shares of the bank. For he retains control and the other benefits of ownership without substituting in his stead any one who is responsible for the risks of the banking business. The law has been edging towards that result. See *Hansen* v. *Agnew,* 195 Wash. 354, 80 P. 2d 845; *Metropolitan Holding Co.* v. *Snyder,* 79 F. 2d 263; *Barbour* v. *Thomas,* 86 F. 2d 510; *Nettles* v. *Rhett,* 94 F. 2d 42. We think the result is necessary, lest the protection afforded by these double liability provisions be lost through transfers to impecunious or not fully responsible holding or operating companies whose stock is owned by the transferor. Whether the transfer is made in avoidance of the double liability as in *Corker* v. *Soper,* 53 F. 2d 190, or for business reasons which may be considered wholly legitimate, the result is the same. Depositors are deprived of the benefit of double liability in either event.

Thus it is no bar to the present suit that Banco was organized in good faith, that there was no fraudulent intent, that Banco was not a sham, that it was not a mere holding company, or that the shareholders of the Bank had no purpose of avoiding double liability. We are not

concerned with any question of good intention. The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law. By that test it is clear to us that the old stockholders of the Bank are liable. For they retained through Banco their former investment positions in the Bank, including control, and did not constitute Banco as an adequate financial substitute in their stead. Banco's asset position immediately after its sales of stock cannot be taken as the measure of its financial responsibility. Its liquid condition was fleeting; the raising of the cash was but an interim step in the planned evolution of Banco as a bank-stock holding company. It is the condition of Banco at the end of the promotion which is significant. Banco emerged as a bank-stock holding company. Technically it was not merely such a holding company as it had other interests and investments. But its main assets were stocks in banks, stocks which carried double liability. Its other assets—apart from the $25,000 of life insurance stock—were always highly suspect and dubious. In substance Banco as a going concern had no free assets which could possibly be said to constitute an adequate reserve against double liability on the bank stocks which it held. It was in no true sense comparable to an investment trust or holding company which holds bank stock in a diversified portfolio. If the small amount of life insurance stock be left out of account, the situation is in point of fact not materially different from the case where the only assets held were bank stocks carrying double liability. Such an arrangement, if successful, would allow stockholders of banks to retain all of the benefits of ownership without the double liability which Congress had prescribed. The only substitute which depositors of one bank would have for that double liability would be the stock in another bank carrying a like liability. The sensitiveness of one bank in the group to the disaster of another would likely mean

that at the only time when double liability was needed the financial responsibility of the holding company as stockholder would be lacking. However that may be, the device used here can be so readily utilized in circumvention of the statutory policy of double liability that the stockholders of the holding company rather than the depositors of the subsidiary banks must take the risk of the financial success of the undertaking.[8]

That is a basis of liability sufficiently broad to include also the stockholders of Banco who had not been stockholders of the Bank. As we have noted, many of them acquired their shares either for cash or for shares in other banks. It must be assumed that in making those purchases or effecting those exchanges they knew what kind of an enterprise Banco was. See *Nettles* v. *Rhett, supra,* pp. 48–49; *Anderson* v. *Atkinson,* 22 F. Supp. 853, 863. Circulars of the Chicago Stock Exchange, on which Banco's shares were listed, gave a plain indication of the nature

[8] The history of bank-stock holding companies shows that their organizers were acutely aware of this problem and at times took steps to protect the depositors of the subsidiary banks on possible assessments on the bank stocks. One holding company is said to have kept "at all times an amount in cash or its equivalent equal to our aggregate stockholders' liability on the bank stocks owned by us." Branch, Chain, and Group Banking, Hearings under H. Res. 141, 71st Cong., 2d Sess. (1930) p. 1181. A similar method was for the holding company "to carry in its treasury a large reserve of readily marketable securities which may be liquidated in order to make good any shareholders' liability that may be imposed upon the holding company." Bonbright & Means, The Holding Company (1932), p. 331. Cf. Nineteenth Annual Report, Superintendent of Banks of California (1928), p. 21. Another method of safeguarding the depositors was to make express provision in the charter of the holding company that its stockholders were ratably liable for any statutory liability imposed on it by reason of its ownership of bank stocks. Branch, Chain, and Group Banking, *op. cit.,* pp. 1042–1043; *Barbour* v. *Thomas,* 86 F. 2d 510, 513–514. Wisconsin provided for such a liability by statute. Wis. Stat. 1941, § 221.56.

of the enterprise.[9] So did circulars of dealers.[10] And there would not seem to be any doubt that the old stockholders of the Bank were given at the time of the exchange a fair

[9] "The BancoKentucky Company was organized under the laws of the State of Delaware on July 16, 1929, with an authorized capital of 2,000,000 shares of $10 par value. The Company was organized for the purpose of owning a controlling interest in state and national banks located primarily in Kentucky, Ohio and Indiana. Its charter gives it broad powers entitling it to engage in a wide range of investment and other activities.

"The BancoKentucky Company has acquired, through an exchange of stock, nearly 100% of the shares of the National Bank of Kentucky-Louisville Trust Company, and in addition its stockholders have subscribed to 480,000 shares of its stock for cash. This cash will be used for acquiring majority interests in other banks and for other corporate purposes."

In listing its shares on the Chicago Stock Exchange it gave the Exchange the following description of its business:

"(b) *Primary purpose:* To acquire control and operate Banks and Trust Companies.

"(c) *Nature of Business:* This company has not engaged in the business of investing and reinvesting in a diversified list of securities of other corporations for revenue and profit, but has limited its activities to acquiring control of Banks and Trust Companies and the operation of same."

[10] Thus a circular of Blyth & Co. stated:

"The BancoKentucky Company was recently formed to acquire and hold controlling interests in commercial banks throughout the Middle West. By charter, broad powers are conferred upon the Company, so that all types of operations in the financial field are permitted but no investments are contemplated other than controlling interests in financial institutions.

"Upon completion of present transactions the Company will control the National Bank of Kentucky, organized in 1834, the Louisville National Bank and Trust Co., organized in 1884 as Louisville Trust Company, both of Louisville, Ky., the Pearl Market Bank & Trust Co., organized 1907, and the Brighton Bank & Trust Co., organized 1898, both of Cincinnati, Ohio, and the Central Savings Bank and Trust Company, organized 1906, of Covington, Ky. In addition, the Company has funds of approximately $6,000,000, which are expected to be used for the acquiring of additional banking institutions."

picture of the nature of the enterprise which Banco was about to launch. Some shareholders of Banco claim the right to rescind their purchases of its shares on the ground of misrepresentations in the sale. But whether or not such relief might be granted in some instances, it seems clear that Banco's stockholders are bound by the decisions of the directors which determined, within the scope of the corporate charter, the kind and quality of the corporate undertaking. As was stated in *Christopher* v. *Brusselback,* 302 U. S. 500, 503, "A stockholder is so far an integral part of the corporation of which he is a member, that he may be bound and his rights foreclosed by authorized corporate action taken without his knowledge or participation. *Sanger* v. *Upton,* 91 U. S. 56, 58." And see *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 207, and cases cited. The legality of the investments of Banco's funds for the most part is not challenged. It must be assumed that they were not *ultra vires.* They fall indeed into the category of acts of directors which normally cannot be challenged by stockholders. Cook, Corporations (8th ed.) § 684. These principles, basic in general corporation law, are relevant here as indicating that the stockholders of Banco cannot escape responsibility for the inadequacy of Banco's resources merely because the choice of its investments was made by the officers and directors—acts in which the stockholders did not participate and of which perhaps they had no actual knowledge. The fact that they may have claims against an officer or director for mismanagement does not relieve them from liability to the depositors of the subsidiary banks. Cf. *Scott* v. *DeWeese,* 181 U. S. 202, 213; *Lantry* v. *Wallace,* 182 U. S. 536, 548–554.

Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. *Elenkrieg* v. *Siebrecht,* 238 N. Y. 254, 144

N. E. 519. See 7 Harv. Bus. Rev. 496. Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted. But there are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Justice Cardozo stated that a surrender of that principle of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld." *Berkey* v. *Third Ave. Ry. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 61; *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247. See Powell, Parent & Subsidiary Corporations (1931) pp. 77–81. The cases of fraud make up part of that exception. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574; *Rice* v. *Sanger Brothers*, 27 Ariz. 15, 229 P. 397; *Donovan* v. *Purtell*, 216 Ill. 629, 640, 75 N. E. 334; *George* v. *Rollins*, 176 Mich. 144, 142 N. W. 337; *Higgins* v. *California Petroleum Co.*, 147 Cal. 363, 81 P. 1070. But they do not exhaust it. An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. *Luckenbach S. S. Co.* v. *Grace & Co.*, 267 F. 676, 681; *Oriental Investment Co.* v. *Barclay*, 25 Tex. Civ. App. 543, 559, 64 S. W. 80, 88. And see *Weisser* v. *Mursam Shoe Corp.*, 127 F. 2d 344. Cf. *Pepper* v. *Litton*, 308 U. S. 295, 310; *Albert Richards Co.* v. *Mayfair, Inc.*, 287 Mass. 280, 288, 191 N. E. 430; *Erickson* v. *Minnesota & Ontario Power Co.*, 134 Minn. 209, 158 N. W. 979. That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat. It becomes more important in a situation such as the present one where the statutory policy of double liability will be defeated if impecunious bank-stock holding companies are allowed to be interposed as non-conductors of liability. It has often

been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Assn.*, 247 U. S. 490; *United States* v. *Reading Co.*, 253 U. S. 26. The Court stated in *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Assn., supra,* p. 501, that "the courts will not permit themselves to be blinded or deceived by mere forms or law" but will deal "with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." We are dealing here with a principle of liability which is concerned with realities not forms. As we have said, the net practical effect of the organization and management of Banco was the same as though the shares of the Bank were held in trust for beneficiaries who were in point of substance its only owners. Those who acquired shares of Banco did not enter upon an enterprise distinct from the banking business. Their investment in Banco was in substance little more than an investment in the shares of the Bank. They were as much in the banking business as any stockholder of the Bank had ever been. And they continued in that business through Banco which as a going concern lacked assets adequate as a reserve against the contingent statutory liability. Its stockholders were in point of substance the only source of funds available to satisfy the assessments. For these reasons the old group of stockholders must be held to have retained and the new group of stockholders must be held to have acquired liability as stockholders of the Bank.

To allow this holding company device to succeed would be to put the policy of double liability at the mercy of corporation finance. The fact that Congress did not outlaw holding companies from the national bank field nor undertake to regulate them during the period of Banco's

existence can hardly imply that Congress sanctioned their use to defeat the policy of double liability. It is true that Congress later addressed itself to this problem and in the Banking Act of 1933 (48 Stat. 186, 12 U. S. C. § 61) established certain controls over them. In general, the Board of Governors of the Federal Reserve System was authorized to issue a voting permit entitling a holding company to vote the stock controlled by it on certain conditions. Apart from requirements for examination and non-affiliation with securities companies, § 19 (a) and (e), certain standards for financial responsibility were established and holding companies seeking such permits were granted a specified period of time within which to meet those standards. Where the stockholders of the holding company were liable for the statutory liability, a specified reserve of readily marketable assets was required. § 19 (c). Otherwise, the holding company was required to maintain free of any lien "readily marketable assets other than bank stock" in an amount equal to a larger percentage of the par value of the bank stocks owned. § 19 (b). It is apparent that Congress in that Act protected its policy of double liability by prescribing one standard of financial responsibility for holding companies whose shares were assessable by their terms and another for those whose shares were non-assessable.[11] We need not stop to consider what would be the measure of liability in cases arising under that Act where there had been no compliance with it. But if that Act had been

[11] As stated in S. Rep. No. 77, 73d Cong., 1st Sess., p. 11: "The affiliates of this type (holding companies) are prohibited from voting the stocks of national banks unless they are willing to undertake to accept examination by the Federal Reserve Board, divest themselves of ownership of stock and bond financing concerns, and comply with regulations designed to insure their ownership of sufficient free assets to make sure that they can satisfy the double liability of their shareholders in case any of the banks owned by such a company should go into the hands of receivers or be closed."

applicable to Banco and Banco had complied with it, Banco would then have met the standards of financial responsibility which Congress had prescribed as adequate for the depositors. Yet the fact that Congress later wrote specific standards into the law means no more than a recognition on its part of an evil and a fashioning by it of a specific remedy. It can hardly mean that Congress by its earlier silence had sanctioned the use of the holding company to defeat the protection which it had provided for depositors of national banks. The legislative policy which Congress had long announced was the policy of double liability. It is that policy with which we are here concerned. It is that policy, declared by Congress, which the judicial power may appropriately protect in the way we have indicated, in absence of a choice by Congress of another method.

It is of course true that Delaware created this corporation. But the question of liability for these assessments is a federal question. The policy underlying a federal statute may not be defeated by such an assertion of state power. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 349; *Seabury* v. *Green, supra.* The spectre of unlimited liability for stockholders has been raised. But there is no cause for alarm. Barring conflicting federal incorporation statutes, Delaware may choose such rules of limitation on the liability of stockholders of her corporations as she desires. And those laws are enforceable in federal courts under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. But no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced. We are concerned here with that problem and with that problem alone.

The result which we reach may be harsh to some of the stockholders of Banco. But rules of liability are usually

harsh especially where they are not bottomed on fault. Thus private investors have frequently found contrary to their expectation or understanding that they purchased with their investment an unlimited liability for the debts of the enterprise. *Thompson* v. *Schmitt,* 115 Tex. 53, 274 S. W. 554; *Frost* v. *Thompson,* 219 Mass. 360, 106 N. E. 1009; *Weber Engine Co.* v. *Alter,* 120 Kan. 557, 245 P. 143; *Rand* v. *Morse,* 289 F. 339. It has never been supposed, however, that the innocence and good faith of investors were barriers to such suits. *Horgan* v. *Morgan,* 233 Mass. 381, 385, 124 N. E. 32. Nor can we accede to the suggestion that those defenses should be available here. The policy underlying double liability is an exacting one. Its defeat cannot be encouraged through the utilization of financial devices which put a premium on ignorance.

The suggestion that there should be no liability without fault unless a statute establishes it denies the whole history of the judicial process in shaping the rules of vicarious liability. The liability of a master for the torts of his servant certainly started from no such foundation. And the rules which made those who purchased shares in Massachusetts business trusts responsible for the debts of the enterprise were evolved, with few exceptions, on a common law, not a statutory, basis. Magruder, The Position of Shareholders in Business Trusts, 23 Col. L. Rev. 423. In the field in which we are presently concerned, judicial power hardly oversteps the bounds when it refuses to lend its aid to a promotional project which would circumvent or undermine a legislative policy. To deny it that function would be to make it impotent in situations where historically it has made some of its most notable contributions. If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with

the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we were helpless to fashion the instruments for appropriate relief.

In summary, we see no difference between the various classes of stockholders of Banco which would support a difference in their liability. Those who purchased stock of Banco for cash were as much participants in the banking business as those who acquired their stock in exchange for shares of the Bank. Together they shared the benefits of ownership of the subsidiary banks, including control. Certainly a sale of shares of Banco by the old stockholders of the Bank did not give those shares an immunity bath. To draw distinctions between the classes of stockholders of Banco would be to make the protection afforded by these statutes turn on accidents of acquisition quite irrelevant to the concept of "stockholders" or "shareholders" on whom Congress placed this liability. One simple illustration will make that plain. A purchases shares of an underlying bank for $10,000 in cash and exchanges those shares for shares of Banco. B hands over to Banco $10,000, Banco purchases the shares of the underlying bank, and then issues its shares to B. From the practical point of view A and B are investors of the same class. To say that A is liable and B not liable when both start with cash and end with identical investments is to make the difference between liability and no liability turn on distinctions which have no apparent relevancy to the legislative policy which the rule of double liability was designed to protect. And to say that courts may hold A liable but not B is to make the occasions for the assertion of judicial power turn on whimsical circumstances.

The final suggestion is that the old stockholders of the Bank remain liable for the full assessment on the shares

of the Bank which they exchanged for shares of Banco. But that overlooks the fact that their interest in those underlying shares was diluted by the issuance of Banco's shares to others.[12] Double liability is an incidence of ownership. It has long been held that a stockholder who in good faith parts with all his interest in the shares rids himself of that double liability, even though his transferee is not responsible. *Earle* v. *Carson, supra.* We could hardly adhere to that principle and still hold the old stockholders of the Bank liable for the full assessment on the shares which they exchanged for shares of Banco. The other stockholders of Banco acquired through their investment in it an interest in the shares of the Bank. To the extent of that interest the beneficial ownership of the old stockholders of the Bank in its shares was as definitely reduced as if they had made a transfer of that part of their holdings.

Certain stockholders of Banco claim that they are entitled to rescind their purchases of Banco's shares because of misrepresentations made to them when they acquired the shares. We do not reach those questions. Nor do we stop to determine whether such a defense would avoid liability on the assessment (cf. *Oppenheimer* v. *Harriman National Bank & Trust Co.*, 301 U. S. 206) and, unlike the case where some shareholders are insolvent (*United States* v. *Knox*, 102 U. S. 422, 425), increase the *pro rata* liability of the other shareholders of Banco. It is sufficient at this time to state that the liability of the shareholders of Banco would be measured by the number of

[12] The old stockholders of the Bank have a lesser interest in the shares of the Bank than they had prior to the exchange. Their interest in the shares of the Bank decreased proportionately with the increase in the outstanding stock of Banco. That resulted in a *pro rata* reduction in their liability. The other group of stockholders of Banco acquired that portion of the liability of which the old stockholders of the Bank were relieved.

shares of stock of the Bank, whether several or only fractional, represented by each share of stock of Banco; and that the assessment liability of each share of stock of Banco would be a like proportion of the assessment liability of the shares of the Bank represented by the former.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE JACKSON, dissenting:

MR. JUSTICE ROBERTS, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and I find ourselves unable to join in the judgment of the Court.

The Court accepts concurrent findings of fact by the two lower courts, but reverses their concurrent judgment. It holds that the findings establish liability as matter of law on two very different kinds of stockholdings: (1) holding company stock taken in exchange for double liability stock of the National Bank of Kentucky; and (2) holding company stock bought and fully paid for in cash. We think holders of the latter are not liable on any principle heretofore known to the law and that if owners of the former are to be held it must be on a quite different principle than that stated by the Court.

I.

Former National Bank of Kentucky stockholders had stock in the Bank itself which carried double liability.[1]

[1] The pertinent sections of the Bank Act follow:

"The shareholders of every national banking association shall be held individually responsible . . . for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; . . ." 12 U. S. C. § 63.

"The stockholders of every national banking association shall be held individual responsible for all contracts, debts, and engagements of

The Bank failed November 30, 1930, and if they had then held that stock, each would have been liable for assessment upon his shares. The aggregate assessment was $4,000,000. Only about a year before the failure, on September 19, 1929, this double-liability bank stock was exchanged for shares of the holding company purporting to be fully paid and nonassessable. At the same time Bank of Kentucky stockholders also bought additional holding company stock for cash to the amount of $4,471,950. Bank of Kentucky stockholders as a group thus paid into the holding company cash more than sufficient to meet the assessment now levied. In addition to that, investors who were not connected with the Bank bought shares for cash amounting to $5,397,000. The Court nevertheless holds that the Bank of Kentucky stockholders contravened the policy of the law and are subject to the double liability because they "did not constitute Banco as an adequate financial substitute in their stead." We do not see how such a statement of fact, and it certainly is not a matter of law, can be conformable with acceptance of the findings of fact of the courts below. Nor are we able to reconcile the view that "the old group of stockholders must be held to have retained . . . *liability as stockholders of the Bank*" with the one later expressed that their interest was "diluted" so as to give them a *pro rata* reduc-

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such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure." 12 U. S. C. § 64.

tion of liability. (See note 12 of the opinion of the Court.) (Emphasis supplied.) It seems to us that the transfer of their bank stock to the holding company either was valid, in which case it relieved of all liability; or it was invalid, in which case it relieved of no liability. The doctrine that a transfer may be good enough to dilute liability but bad enough to carry along a part of it is new to us and we have difficulty grasping its implications.

We are, however, agreed that it would be a proper use of the power of this Court for it to examine the evidence that lies back of these findings and determine whether clear error has been committed and whether the conditions disclosed are such that a *bona fide* transfer of the stock took place sufficient to shake off double-liability obligations.

In spite of the exchange of National Bank of Kentucky stock, its stockholders through the holding company kept both a large measure of control of the Bank and the benefits of investment in it. They, or those acting in their behalf, had determined the policy of the holding company, had sponsored its representatives, and had selected its officers and personnel, including the manager who proved to be false to his trust. There is evidence that the National Bank of Kentucky had for some time been under criticism by the Comptroller for many of its loans and some of its policies, although it is found not to have been insolvent. The exchange did not consist of individual acts but was a concerted movement, planned by the Bank management, by which the holding company absorbed all of the stockholdings and all of the double liability.

The Court might properly, if examination of the evidence should warrant it, reach a legal conclusion that the double liability of the stockholders of the National Bank of Kentucky survives the exchange and that those who have continued their interest in the Bank through the holding company are liable upon assessment in the same manner and to the extent that they would have been had

the holding company transactions never occurred. But this would be because the formal transfer of the stock out of their own names would not be recognized as a defense. The Court's conclusion rests on a quite different theory. It concludes that the transfer was valid to relieve these stockholders of their liability *as stockholders of the Bank,* but that they became subject to a new and smaller liability *as stockholders of a holding company.* With this we cannot agree. The holding company, its financing, its management, and all that relates to it constitute relevant material as to whether under principles that have long been recognized the transfer is good. We do not think they create a new liability.

II.

After holding that former owners of National Bank of Kentucky shares are liable because they did not find an adequate substitute for their own personal liability, the Court proceeds to hold purchasers of holding-company stock for cash to be under a substituted liability *pro tanto.* The grounds upon which Bank of Kentucky stockholders and non-Bank of Kentucky stockholders are both held seem to conflict. If the new stockholders for cash are liable it is hard to see why the old ones have not found a substitute, and if the Bank of Kentucky stockholders have not found a substitute, it is difficult to see a basis on which the new stockholders are liable.

Stock purchasers for cash have at no time owned a stock that purported to carry double liability. On the contrary, by the terms of the stock certificates and by the law of the corporation's being, their shares were fully paid and nonassessable. These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability. No statute of the United States and no applicable state statute then or since has purported to impose a double liability upon these holding-company shares.

No controlling precedent in this Court at the time these stockholders purchased or since (until today) purported to attach a double liability to such shares.[2]

[2] The authorities cited to support the Court's disregard of the corporate entity fall far short of persuasion. The quotation of the statement by Mr. Justice Cardozo from *Berkey* v. *Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58, 61, "that a surrender of that principle of limited liability would be made 'when the sacrifice is essential to the end that some accepted public policy may be defended or upheld'" has a very different significance in its context. The facts, including interchangeable names of parent and subsidiary, complete financial and operating domination, and use of one company's assets by the other, indicated a stronger case for disregard of the corporate fiction than do the findings here. Nevertheless, Chief Judge Cardozo considered that the corporate entity could not be disregarded in favor of a tort claimant and said: "In such circumstances, we thwart the public policy of the State instead of defending or upholding it, when we ignore the separation between subsidiary and parent, and treat the two as one."

Other cases cited afford no more support for the decision. *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247, held that payments by a carrier to a corporation wholly controlled by a shipper might constitute rebates under the Elkins Act. The statements in Powell, Parent & Subsidiary Corporations, 77–81, are completely general and to be read in the light of the specific categories which precede the page citation, all of which involve active wrong by a parent corporation. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, involved the question whether an "instrumentality" corporation could acquire rights which would enable it to stand better than its transferor-creator. *Rice* v. *Sanger Brothers*, 27 Ariz. 15, 229 P. 397, found a corporation to be organized for fraudulent purposes and the former partners who became its stockholders were held liable. *Donovan* v. *Purtell*, 216 Ill. 629, 75 N. E. 334, holds nothing more than that an officer of a corporation who is personally guilty of fraud will be held liable therefor. *George* v. *Rollins*, 176 Mich. 144, 142 N. W. 337, stands for the proposition that equity will enforce a restrictive covenant against a successor corporation formed for the purpose of evading it. *Higgins* v. *California Petroleum Co.*, 147 Cal. 363, 81 P. 1070, held that in the circumstances certain successor corporations assumed a lease and therefore had to pay royalties; there was no disregarding of the corporate entity involved. *Luckenbach S. S. Co.* v. *Grace & Co.*, 267 F. 676,

The reason given for this decision is that "the interposition of a corporation will not be allowed to defeat *a legislative policy*" and that "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the *federal policy*

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comes nearer the mark, but still is far wide of it. A steamship corporation leased its fleet of vessels to a $10,000 corporation, formed and 90 per cent owned by it, for an utterly inadequate rental. It was held that this turning over of the corporation's ships to a subsidiary which was "itself in another form" rendered the parent corporation liable for the subsidiary's breach of contract. *Oriental Investment Co.* v. *Barclay*, 25 Tex. Civ. App. 543, 64 S. W. 80, allowed a hotel employee to recover for personal injuries against the parent holding company, even though technically he was the employee of the subsidiary operating company, of whose existence he was unaware and which had been capitalized with $2,000 to operate a property whose monthly rental alone was $1,500. *Weisser* v. *Mursam Shoe Corp.*, 127 F. 2d 344, arose on dismissal of the complaint and it was held that on a full trial it might be found that the subsidiary was "only a tool of the other defendants, deliberately kept judgment-proof, to obtain the benefits of a lease with the plaintiffs without assuming any obligations. The plaintiffs allege that this was done fraudulently. . . ." *Pepper* v. *Litton*, 308 U. S. 295 and *Albert Richards Co.* v. *Mayfair, Inc.*, 287 Mass. 280, 191 N. E. 430, both dealt with cases where parent corporations claimed priority over other creditors of a subsidiary; in each, the subsidiary was held to be an instrumentality of the parent and, to avoid a fraud on creditors, the latter's claim of priority was denied. In *Erickson* v. *Minnesota & Ontario Power Co.*, 134 Minn. 209, 158 N. W. 979, a parent corporation was held liable for damage caused by a dam owned by a subsidiary; the parent paid the operating expenses of the dam, took all the earnings of the subsidiary, had a mortgage on all its assets, ad in addition had a direct right of control over the operation of the dam. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, and *United States* v. *Reading Co.*, 253 U. S. 26, held that a railroad's exercise of its power as a stockholder might amount to such a commingling of affairs as to make it liable for a violation of the commodities clause. *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Assn.*, 247 U. S. 490, held that additional terminal charges made by a wholly owned subsidiary as compared with terminal charges by the parent might be held to constitute a discrimination.

concerning national banks which Congress has announced." (Italics supplied.)

We have been unable to find that Congress ever has announced a legislative policy such as the Court announces. And the Court nowhere points it out. The National Banking Act applicable at the time provided that the stockholders "of every national banking association" shall be under assessment liability. But Congress nowhere has said that the stockholders of a corporation that is not a national banking association shall be liable to assessment because the latter corporation held some or all of the stock of a national bank. Indeed, the history of banking legislation shows that Congress has considered the problems created by the holding company and not only has failed to adopt such a policy as the Court is declaring, but has made other provisions inconsistent with such a policy.

No legislation on the subject appears until 1933, when Congress enacted detailed regulation of the relations between holding companies and national banks. It required the holding company to obtain a permit to vote national bank shares and empowered the Board of Governors of the Federal Reserve System to grant or withhold the permit.[3] No permit can be granted except upon certain

[3] § 19 of the Banking Act of 1933, amending § 5144 of the Revised Statutes, provides in part as follows:

". . . shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted.

. . . . . .

"For the purposes of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

"Any such holding company affiliate may make application to the Federal Reserve Board for a voting permit entitling it to cast one

conditions, and assumption by holding-company stockholders of an assessment liability is not among them. In general, they are (a) that the holding company must submit to examination in the same manner as the national bank and must publish periodic statements of condition; (b) that after five years from the statute's enactment, each holding company must possess readily marketable assets and free assets other than bank stock in a pre-

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vote at all elections of directors and in deciding all questions at meetings of shareholders of such bank on each share of stock controlled by it or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Federal Reserve Board may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

"(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

"(b) After five years after the enactment of the Banking Act of 1933, every such holding company affiliate (1) shall possess, and shall

scribed amount; and (c) that after five years a holding company *whose stockholders or members are individually and severally liable* may be relieved of establishing a part of this reserve under certain circumstances. Congress was informed that some bank stock holding corporations were, by the law of the states in which they were incorporated, subject to double liability just as were stockholders of banks. It was also informed that other bank holding

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continue to possess during the life of such permit, free and clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

"(c) Notwithstanding the foregoing provisions of this section, after five years after the enactment of the Banking Act of 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be made up within such period as the Federal Reserve Board may by regulation prescribe . . ." June 16, 1933, c. 89, 48 Stat. 186–7.

corporations by the law of their incorporation were not so liable.[4] It did not expressly or by implication recognize or create a uniform double liability by federal act on stockholders of state-created holding companies. It made specific provision, on the contrary, for each class of corporation. Where does this Court get authority to disregard the distinction Congress has thus created and to impose a single rule of its own making instead? When Congress has expressly set up a standard of diversification

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[4] At the Senate hearings which preceded the Banking Act of 1933, Mr. L. E. Wakefield, vice-president of one of the largest bank holding companies, testified as follows with respect to double liability:

"Mr. Wakefield. The stockholders of the First Bank Stock Corporation, being a Delaware corporation, do not have a double liability. When we started to organize this institution we did all the work on the theory we would have it a Minnesota corporation, which would have double liability. At the last minute, when we found that every stockholder in North Dakota, South Dakota, and Montana would, in case of death, have a double inheritance tax, they complained so strongly about that situation we shifted and put it into a Delaware corporation.

. . . . . .

"The other factor that we have heard discussed and that I think of in connection with banking such as we are doing is this thought in the public mind, or some minds, that, for instance, our being a Delaware corporation was intended to avoid the double liability of stockholders. I would say that if that is of importance it might easily be provided that a holding company should create a surplus account in its holdings or build up a surplus account of some proportion of the capital of the banks that should be kept in liquid securities, or something of that sort. . . ." Hearings before Senate Committee on Banking and Currency Pursuant to S. Res. 71, 71st Cong., 3d Sess., Pt. 4, pp. 616, 620.

Earlier, Mr. J. W. Pole, Comptroller of the Currency, had testified:

"Mr. Pole. We call that a group-banking system in the Northwest. In the case of the Northwest and the First Bank Stock Corporation, I think that their stock is not subject to the double liability, although the stock of some holding corporations is subject to double liability. But in the case of those two corporations, in those particular cases—

for holding company assets and has given the companies five years to meet it, from what do we derive authority to say the five-year adjustment period shall be ignored? How can we say retroactively that there is a liability for failure to do before Congress acted something which, after it did act, it expressly gave five years to do? And how can such a result be said to be an enforcement of congressional policy, which we understand to be the basis of the Court's opinion?

III.

If to legislate were the province of this Court, we would be at liberty candidly to exercise discretion toward the

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not that it obtains too generally—they have invested in securities other than bank stocks, so that a judgment against either one of those corporations would be good for the assessment.

Mr. Willis. In those particular cases?

Mr. Pole. In those particular cases; yes, sir.

Mr. Willis. But there are cases where they are not subject to the assessment?

Mr. Pole. There are cases where they are not subject to the assessment; yes, and where they hold nothing but bank stocks.

Mr. Willis. In those cases where you have an affiliated bank that buys all the stock of the bank itself, what becomes of the double liability of the shareholder?

Mr. Pole. The securities company where it buys the stock of the bank itself, would be the holder of the stock and subject to assessment.

. . . . .

Mr. Willis. Is not the double liability then very largely neutralized?

Mr. Pole. Yes.

Mr. Willis. What have you done to correct that?

Mr. Pole. We have done nothing to correct it.

Mr. Willis. What can be done by law to correct it?

Mr. Pole. That is a big problem.

Mr. Willis. Can you make a recommendation covering that along with your other problems?

Mr. Pole. Yes."

Senate Hearings, *supra*, Part 1, pp. 27–28.

For a provision extending double liability to holding-company stockholders, see Wisconsin Stat. (1943) § 221.56 (3).

undoing of the holding company. Some of us feel that as utilized in this country it is, with a few exceptions, a menace to responsible management and to sound finance, shifting control of local institutions to absentee managements and centralizing in few hands control of assets and enterprises bigger than they are able well to manage—views which are matters of record.[5]

But we are of one opinion that no such latitude is confided to judges as here is exercised. We are dealing with a variety of liability without fault. The Court is professing to impose it, not as a matter of judge-made law, but as a matter of legislative policy, and it cannot cite so much as a statutory hint of such a policy. The Court is not enforcing a policy of Congress; it is competing with Congress in creating new regulations in banking, a field peculiarly within legislative rather than judicial competence. Nor was such a policy of assessment liability one whose importance was so transcending as to set aside the policy of permitting corporate enterprise under limited liability. Congress has since repealed the double liability, even of holders of stock in national banks;[6] and when in force, it had little practical value to depositors.[7] States also have

[5] See 56 Reports of American Bar Association (1931) p. 763; Briefs for Government in *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419; testimony in support of a proposal to withdraw from holding companies tax exemption of intercorporate dividends, Hearings before Senate Committee on Finance, on H. R. 8974, 74th Cong., 1st Sess., p. 221, *et seq.*

[6] The removal of liability is conditioned upon giving the notice prescribed. June 16, 1933, c. 89, § 22, 48 Stat. 189, Aug. 23, 1935, c. 614, § 304, 49 Stat. 708; 12 U. S. C. § 64a.

[7] Comptroller Pole stated at the Senate hearings: "We hear a good deal about double liability. It is not so important as at first one might so regard it. As an illustration, the deposits, we will say, of a bank with $100,000 capital would be ordinarily $1,000,000. If you collected the entire 10 per cent assessment, you only would collect 10 per cent of your deposits after all. . . . But in practice you would not

abandoned the assessment plan.[8] Courts should, of course, see that the congressional policy is not defeated by any fraud, by creating sham corporations, or by any other artifice. When, however, assessment liability is a failure only because the corporate owner of the stock is not solvent, that is not a circumstance which will warrant disregard of the corporate entity so as to render stockholders liable. The findings here, accepted by the Court, eliminate every charge of fraud, bad faith, or intentional evasion of liability.[9]

We are fully agreed that Bank of Kentucky depositors, however, should not be prejudiced by a transfer to the holding company of its stock in violation of letter or spirit

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collect over 50 per cent of that. We do collect, as a matter of fact, just about 50 per cent." Hearings, *supra* note 4, Pt. 1, p. 28.

Depositors in the bank have already received 77 per cent of their deposits. Few pre-depression investments have yielded so much. About 6,000 stockholders of Banco have lost 100 per cent of their investment, and are now faced with liability in undetermined amounts. As to many of them, it is idle to say that they had actual responsibility for the Bank's management or any better knowledge of its affairs than the depositors.

[8] Within the last decade at least thirty-one states which formerly had double liability have abolished it either absolutely or upon compliance with certain conditions. Only five states appear to have retained their double liability provisions intact, and in one of these a proposal to abolish it is currently being considered. See "Stockholders' Double Liability," Commerce Clearing House State Banking Law Service, Vol. II.

[9] Findings of the trial court included the following:

"61. Banco was organized in good faith.

62. Banco was 'certainly not a sham.'

63. Banco was 'not organized for a fraudulent purpose or to conceal secret or sinister enterprises conducted for the benefit of the Bank.'

64. Banco was not a mere holding company.

65. Banco 'was formed for the purpose set out in the letter of July 19, 1929, and for no other purpose.'

66. Banco 'was not formed as a medium or agency through which to avoid double liability on the stock of the Bank.' "

of the National Banking Act. If the case warrants disregard of the transfer, the depositors then would have just the protection that they would have enjoyed had no holding company intervened. The Court, however, makes the holding company a windfall to bank creditors by extending the liability to persons never otherwise reachable. We may disallow the holding company as a sanctuary for stockholders escaping pre-existing liability without making of it a trap for unwary and unwarned investors.

To disregard the transfer of this stock, and to hold former stockholders liable to the same extent as if they had made no such transfer, is the manner of proceeding indicated under proper circumstances by the National Banking Act itself. Instead of considering whether to disregard the transfer the Court disregards the corporate entity of the holding company because it says these obligations arise from legislative policy. Even if we could find such a policy, legislative liabilities are numerous. It is probably a legislative policy that a corporation shall pay all of its debts. The reasoning employed by the Court, we should think, would leave it uncertain whether stockholders may not be liable for many other types of indebtedness. Congress, if the matter of banking reform were left to it, could define the limits of vicarious liability at the time it was imposed. The Court is leaving the limits and extent of that liability so vague that a whole cluster of decisions will have to be written to clarify what is being done today. And meanwhile we know of no way that a stockholder can learn the extent and circumstances of stockholder liability except to give his name to a leading case.[10]

The Court admits that the judgment is "harsh." Why is it so if it is according to any law that was known or

[10] This Court has considered the disregard of the corporate fiction in *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273 and *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24.

knowable at the time of the transactions? To enforce a double liability so incurred would be no harsher than to enforce any contract obligation that had been assumed without expecting it would result in liability. This decision is made harsh by the element of surprise.[11] Its only harshness is that which comes of the Court's doing with backwards effect what Congress has not seen fit to do with forward effect.

JOHNSON ET AL. *v.* YELLOW CAB TRANSIT CO.

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

No. 447. Argued January 6, 7, 1944.—Decided March 13, 1944.

Intoxicating liquors in transit from a consignor in Illinois to a consignee at Fort Sill Military Reservation were seized in Oklahoma by state officers. The carrier instituted a proceeding in the federal district court for the return of the liquors and to restrain further interference with their transportation to destination. *Held*:

1. The transportation of the liquors through Oklahoma violated no law of that State and the seizure was illegal. P. 386.

2. Upon the facts, the purchase and delivery of the liquors were not in violation of 10 U. S. C. § 1350. P. 388.

3. Applicability of the federal assimilative crimes statute is not decided. P. 390.

4. Upon the record, the carrier, which had acted in good faith, was not barred by the "clean hands" doctrine and was entitled in this proceeding to the relief sought. Pp. 387, 392.

137 F. 2d 274, affirmed.

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[11] In authoritative studies made prior to the origin of this controversy which included studies of many of the cases cited by the Court's opinion we are unable to find a trace or suggestion of the present theory of stockholder liability for corporate obligations created by legislation. See Douglas and Shanks, Insulation from Liability through Subsidiary Corporations (1929), 39 Yale L. J. 193; Powell, Parent and Subsidiary Corporations (1931), esp. Ch. III; Wormser, Disregard of the Corporate Fiction (1927).

CERTIORARI, 320 U. S. 731, to review the affirmance of a decree of injunction, 48 F. Supp. 594.

Mr. Sam H. Lattimore, Assistant Attorney General of Oklahoma, with whom *Mr. Randell S. Cobb,* Attorney General, was on the brief, for petitioners.

Messrs. John B. Dudley and *Duke Duvall* for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners are officials of Oklahoma State and Oklahoma County concerned with enforcement of Oklahoma's liquor laws. Respondent is a common carrier by motor vehicle authorized by the Interstate Commerce Commission to transport in interstate commerce various commodities, including wines and liquors. See U. S. C. Title 49, c. 8. In regular course of business the respondent-carrier undertook to transport 225 cases of wines and liquors from East St. Louis, Illinois, through Missouri, into Oklahoma and thence to a consignee at Fort Sill, a military reservation within the boundaries of Oklahoma. While the vehicle carrying the liquors was momentarily stopped at Oklahoma City for the purpose of loading and unloading other freight, the petitioner-officials forcibly seized and took away the liquors.

The carrier filed a complaint in the federal District Court alleging that the seizure constituted an unlawful interference with its authorized interstate transportation, and praying that the Court order the officials to return the liquors so that it might deliver them to the consignee at Fort Sill. The answer to the complaint, in substance, admitted the material facts relative to the shipment and seizure of the liquors but denied the allegation of the complaint that the seizure was unlawful. The answer did not allege that judicial proceedings concerning the seized liquor were pending, or were to be commenced, in an

Oklahoma state court. After a trial on stipulated facts, the District Court ordered the liquors returned to the carrier and forbade the officials to interfere with completion of the shipment. 48 F. Supp. 594. The Circuit Court of Appeals, one Judge dissenting, affirmed. 137 F. 2d 274.

Questions presented in the petition for review concerning important state and federal relationships with regard to federal enclaves prompted us to grant certiorari. 320 U. S. 731. Argument has revealed, however, that the determinative issues are more narrow: (1) Did transportation of the liquors through Oklahoma violate that State's law so as to justify their seizure? (2) Should the District Court have denied the carrier equitable relief because of the "unclean hands" doctrine, even though seizure of the liquors by the officials was illegal? This second question rests on the disputed premise that introduction of the liquors into Fort Sill would have violated the laws of the United States.

Petitioners do not claim, nor could they claim, that either of these two separate questions should be decided in their favor on the ground that Oklahoma has power to control liquor transactions on the Fort Sill Reservation. With certain minor exceptions not here material, Oklahoma ceded to the United States in 1913 whatever authority it ever could have exercised in the Reservation.[1] The Oklahoma Supreme Court has recognized that the general power to govern the Fort Sill area is vested in the United States, not in Oklahoma,[2] and our decisions lead to the same conclusion.[3]

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[1] Oklahoma Laws, 1913, c. 52, p. 90.

[2] See *Utley* v. *State Industrial Commission,* 176 Okla. 255, 55 P. 2d 762; *In re Annexation of Reno Quartermaster Depot Military Reservation,* 180 Okla. 274, 69 P. 2d 659.

[3] See *Collins* v. *Yosemite Park Co.,* 304 U. S. 518, 533; *Pacific Coast Dairy* v. *Department of Agriculture,* 318 U. S. 285, 294.

First. Since power to govern Fort Sill is in the United States, and since the seized liquors were not to be sold, delivered or otherwise disposed of in Oklahoma proper, as distinguished from Fort Sill, the only Oklahoma laws called to our attention which could have justified the seizure are those which apply to liquor transportation. No Oklahoma law purports on its face to prohibit or regulate interstate shipments of liquor into and through the state to another state, or to an area subject to the exclusive jurisdiction of the United States. And we were informed at the bar by Oklahoma's legal representative that no state statute had been construed by any state court as applying to such through shipments. Oklahoma law does make it unlawful "to import, bring, transport, or cause to be brought or transported *into the State* . . . intoxicating liquor . . . without a permit . . . as hereinafter provided." Okla. Stat. (1941) Title 37, § 41. The argument is that the Oklahoma legislature intended this statute to apply to liquor imported into the Fort Sill Reservation because the latter is located within the exterior boundaries of Oklahoma. Were this statute intended to do no more than provide a means whereby the state could protect itself from illegal liquor diversions within the area which Oklahoma has power to govern, the interpretation asked might well be an acceptable one. *Duckworth* v. *Arkansas*, 314 U. S. 390; *Carter* v. *Virginia*, 321 U. S. 131. But the statute has no such limited purpose. No permit to transport liquor into Oklahoma can be obtained at all except for scientific, mechanical, medicinal, industrial, or sacramental purposes. Okla. Stat. (1941) Title 37, § 42. To construe the state statute in the manner urged would be to say that, although Oklahoma admittedly has no power directly to regulate the liquor traffic on the Reservation, the Oklahoma legislature intended practically to exclude from the Reservation liquor which might be put to legal uses under controlling United States laws. Neither the words nor

the scheme of the statute in question, nor any other relevant material pointed out to us, indicate that the Oklahoma legislature had such a purpose. Had the legislature expressed such a purpose, questions would be raised which we need not here consider. See *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 533; *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U. S. 285, 295. Consequently, we find no justification for the seizure in Oklahoma law.

Second. But it is said that despite the fact the seizure was illegal and wholly without justification, the consignee could not have received the liquors without violating the laws of the United States and for that reason the District Court should have denied the carrier any relief under the "clean hands" doctrine.

We may assume that because of the clean hands doctrine a federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law.[4] But this does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law in the transactions involved.[5] The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but "upon considerations that make for the advancement of right and justice." *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245. It is not a rigid formula which "trammels the free and just exercise of discretion." *Ibid.*, 245, 246.

[4] See generally 2 Pomeroy's Equity Jurisprudence (5th Ed.) §§ 402, 403. Cf. *Bentley* v. *Tibbals*, 223 F. 247, 252; *Bonnie & Co.* v. *Bonnie Bros.*, 160 Ky. 487, 495, 169 S. W. 871.

[5] See, e. g., *Catts* v. *Phalen*, 2 How. 376; *Kinsman* v. *Parkhurst*, 18 How. 289, 293; *Stark* v. *Grant*, 16 N. Y. S. 526; *Martin* v. *Hodge*, 47 Ark. 378, 1 S. W. 694.

Therefore, before deciding the applicability of the maxim to the case at hand, we must examine the particular transactions and circumstances involved together with the federal laws which are alleged to taint these transactions with illegality.

As shown by the stipulated facts in this record, the circumstances of the liquor shipment were as follows: Fort Sill had an Officers' Club, which provided among other things an officers' mess, living quarters for some Officers, and other customary club facilities. Several hundred Officer-members gave to the Club Secretary, himself an Officer, separate written orders for liquor together with money or checks in payment for the respective orders. Acting for the Officer-members, the Secretary telephoned from Fort Sill to a dealer at East St. Louis, Illinois, and ordered the liquors shipped to the Club. The dealer delivered the liquors to the respondent-carrier under a uniform through bill of lading. It was this shipment which the state officials seized. Had the shipment not been seized it would have arrived at the Club for delivery to the several Officers who had paid for it.

It is first contended that purchase and delivery of the liquors were in violation of U. S. C. Title 10, § 1350, set out in the margin.[6] The agreed facts, summarized above, sufficiently show that the transactions were not in violation of this statute.

Petitioners next argue that the liquor transactions here involved were in violation of the assimilative crimes statute.[7] This statute, it is said, adopts all of the various

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[6] "The sale of or dealing in, beer, wine or any intoxicating liquors by any person in any post exchange or canteen or army transport or upon any premises used for military purposes by the United States, is hereby prohibited. The Secretary of War is hereby directed to carry the provisions of this section into full force and effect." 31 Stat. 758; U. S. C. Title 10, § 1350. See Note 9, *infra*.

[7] "Whoever, within the territorial limits of any State, . . . but within or upon any of the places now existing or hereafter reserved

penal statutes of Oklahoma relating to liquor and makes them the federal law applicable to the Fort Sill Reservation. Cf. *United States* v. *Press Publishing Co.*, 219 U. S. 1; *Franklin* v. *United States*, 216 U. S. 559. Petitioners' argument as to the applicability of the assimilative crimes statute raises at least three distinct questions, no one of which is easily resolved: (1) Which, if any, of the Oklahoma penal statutes are so designed that they could be adopted by the assimilative crimes statute and applied to Fort Sill?[8] See opinions of Circuit Court of Appeals, *supra;* cf. *Murray* v. *Gerrick & Co.*, 291 U. S. 315. (2) If there are Oklahoma statutes which could be so adopted, are

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or acquired, described in section 272 of the Criminal Code . . ., shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment." 54 Stat. 234, U. S. C. Title 18, § 468. Section 272 of the Criminal Code, referred to in this Act, is broad enough to include the Fort Sill Reservation. 35 Stat. 1143.

[8] The Oklahoma liquor statutes pertaining to liquor imports provide one illustration of the difficulties inherent in this question. These penal statutes are designed to enforce a system of licensing such imports by special permits issued by a state agency. Okla. Stat. (1941) Title 37, §§ 41–48. Importation of liquors without a special permit is made penal. *Ibid.*, §§ 41, 46. To hold, therefore, that the assimilative crimes statute adopts Oklahoma's penal liquor laws the Court might further have to hold that that statute compels federal officials on the Fort Sill Reservation to apply for and obtain state permits before they can lawfully import any liquors for any purpose. And a strong argument might be made that had Congress intended such a drastic result, it would have considered the problem and used more express language. See Note 7, *supra;* Senate Report No. 1699, Senate Judiciary Committee, 76th Cong., 3d Sess.; House Report No. 1584, House Judiciary Committee, 76th Cong., 3d Sess. Cf. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 533.

all or any of them in conflict with federal policies as expressed by Acts of Congress other than the assimilative crimes statute or by valid Army Regulations [9] which have the force of law? [10] Cf. *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99–104. (3) Assuming that certain Oklahoma statutes are adaptable, and are not inconsistent with federal policies, would such statutes make penal the liquor transactions here stipulated to have taken place? Inextricably involved in each of the three questions is the further problem of whether certain of the Oklahoma liquor statutes may be inconsistent with Oklahoma's constitution as interpreted by the Oklahoma Supreme Court. See opinions of the Circuit Court of Appeals, *supra; Ex parte Wilson,* 6 Okla. Cr. 451, 119 P. 596; *Morse* v. *State,* 63 Okla. Cr. 445, 77 P. 2d 757.

Considering the difficulty and importance of a correct decision of the novel issues which an attempt to construe this federal criminal statute would present, together with the other circumstances of the present case, we are convinced that in the interest of sound administration of justice we should refrain from a complete exploration of these issues in this proceeding, especially since these is-

[9] Army regulations have declared certain liquor policies for Army reservations generally. See, e. g., A. G. 250.1 (1–20–43), concerning the sale of liquor upon premises used for military purposes by the United States, published by the War Department on January 25, 1943, in Circular No. 29; and A. R. 210–65, concerning Army Exchanges, published by the War Department on March 19, 1943. Petitioners have not contended that the liquor transactions here were contrary to any Army Regulations, and no Regulations have come to our attention which would indicate that there is a basis for such a contention. Whether the declaration of policies contained in these various regulations indicates an intention of the War Department to permit all liquor transactions not expressly prohibited, and whether, if it does, the War Department has the power under Acts of Congress to permit such transactions, seem open questions.

[10] *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484.

sues are only collateral to the principal issue of the legality of the seizure of the liquor. Were we to decide that the assimilative crimes statute is not applicable to this shipment of liquors, we would, in effect, be construing a federal criminal statute against the United States in a proceeding in which the United States has never been represented. And, on the other hand, should we decide the statute outlaws the shipment, such a decision would be equivalent to a holding that more than 200 Army Officers, sworn to support the Constitution, had participated in a conspiracy to violate federal law. Not only that, it would for practical purposes be accepted as an authoritative determination that all army reservations in the State of Oklahoma must conduct their activities in accordance with numerous Oklahoma liquor regulations, some of which, at least, are of doubtful adaptability. And all of this would be decided in a case wherein neither the Army Officers nor the War Department nor the Attorney General of the United States have been represented, and upon a record consisting of stipulations between a private carrier and the legal representatives of Oklahoma.

Nor is it any answer to say that the carrier should be compelled to sue in the Oklahoma state courts to reclaim the liquors in order to give the Oklahoma courts the opportunity collaterally to pass upon the question of whether these liquor transactions violate the federal assimilative crimes statute. That broad question, though some parts of it involve a consideration of the proper scope of the state law adopted by the federal government, is in the final analysis a question of the correct interpretation of a federal criminal statute, and therefore an issue upon which federal courts are not bound by the rulings of state courts. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 266. Indeed Congress has vested in the federal courts exclusive jurisdiction over the trial of all federal crimes. Judicial Code § 256 as amended, 28 U. S. C. § 371. And so, even if the carrier

could bring suit in an Oklahoma state court to reclaim the liquor, a point which is itself subject to some doubt,[11] the federal District Court should not for that reason refuse relief in the present suit.

The ultimate question in this part of the case is whether the carrier, whose complete good faith is in no way questioned, should have the court's doors shut to it. So to hold would be to say that the state officials, who so far as this record shows, had no search warrant or judicial process of any kind,[12] could retain liquors which they seized without authority of law. We do not find here any "unconscientious or inequitable attitude" on the part of the carrier. *International News Service* v. *Associated Press*, 248 U. S. 215, 245. And so far as this record shows, the carrier, in seeking relief in the courts against the unlawful seizure, has proceeded in the only "practicable and adequate way" [13] available.

If the carrier's delivery of these liquors on the Fort Sill Reservation would violate any federal law, federal agen-

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[11] Nothing in the record or briefs justifies the conclusion that the carrier could bring such a proceeding in the state courts. And see Okla. Stat. (1941) Title 37, §§ 72, 86, and 89; *Blunk* v. *Waugh*, 32 Okla. 616, 122 P. 717; *Lee* v. *State*, 180 Okla. 643, 71 P. 2d 1090; cf. *1942 Chevrolet Automobile Motor No. BA-193397* v. *State*, 191 Okla. 26, 27, 128 P. 2d 448. Nor has there been any attempt to show that, if the carrier could bring such a proceeding, the Army Officers, the War Department, and the Attorney General of the United States could intervene on the collateral issue of "clean hands."

[12] Under Oklahoma law there are no "property rights" in liquor. Okla. Stat. (1941) Title 37, § 72. Officers with power to execute criminal process may arrest without a warrant one who violates the state liquor laws, and seize the property used in the violation, and it is their duty to take the property before a Court which may order it forfeited and destroyed. *Ibid.*, §§ 89, 90. As stated in the body of the opinion, the record does not show that proceedings of any kind were ever instituted, or sought to be instituted, in the state courts.

[13] *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 84–85; see also *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465.

cies exist which are charged with responsibilities to institute appropriate proceedings against the carrier in federal tribunals. In such proceedings the parties would be the United States and the carrier, and the issue of violation of federal laws would be directly, and not collaterally, presented. The complicated federal questions involved, concerning various federal statutes as well as Army rules and regulations, could be answered upon an adequate presentation of all factors essential to a right and just determination.

And, similarly, if the several hundred Army Officers who ordered and paid for these liquors have acted contrary to United States Statutes, Army Regulations, or Orders of the Post Commandant, it is not to be doubted that the Army or some other United States agency is capable of determining what course shall be pursued. Should the United States determine to proceed in the matter it could do so at such time and place as least would hamper essential military training, and the Army Officers would be heard before they would be stigmatized as law breakers and subjected as such to Army discipline. We will not, at this time, and upon this inadequate record, resolve all doubts against the lawfulness of their conduct in order to deny relief against a plainly unlawful seizure of their property from an interstate carrier whose good faith has not been questioned.

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting:

MR. JUSTICE ROBERTS and I are unable to agree with the Court's decision.

The ultimate issue in this case is whether a federal court should, by issuing an injunction, aid in the consummation of what appears to be a violation of the Criminal Code of the United States. For it must not be forgotten that a mandatory injunction, the relief sought in this suit, "is

an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." *Morrison* v. *Work,* 266 U. S. 481, 490.

A large shipment of wine and spirituous liquors was seized by law-enforcement officers of the State of Oklahoma while the liquor had temporarily come to rest at the terminal of the Transit Company. The liquor, in course of transit from East St. Louis, Illinois, to the Fort Sill, Military Reservation, was destined for the Officers Club at the Reservation for delivery to several hundred members of the Club on whose behalf its secretary was managing the importation of the liquor. Upon seizure the liquor was deposited in the County Court House of Oklahoma County, where it is held as an illegal shipment of intoxicating liquor subject to forfeiture and destruction. Thereupon the Transit Company brought this suit for a mandatory injunction against the state officers, requiring them to return the shipment and to refrain from interfering with its delivery by the Transit Company at the Reservation. The injunction issued and the Circuit Court of Appeals, in two separate opinions, approved, with one judge dissenting. 48 F. Supp. 594; 137 F. 2d 274.

The facts establish that that which was done, if it had been done in Oklahoma proper, would under its laws have constituted a misdemeanor. Delivery of the liquor on the Reservation would therefore be an offense under the federal criminal law by virtue of the Act of June 6th, 1940, 54 Stat. 234, whereby Congress made applicable to the Reservation the penal laws of Oklahoma in existence on February 1, 1940, 18 U. S. C. § 468. But even if there were doubt that the importation of the liquor into the Reservation under the circumstances of this record would offend the Criminal Code of the United States, on the ground that the act if committed within the jurisdiction of Oklahoma "by the laws thereof in force on February 1, 1940 . . . would be penal," equity should resolve the

doubt in favor of law by denying the extraordinary remedy of injunction instead of resolving it against law by granting the injunction.

Oklahoma is, colloquially speaking, a dry State. Only for strictly defined purposes may liquor from without the State be lawfully brought into it for consumption. Prohibited importations are penalized. If a transaction like the one before us related wholly to Oklahoma soil it would—there can hardly be doubt—be outlawed. The Circuit Judge who speaks with special knowledge of Oklahoma law assures us that "the State of Oklahoma, by its Constitution and laws, makes it unlawful to possess, transport, furnish, or receive this particular shipment of intoxicating liquor, and it is therefore contraband and subject to seizure and confiscation under the laws of the State," 137 F. 2d at 279. Judge Murrah calls specific attention to an Oklahoma statute which makes it a misdemeanor "for any person in this State to receive directly or indirectly any liquors, the sale of which are prohibited by the laws of this State, from a common or other carrier." [1] The opinion of Judge Phillips recognizes that this Act of 1917 penalizes the

[1] "Section 1. It shall be unlawful for any person in this State to receive directly or indirectly any liquors, the sale of which is prohibited by the laws of this State, from a common or other carrier.

"It shall also be unlawful for any person in this State to possess any liquor, the sale of which is prohibited by the laws of this State, received directly or indirectly from a common or other carrier in this State. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate as well as intrastate shipments or carriage. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $50.00 nor more than $500.00 and by imprisonment for not less than thirty days nor more than six months; Provided, however, that scientific institutions, universities and colleges, and bonded apothecaries, druggists, hospitals or pharmacists may receive and possess pure grain alcohol, as provided by the laws of this State, to be used only for such purposes as are prescribed by the laws of this State." Laws 1917, ch. 186, p. 350, § 1.

transaction before us within Oklahoma, but rejects its bearing when a federal court is asked to grant an injunction involving this law by suggesting that this statute is "unconstitutional." He bases this suggestion on the argument that inasmuch as the Oklahoma Supreme Court has held that a statute making mere possession of over one quart of spirituous liquors unlawful is not "a reasonable exercise of the police powers," and therefore beyond the power of the legislature to make unlawful, *Ex parte Wilson,* 6 Okla. Cr. 451, 475, "it must likewise be beyond its power to make unlawful the possession of intoxicating liquor for personal use received from a common carrier." 137 F. 2d at 277.[2] In other words, it is argued that because the Oklahoma Supreme Court held that the mere possession of liquor cannot be made a crime by Oklahoma, Oklahoma cannot prohibit the receipt of liquor from a carrier. On such reasoning a law that has been on the Oklahoma statute books for more than twenty-five years, and during that period actively enforced and never questioned, is thrown into discard when a federal court is asked to exercise its duty of discretion in granting the extraordinary relief of an injunction. I am unable to follow such reasoning because Oklahoma law makes it baseless. The validity of this provision, as already indicated, has been taken for granted by the Oklahoma courts. It was the subject of litigation in *De Hasque* v. *Atchison, T. & S. F. Ry. Co.,* 68 Okla. 183, 173 P. 73, and *Crossland* v. *State,* 74 Okla. 58, 176 P. 944, and a conviction under this Section was sus-

[2] *Ex parte Wilson* was decided in 1911. In 1913, the Oklahoma legislature enacted a statute which made the possession of more than one quart of liquor "prima facie evidence of an intention to convey, sell or otherwise dispose of such liquors." Laws 1913, c. 26, p. 48, § 6, 37 O. S. A. § 82. The validity of this statute was upheld (*Caffee* v. *State,* 11 Okla. Cr. 485, 148 P. 680), and the Oklahoma court ruled that it superseded the 1911 Act which had been held invalid. Cf. *Jenkins* v. *State,* 28 Okla. Cr. 249, 230 P. 293; *Morse* v. *State,* 63 Okla. Cr. 445, 458, 77 P. 2d 757.

tained in *Walker* v. *State,* 18 Okla. Cr. 661, 197 P. 520. This is a specific statute, the continuing validity of which is wholly unaffected by speculative doubts regarding other and irrelevant liquor legislation of Oklahoma. The dissenting judge was justified in reading the Act of 1917 as conclusively condemning the transaction which the carrier was seeking to consummate as an offense, were it subject to Oklahoma law.[3]

But the shipment of liquor in controversy was for delivery on the Fort Sill Reservation, that is, a place within the physical boundaries of Oklahoma but beyond its jurisdiction. It was stipulated between the parties that the purpose of the suit was to enable the Transit Company to transport and deliver the shipment to its destination in the Reservation. Such was the basis of the District Court's decree requiring the return of the shipment and enjoining interference with "delivery of said shipment to its destination" and no place else. This brings us to the second half of the question in this case: may the Transit Company, according to the law that rules such matters on the Reservation, lawfully deliver this liquor at Fort Sill? Of course all transactions on the Reservation are subject to regulation by Congress. Constitution, Art. IV, § 3,

[3] At least one other provision of Oklahoma legislation may well be found to outlaw the delivery of the shipment for the completion of which the carrier is seeking the aid of the federal court. Chapter 16, p. 16, § 1 of the Laws of 1939 makes it "unlawful for any person . . . to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor . . . without a permit first secured therefor as hereinafter provided." 37 O. S. A. § 41. Permits may be issued, under § 2 of that Act, only for the importation of alcohol for scientific, mechanical, medicinal or sacramental purposes. 37 O. S. A. § 42. Since the importation of the liquor here involved cannot possibly be said to fall within the classifications for which permits are granted, these statutory provisions as applied to the circumstances in this case are penal, and as such, may be applicable to the Reservation under the Assimilative Crimes Act. 54 Stat. 234, 18 U. S. C. § 468. See *infra.*

par. 2; see *Collins* v. *Yosemite Park Co.*, 304 U. S. 518; *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261; *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U. S. 285. If it chooses, Congress may provide a rule of law which runs counter to the expressed dry policy of Oklahoma, and it may do so either specifically for Fort Sill or generally for all federal reservations. Congress has not done so. It has done the opposite. For more than a hundred years most of the rules of life on national reservations have been controlled by the laws of the States in which these reservations are located. By the Act of March 3, 1825 (4 Stat. 115), Congress provided that when something is done on a federal reservation which is not made penal by the laws of Congress but which under State law, if the State had jurisdiction, would be punishable, the act should be equally punished as wrongful if committed on the reservation. In thus adopting the penal laws of the States as its code for lawful conduct on federal reservations within the States, Congress did not give to the States a free hand to impose the continuing process of State law-making on places over which the United States has jurisdiction. Only the laws of the States existing at the time when the Act of March 3, 1825 was enacted became operative on the reservations. *United States* v. *Paul*, 6 Pet. 141. And so, in view of the inevitable modifications and additions in the penal laws of the States, Congress has accommodated its adoption of those state laws, as the governing federal law, by bringing up to date from time to time its adoption for enforcement on federal reservations of the policies of the States which have penal sanctions. Accordingly, the Act of March 3, 1825, was in substance reenacted on April 5, 1866, 14 Stat. 12, 13, was carried forward in § 5391 of the Revised Statutes of 1878, was again reenacted on July 7, 1898, 30 Stat. 717, and became § 289 of the Federal Penal Code of 1910, 35 Stat. 1088, 1145. Since then and in relatively quick suc-

cession, Congress has three times brought still nearer the effective date of state penal laws applicable on federal reservations, to wit by the amendments of June 15, 1933, 48 Stat. 152; June 20, 1935, 49 Stat. 394; and June 6, 1940, 54 Stat. 234. The last Amendment now controls whereby

"Whoever . . . shall do . . . any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing . . . of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment." 18 U. S. C. § 468.

The very important purpose of this legislation in the working of our dual system, as expounded after the fullest consideration heretofore given to this subject by this Court, bears repetition:

"while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdic-

tion but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the State." *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–10.[4]

Therefore the crucial question in relation to our present problem is whether any law of Congress has overridden the Oklahoma Act of 1917 which makes unlawful the transaction that the Transit Company seeks to consummate with the aid of an injunction issued by a federal court.

There is no such law. Long before the Twenty-first Amendment, Congress did provide that "The sale of or dealing in, beer, wine or any intoxicating liquors by any person in any post exchange or canteen or army transport or upon any premises used for military purposes by the United States, is hereby prohibited." Act of February 2,

[4] And see Webster, the sponsor of the bill in the Senate, in Register of Debates in Congress (Gales & Seaton, 1825) Vol. I, p. 338: "As to the third section [the precursor of the present Assimilative Crimes Act], it must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people, (a navy yard for instance,) was ceded to the United States, some provision was required for the punishment of offences; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, &c. might be. He was persuaded that the people would not view it as any hardship, that the great class of minor offences should continue to be punished in the same manner as they had been before the cession."

1901, § 38, 31 Stat. 748, 758, 10 U. S. C. § 1350. Plainly, the purpose of this legislation is not to supplant social policies in regard to alcoholic liquor in the various States within which the many federal enclaves are located except to the extent of providing minimum regulations to restrict the free dealing in liquor at all Army posts including those within wet States. The specific barrier thus erected by Congress against the liberal liquor policies of some States should not now be used as a qualification of the generality of the Assimilative Crimes Statute in order to serve as a barrier against the prohibitory laws of other States. No such policy can be drawn from the Act of 1901—quite the opposite is implied. And assuming that the military could assert such a policy in the interest of Army morale, there is wholly lacking any manifestation that the Army deems it necessary for the morale of its officers that at Fort Sill conduct should be permitted which if committed in the surrounding territory of Oklahoma would offend its penal laws. So far as the War Department has indicated a policy, its policy like that of the Assimilative Crimes Statute is to adopt on military reservations the laws of their respective States. Thus, in reference to A. G. 250.1, § VI, par. 4 (1–20–43) of Circular No. 29 of the War Department, Jan. 25, 1943, provides: "Beer of an alcoholic content not in excess of 3.2 per centum by weight may be sold or dealt in upon any of the mentioned premises unless a State enactment of the State in which the premises are located prohibits the sale of or dealing in such beer throughout the entire State." And the Judge Advocate General has said that "War Department policy does not favor sale of such [3.2] beer by exchanges in States where its sale is absolutely prohibited . . ." Bulletin of the Judge Advocate General of the Army, July 1942, p. 100, § 310.

Even if there were more hypothetical doubt than the laws and decisions of Oklahoma make manifest as to the

validity and vitality of the Act of 1917 and its applicability to the importation of the liquor shipment involved in this case, if the importation were into Oklahoma proper, such a contingency should be left for determination by appropriate proceedings in the state court to recover the liquor and not be made the basis for an injunction against the state law in the federal court. Since federal law here too turns on state law by adoption through the Assimilative Crimes Statute, the basis of our decision in *Penn Dairies* v. *Milk Control Comm'n, supra,* becomes relevant. Here, as in that case, there is an "absence of some evidence of an inflexible Congressional policy," 318 U. S. at 275, opposed to the policy expressed by the State. In this case as in that, we should therefore be slow to strike down state legislation by elaborate implications. The discretionary powers of equity particularly counsel against it. And even if there were more doubt than appears regarding the adoption of the Act of 1917 by the Assimilative Crimes Statute, whereby the delivery of the liquor by the Transit Company on the Reservation would constitute a misdemeanor, that doubt too should not be resolved against the law in such a proceeding as this for an injunction. That question although federal may also be litigated as part of the indicated state court suit, where the Attorney General may intervene and then come here if he chooses to assert whatever position the Government deems it appropriate to press.

In my view therefore it was an inequitable exercise of discretion to issue this injunction. Of course, "Equity does not demand that its suitors shall have led blameless lives." *Loughran* v. *Loughran,* 292 U. S. 216, 229. But where the relief sought is not as to something past and collateral, but where it is the very means, as is the case here, for completing an outlawed transaction, a court of equity should withhold its aid and not become the promoter of wrongdoing. The possible illegality of the seizure

of the liquor by the Oklahoma enforcement officers is quite irrelevant to our problem. "A question of public policy is presented—not a mere adjudication of adversary rights between the two parties." *Weil* v. *Neary,* 278 U. S. 160, 171. The abstention which equity exercises, as it should here, under the short-hand phrase of the "clean hands doctrine" is not due to any desire to punish a litigant for his uncleanliness. "But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself." Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U. S. 438, 485. It is hardly seemly for a federal court to order the return of liquor seized with full knowledge by the court that the carrier would use the liquor to share in the commission of a misdemeanor. The penal statute here applicable is a police regulation violation of which ought not to be furthered by a federal court. While its violation does not imply moral turpitude, Congress has required that army officers should also conform to the law of a State on which military reservations are located in matters that are outside military concern.

UNITED STATES ET AL. *v.* WABASH RAILROAD CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 453. Argued March 8, 1944.—Decided March 27, 1944.

1. An order of the Interstate Commerce Commission directing appellee railroads to cancel certain tariff supplements by which they proposed to eliminate charges for spotting freight cars at the doors of factories in the industrial plant of a manufacturing company—based on its finding that performance of the spotting service without charge would be an unlawful preference because a departure

from filed tariffs, in violation of § 6 (7) of the Interstate Commerce Act—*sustained*. Pp. 405, 410.

2. The point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission, and its findings on that question, if supported by evidence, will not be disturbed by the courts. P. 408.
3. The Commission's conclusion in this case that the movement of cars between the interchange tracks and points of loading and unloading was a plant service for the convenience of the industry, and not a part of the carrier service comparable to the usual car delivery at a team track or siding, is supported by the evidence and is binding on review. P. 409.
4. Section 6 (7) prohibits departures from the filed tariffs and it is violated when carriers pay the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge. P. 410.
5. The prohibition of § 6 (7) applies without qualification to every carrier, and when the unlawfulness of the allowance or service is shown by the conditions prevailing at a particular industrial plant, it is unnecessary, in order to support the Commission's order, to consider whether generally similar allowances or services at other plants are, or are not, lawful under conditions prevailing there. P. 410.
6. The finding of the court below that the manufacturing company in this case was being discriminated against by the continuance of free spotting service at other plants is irrelevant to any issue in the present proceeding, which relates only to violations of § 6 (7) and not to §§ 2 and 3 (1). P. 413.
7. While it is the duty of the Commission to proceed as rapidly as may be to suppress violations of § 6 (7) in the performance of spotting services, that is to be accomplished by an investigation of the traffic conditions prevailing at each particular plant where the service is rendered and not by comparison of the services rendered at different plants. P. 413.
8. The Commission is not required to suppress all violations of § 6 (7) simultaneously or none. P. 414.

51 F. Supp. 141, reversed.

APPEAL from a decree of a District Court of three judges setting aside an order of the Interstate Commerce Commission.

Mr. Allen Crenshaw, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton, Robert L. Pierce, Edward Dumbauld,* and *Howard L. Doyle* were on the brief, for appellants.

Mr. Elmer A. Smith, with whom *Mr. Louis H. Strasser* was on the brief and *Mr. Carleton S. Hadley* entered an appearance, for the Wabash Railroad Co. et al.; and *Mr. John S. Burchmore,* with whom *Messrs. C. C. Le Forgee, Luther M. Walter,* and *Nuel D. Belnap* were on the brief, for the A. E. Staley Manufacturing Co.,—appellees.

Opinion of the Court by MR. CHIEF JUSTICE STONE, announced by MR. JUSTICE ROBERTS.

The Interstate Commerce Commission, in a report and order supplemental to its main report in *Ex parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,* 209 I. C. C. 11, has directed appellee railroads to cancel certain tariff supplements by which they propose to eliminate charges for spotting freight cars at the doors of factories in the industrial plant of appellee Staley Manufacturing Co., at Decatur, Illinois. The Commission based its order upon a finding that the performance without charge of the spotting service would be an unlawful preference because a departure from filed tariffs, in violation of § 6 (7) of the Interstate Commerce Act. 49 U. S. C. § 6 (7). On appellees' petition the District Court for Southern Illinois, three judges sitting, 28 U. S. C. § 47, set aside the Commission's order, 51 F. Supp. 141. It held that the Commission's conclusion that the free spotting service rendered at the Staley

plant is an unlawful preference, was not supported by evidence, and that the Commission's order must be set aside because it results in discrimination contrary to §§ 2 and 3 (1) of the Act, since it appears that similar free spotting service was being rendered to Staley's competitors against which the Commission had issued no order. The case comes here on appeal under 28 U. S. C. §§ 47a, 345. The principal question for our decision is whether, as the District Court thought, the order is invalid because it results in a prohibited discrimination.

In *Ex parte 104,* the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, or the payment to the industries of allowances for its performance by them, is in violation of § 6 (7) of the Act.

The Commission, in its main report in *Ex parte 104,* recognized that by railway tariff practice in this country the rates on carload traffic moving to or from any city or town apply to so-called "switching" or "terminal" districts and entitle each industry within such a district to have the traffic delivered directly to and taken from its site. By this method of delivery and by use of private tracks of the industry the railroads are saved the expense of maintaining more extensive terminal facilities, the service and cost

of delivery within the switching district being comparable to that of delivery on team tracks or sidings or at way stations. But in the case of large industries having extensive plant trackage the Commission found that cars hauled to the industry usually come to rest at nearby interchange tracks, after which the intraplant distribution of the cars is made at times and in a manner to serve the convenience of the industry rather than that of the carrier in completing its transportation service.

In determining in such circumstances the point at which the carrier service ends and the service in placing the cars so as to meet the convenience of the industry begins, the Commission stated that the line of demarcation "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant," 209 I. C. C. at 34. It added, "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. . . ." 209 I. C. C. at 44–5.

The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered. It is for this reason that the Commission, in carrying into effect the principles announced in *Ex parte 104*, has found it necessary to proceed to a series of supplemental investigations of the spotting service rendered at particular plants. Accordingly the Commission made no order on the foot of its main report, but following a series of sup-

plemental reports, including the present one, each detailing the facts found as to the spotting service rendered at the particular plant investigated, the Commission has made cease and desist orders, applicable to that service, a number of which this Court has upheld on review. See *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *American Sheet & Tin Plate Co., supra*, 408; *United States* v. *Pan American Petroleum Corp., supra*, 158; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. Co.*, 320 U. S. 368, 378 and cases cited.

In this, as in its earlier supplemental reports, the Commission has examined the actual conditions of operation at the industrial plant in question, here the Staley plant, and has found these conditions to be similar in type to those held sufficient to support its orders in *United States* v. *American Sheet & Tin Plate Co., supra*, and *United States* v. *Pan American Petroleum Corp., supra*.[1] It made an extended

[1] The Commission examined the conditions at the Staley plant in a supplemental report rendered May 22, 1936, in which it directed the carriers, appellants here, to abandon the practice of paying allowances to Staley for the performance of the spotting service. A. E. Staley Mfg. Co. Terminal Allowance, 215 I. C. C. 656. An action to enjoin enforcement of that order was voluntarily dismissed without prejudice as a result of this Court's decision in the Tin Plate, Pan American Petroleum, and other cases sustaining similar orders. Thereupon the payment of allowances was abandoned, and the carriers assumed the performance of the spotting services, establishing a charge of $2.27 per car, later increased to $2.50. By schedules filed

examination of car movements within the plant area of the Staley Company, which extends for a distance of about two and a quarter miles, includes some forty buildings used in the manufacture of various products, principally from corn and soy beans, and contains approximately 20 miles of track, having 18 points at which freight is loaded or unloaded. It found that inbound cars are in the first instance placed upon interchange tracks from which they are later spotted at the points of loading and unloading, a service requiring in numerous instances two or more car movements performed by engines and crews regularly and exclusively assigned to it; that the interchange tracks are reasonably convenient points for the delivery and receipt of cars; that the movements between the interchange tracks and the points of loading and unloading are not performed at the carrier's convenience but are "coordinated with the industrial operations of the Staley Company and conform to its convenience"; that the service beyond the interchange points is in excess of that involved in switching cars to a team track or ordinary industrial siding or spur, and is consequently not a part of the transportation service which ends at the interchange tracks.

Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in *Ex parte 104*, are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks and the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a

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to become effective December 15, 1939, the carriers proposed to cancel the spotting charge. In the present proceeding the Commission has refused to approve the proposed schedules, and has likewise refused, after having reopened the proceedings in Staley Mfg. Co. Terminal Allowance, *supra*, to modify its prior order. 245 I. C. C. 383.

part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.

Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack. Their contention, upheld by the court below, is that the Commission's order cannot be supported merely by the circumstances disclosed by the evidence respecting the operations at the Staley plant, but that its validity must turn upon a comparison of the conditions at the Staley plant with those at competing plants. They urge further, and the District Court so held, that, as it appears from the record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley, contrary to §§ 2 and 3 (1).

This argument ignores the nature of the present proceeding which is to enforce § 6 (7), not §§ 2 and 3 (1). Section 6 (7) prohibits departures from the filed tariffs and it is violated, as the Commission has pointed out, when carriers pay the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge. This prohibition applies without qualification to every carrier and when, as here, the unlawfulness of the allowance or service is shown by the conditions prevailing at a particular industrial plant, it is unnecessary, in order to support the Commission's order, to consider whether generally similar allowances or services at other plants are, or are not, lawful under conditions prevailing there.

In this respect a proceeding under § 6 (7) is unlike proceedings under §§ 2 and 3 (1) which prohibit unjust discriminations and undue preferences. *United States* v. *American Sheet & Tin Plate Co., supra,* 406; *United States*

v. *Hanley,* 71 F. 672, 673–4; compare *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 510–11. Since under these sections acts or practices not otherwise unlawful may be so because discriminatory or preferential, it becomes necessary to make comparisons between the different acts or practices said to produce the discrimination or preference, in order to determine whether they are such in fact and whether they are unjust or undue. Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. See *Barringer & Co.* v. *United States,* 319 U. S. 1, 7–8, and cases cited.

The Commission's decision here, and its finding of a "preferential service," are not based and do not depend on a comparison of conditions at the Staley plant with those obtaining at others. By its fifth finding the Commission found that the spotting service rendered at the Staley plant was a service "in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks or industrial sidings and spurs," and hence in excess of that provided for by the tariff rates. It concluded in its third conclusion of law that the performance of this service without charge would result in receipt by the Staley Company of "a preferential service not accorded to shippers generally," and hence would result in a prohibited refunding or remitting of a portion of the filed tariff rates.

The Commission, after pointing out that evidence was introduced showing that spotting is performed without charge at various plants, some of which compete with the Staley Company, also found, "The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant. If it

did it would only show the probability of existence of unlawful practices at such plants and the need for investigation in connection therewith." The District Court relied solely on this evidence to support its conclusion of lack of evidentiary support for the Commission's finding of a "preferential service not accorded to shippers generally" and to support its own finding that under the present order Staley is being discriminated against. For this reason it concluded that the Commission's order must be set aside.

We think that this is a mistaken interpretation of the Commission's findings and misapprehends their legal effect. If the Commission's reference, in its conclusion of law, to "a preferential service not accorded to shippers generally" means more than the statement in the fifth finding of fact that the service is "in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks," it is obviously irrelevant to the present proceeding. For it could not serve to foreclose the legal conclusion to be drawn from the fifth finding that the free performance of the spotting service at the Staley plant is in violation of § 6 (7) because of the traffic conditions found to prevail there. *United States* v. *American Sheet & Tin Plate Co., supra,* 406–7. But a reading of the Commission's report and findings makes abundantly clear that it was not concerned with discriminations or preferences between the Staley plant and others, such as are prohibited by §§ 2 and 3 (1); that the "preference" to which it referred was not based upon a comparison of conditions at the Staley plant with those of others, but upon an application to the actual conditions at the Staley plant of the standards laid down in its report in *Ex parte 104,* in order to ascertain whether the service rendered there is in excess of that which the carriers are obliged to perform by their tariffs.

As the Commission and this Court have pointed out, a preference or rebate is the necessary result of every violation of § 6 (7) where the carrier renders or pays for a service

not covered by the prescribed tariffs. *Davis* v. *Cornwell,* 264 U. S. 560, 562. The Commission emphasized that no question of discrimination or preference prohibited by §§ 2 and 3 was involved in the present proceeding when it found that the evidence did not show that the circumstances and conditions under which the spotting is performed at other plants are substantially similar to those at the Staley plant, and that if it did that it would only tend to show that the practice was unlawful at the others as well. So far as the District Court found that the Staley Company was being discriminated against by the continuance of the service at other plants, its finding is irrelevant to any issue in the present proceeding which relates only to violations of § 6 (7) and not §§ 2 and 3 (1). In any case findings of discrimination or undue preference under §§ 2 and 3 (1), as we have said, are for the Commission and not the courts. And the Commission has found that the evidence does not show that conditions with respect to the spotting service at the Staley plant and those of its competitors are similar.

While it is the duty of the Commission to proceed as rapidly as may be to suppress violations of § 6 (7) in the performance of spotting services, that is to be accomplished, as we have held, by an investigation of the traffic conditions prevailing at each particular plant where the service is rendered and not by comparison of the services rendered at different plants. Appellees complain of the Commission's long delay, some six years since the present proceeding was begun, in investigating spotting services rendered at the plants of Staley's competitors, but any of the appellees have been free to initiate proceedings to eliminate any unlawful preferences or discriminations affecting them if they so desired, § 13 (1), and no reason appears why they could not have done so. There are other modes of inducing the Commission to perform its duty than by setting aside its order prohibiting a practice

which plainly violates § 6 (7), because it has not made like orders against other offenders. The suppression of abuses resulting from violations of § 6 (7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12 (1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6 (7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.

Reversed.

YAKUS *v.* UNITED STATES.

NO. 374. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

Argued January 7, 1944.—Decided March 27, 1944.

1. The Emergency Price Control Act of 1942, as amended, *held* not to involve an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control commodity prices in time of war. P. 423.

(a) The Act, the declared purpose of which is to prevent wartime inflation, provides for the establishment of an Office of Price Administration under the direction of a Price Administrator appointed by the President. The Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act." The Administrator is directed in fixing prices to give due consideration, so far as practicable, to prices prevailing during a

*Together with No. 375, *Rottenberg et al.* v. *United States,* also on writ of certiorari to the Circuit Court of Appeals for the First Circuit.

designated base period, and to make adjustments for relevant factors of general applicability. P. 419 *et seq.*

(b) The essentials of the legislative function are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. P. 424.

(c) Acting within its constitutional power to fix prices, it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. P. 425.

(d) Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. P. 425.

(e) The standards prescribed by the Act, with the aid of the "statement of considerations" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. P. 426.

2. The procedure prescribed by §§ 203 and 204 of the Emergency Price Control Act for determining the validity of the Administrator's price regulations—by protest to and hearing before the Administrator, whose determination may be reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari—is exclusive and precludes the defense of invalidity of the regulation in a criminal prosecution for its violation. Pp. 427, 429.
3. Petitioners, who have not resorted to the procedure prescribed by Congress, can excuse their failure to do so, and can show a denial of constitutional right, only by showing that that procedure is incapable of affording them the due process of law guaranteed by the Fifth Amendment. P. 434.
4. The provisions of the Emergency Price Control Act, construed to deprive petitioners of opportunity to attack the validity of a price regulation (establishing maximum prices for the sale of certain meats at wholesale) in a prosecution for its violation, *held* not

on their face incapable of affording due process of law. P. 435.

(a) Petitioners were not required by the Act, nor by any other rule of law, to continue selling at a loss. P. 431.

(b) The sixty days' period allowed for protest to the Administrator was not unduly short in view of the power of the Administrator to extend the time for presentation of evidence, and the right given by the Act to apply to the Emergency Court of Appeals for leave to introduce any evidence "which could not reasonably" have been offered to the Administrator. P. 435.

(c) Since the Administrator's regulations provide for a full oral hearing in appropriate cases, the Court does not consider, in the absence of any application to the Administrator for such a hearing, whether the denial or an oral hearing in any particular case would be a denial of due process. P. 436.

(d) In the absence of any application to the Administrator, it can not be assumed that he will deny due process to any applicant. And the Emergency Court of Appeals, and this Court upon certiorari, have full power to correct any denial of due process or other procedural error that may occur in a particular case. Pp. 434, 437.

5. Under the circumstances in which the Act was adopted and must be applied, its denial of any judicial stay pending determination of the validity of a regulation does not deny due process. P. 437.

(a) The statute provides an expeditious means of testing the validity of a price regulation without necessarily incurring any of the penalties provided by the Act. P. 438.

(b) The due process clause is not violated by a statutory denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, from the operation of an administrative regulation, pending determination of its validity. P. 439.

(c) The award of an interlocutory injunction by courts of equity is not a matter of right, even though irreparable injury may otherwise result to the plaintiff. And the legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Pp. 440, 442.

(d) The public interest may justify legislative authorization of summary action subject to later judicial review of its validity. P. 442.

6. No principle of law or provision of the Constitution precludes Congress from making criminal the violation of an administrative regu-

lation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or precludes the practice of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. P. 444.

7. The Court does not decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face, or whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid. P. 446.
8. The Seventh Amendment's guarantee of a jury trial is inapplicable to a proceeding within the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation. P. 447.
9. In the present criminal proceeding, there was no denial of the right of trial by jury, guaranteed by the Sixth Amendment, to a trial by a jury of the State and district where the crime was committed. The question whether petitioners had committed the crime charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury. P. 447.

137 F. 2d 850, affirmed.

CERTIORARI, 320 U. S. 730, to review the affirmance of convictions for violations of the Emergency Price Control Act.

Messrs. Joseph Kruger and *Leonard Poretsky,* with whom *Mr. Harold Widetsky* was on the brief, for petitioner in No. 374. *Messrs. Leonard Poretsky* and *William H. Lewis,* with whom *Mr. John H. Backus* was on the brief, for petitioners in No. 375.

Solicitor General Fahy, with whom *Messrs. Paul A. Freund, Thomas I. Emerson,* and *David London* were on the brief, for the United States.

Messrs. Maxwell C. Katz, Otto C. Sommerich, and *Benjamin Busch* filed a brief, as *amici curiae,* in No. 375, urging reversal.

OPINION of the Court by MR. CHIEF JUSTICE STONE, announced by MR. JUSTICE ROBERTS.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, §§ 901 *et seq.*, as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, §§ 961 *et seq.*, involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether § 204 (d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by §§ 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, § 204 (d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of §§ 4 (a) and 205 (b) of the Act by the willful sale of wholesale cuts of beef at prices above the maximum prices prescribed by §§ 1364.451–1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed. Reg. 10381 *et seq.* Petitioners have not availed themselves of the procedure set up by §§ 203 and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be

reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see *Lockerty* v. *Phillips,* 319 U. S. 182. When the indictments were found the 60 days' period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in *Lockerty* v. *Phillips, supra,* whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F. 2d 850, and we granted certiorari, 320 U. S. 730.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in § 1 (b) for its termination on June 30, 1943, unless sooner

terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory Act of October 2, 1942, it was extended to June 30, 1944.

Section 1 (a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war," and that its purposes are:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; . . ."

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by § 2 (a) and by § 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, promulgated under it. 7 Fed. Reg. 7871. By § 2 (a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

The section also directs that

"So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, § 4 of Executive Order No. 9250, he has directed "all departments and agencies of the Government" "to stabilize the cost of living in accordance with the Act of October 2, 1942." [1]

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum

[1] The parties have not discussed in briefs or on argument, and we do not find it necessary to consider, the precise effect of this direction to stabilize prices "so far as practicable" at the levels obtaining on September 15, 1942, upon the standards laid down by § 2 (a) of the Act and the discretion which they confer on the Administrator.

prices for the sale at wholesale of specified cuts of beef and veal. As is required by § 2 (a) of the Act, it was accompanied by a "statement of the considerations involved" in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,[2] and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural

[2] The use of the March 16–28, 1942, base period is explained by the fact that wholesale meat prices had already been stabilized at approximately that level by Maximum Price Regulation No. 169 as originally issued on June 19, 1942, 7 Fed. Reg. 4653, and by the General Maximum Price Regulation, issued April 28, 1942, 7 Fed. Reg. 3153, which forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March, 1942. The Statement of Considerations accompanying the latter, 2 C. C. H. War Law Service—Price Control, ¶ 42,081, explains in some detail the considerations impelling the Administrator to the conclusion that stabilization at the levels obtaining in March, 1942 would be fair and equitable and would effectuate the purposes of the Act; it considers the price levels prevailing during October 1–15, 1941, and gives reasons why price stabilization at those levels would not be practicable. The Statement of Considerations accompanying Maximum Price Regulation No. 169 as originally issued, 2 C. C. H. War Law Service—Price Control, ¶ 43,369A, refers to this discussion in explanation of the continuance of the use of March, 1942, levels as a base.

features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent wartime inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—, and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare *Field* v. *Clark*, 143 U. S. 649; *Hampton & Co.* v. *United States*, 276

U. S. 394; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Hirabayashi* v. *United States,* 320 U. S. 81.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in *Schechter Corp.* v. *United States,* 295 U. S. 495, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare *Sunshine Coal Co.* v. *Adkins, supra,* 399.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence,

ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See *Opp Cotton Mills* v. *Administrator, supra,* 145–6, and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Currin* v. *Wallace, supra,* 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386. Congress is not confined

to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *M'Culloch* v. *Maryland,* 4 Wheat. 316, 413 *et seq.* It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton & Co.* v. *United States, supra,* 408, 409. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

The standards prescribed by the present Act, with the aid of the "statement of considerations" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare *Hirabayashi* v. *United States, supra,* 104. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in *Sunshine Anthracite Coal Co.* v. *Adkins, supra,* or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in *Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are "reciprocally unequal and unreasonable," held valid in *Field* v. *Clark, supra.*

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see *Sunshine Coal Co.* v. *Adkins, supra,* and cases cited; or the power to approve consolidations in the "public interest," sustained in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24–5 (compare *United States* v. *Lowden,* 308 U. S. 225); or the power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires," upheld in *National Broadcasting Co.* v. *United States, supra,* 225–6; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law, *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304; or the direction that in alloting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in *Mulford* v. *Smith, supra,* 48–9; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in *Hampton & Co.* v. *United States, supra;* or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors" and determine the respective weights attributable to each, held valid in *Opp Cotton Mills* v. *Administrator, supra.*

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under §§ 4 (a) and

205 (b). Section 203 (a) sets up a procedure by which "any person subject to any provision of a regulation or order" may within sixty days after it is issued "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." He may similarly protest later, on grounds arising after the expiration of the original sixty days. The subsection directs that within a reasonable time and in no event more than thirty days after the filing of a protest or ninety days after the issue of the regulation protested, whichever is later, "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."

Section 204 (c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States. Section 204 (a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. The court may issue such an injunction only if it finds that the regulation, order or price schedule "is not in accordance with law, or is arbitrary or capricious." (Subsection (b).) It is denied power to issue a temporary restraining order or interlocutory decree. (Subsection (c).) The effectiveness of any permanent injunction it may issue is postponed for thirty days, and if review by this Court is sought upon writ of certiorari, as authorized by subsection (d), its effectiveness is further

postponed until final disposition of the case by this Court by denial of certiorari or decision upon the merits. (Subsection (b).)

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 regulation, 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."

In *Lockerty* v. *Phillips, supra,* we held that these provisions conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of inferior federal courts, and the jurisdiction of all state courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals.

The considerations which led us to that conclusion with respect to the equity jurisdiction of the district court, lead to the like conclusion as to its power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation. The provisions of § 204 (d), con-

ferring upon the Emergency Court of Appeals and this Court "exclusive jurisdiction to determine the validity of any regulation or order," coupled with the provision that "no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation," are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

That such was the intention of Congress appears from the report of the Senate Committee on Banking and Currency, recommending the adoption of the bill which contained the provisions of § 204 (d). After pointing out that the bill provided for exclusive jurisdiction of the Emergency Court and the Supreme Court to determine the validity of regulations or orders issued under § 2, the Committee said: "The courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself." Sen. Rep. 931, 77th Cong., 2d Sess., p. 25. That the Committee, in making this statement, intended to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution, is further borne out by the fact that the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves. H. R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H. R. 5479, pp. 4, 7–8.

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regula-

tions or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. At the trial, petitioners offered to prove that the Regulation would compel them to sell beef at such prices as would render it impossible for wholesalers such as they are, no matter how efficient, to conduct their business other than at a loss. Section 4 (d) declares that "Nothing in this Act shall be construed to require any person to sell any commodity . . ." Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss. But they argue that to impose on them the choice either of refraining from sales of beef at wholesale or of running the risk of numerous criminal prosecutions and suits for treble damages authorized by § 205 (e), without the benefit of any temporary injunction or stay pending determination by the prescribed statutory procedure of the Regulation's validity, is so harsh in its application to them as to deny them due process of law. In addition they urge the inadequacy of the administrative procedure and particularly of the sixty days' period afforded by the Act within which to prepare and lodge a protest with the Administrator.

In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a wartime emergency measure. The Act was adopted Jan-

uary 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act, that there was grave danger of wartime inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., pp. 23–5.

Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders complained of before resort to judicial determination of their validity. The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction. The considerations which led to its creation are similar to, and certainly no weaker than, those which led this Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and the long line of cases following it, to require resort to the Interstate Commerce Commission and the special statutory method provided for review of its decisions in certain types of cases involving railway rates. As with the present statute, it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. *Bradley* v. *Richmond*, 227 U. S. 477; *First National Bank* v. *Weld County*, 264 U. S. 450; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

Petitioners assert that they have been denied that opportunity because the sixty days' period allowed for filing a protest is insufficient for that purpose; because the pro-

cedure before the Administrator is inadequate to ensure due process; because the statute precludes any interlocutory injunction staying enforcement of a price regulation before final adjudication of its validity; because the trial of the issue of validity of a regulation is excluded from the criminal trial for its violation; and because in any case there is nothing in the statute to prevent their conviction for violation of a regulation before they could secure a ruling on its validity. A sufficient answer to all these contentions is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

For the purposes of this case, in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 545; *Hall*

v. *Geiger-Jones Co.*, 242 U. S. 539, 554; *Minnesota* v. *Probate Court*, 309 U. S. 270, 277, and cases cited. Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309; *Anniston Mfg. Co.* v. *Davis*, *supra*, 356–7; *Minnesota* v. *Probate Court*, *supra*, 275, 277. But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 U. S. C. § 307. The penal provisions of the statute are applicable only to violations of a regulation which are willful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue.

The sixty days' period allowed for protest of the Administrator's regulations cannot be said to be unreasonably short in view of the urgency and exigencies of wartime price regulation.[3] Here the Administrator is required to act initially upon the protest within thirty days after it is filed or ninety days after promulgation of the challenged regulation, by allowing the protest wholly or in part, or denying it or setting it down for hearing. (§ 203 (a).)

[3] For numerous instances in which comparable or shorter periods for resort to administrative relief as a prerequisite to proceeding in the courts have been held to be sufficient, see, e. g., *Bellingham Bay & B. C. R. Co.* v. *New Whatcom*, 172 U. S. 314 (10 days); *Campbell* v. *Olney*, 262 U. S. 352 (20 days); *Wick* v. *Chelan Electric Co.*, 280 U. S. 108 (18 days); *Phillips* v. *Commissioner*, 283 U. S. 589 (60 days); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (40 days).

But we cannot say that the Administrator would not have allowed ample time for the presentation of evidence.[4] And under § 204 (a) petitioners could have applied to the Emergency Court of Appeals for leave to introduce any additional evidence "which could not reasonably" have been offered to the Administrator or included in the proceedings before him, and could have applied to the Administrator to modify or change his decision in the light of that evidence.

Nor can we say that the administrative hearing provided by the statute will prove inadequate. We hold in *Bowles* v. *Willingham, post,* p. 503, that in the circumstances to which this Act was intended to apply, the failure to afford a hearing prior to the issue of a price regulation does not offend against due process. While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest." (§ 203 (a); Revised Procedural Regulation No. 1, § 1300.39, 7 Fed. Reg. 8961.) In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process. The Act requires the Administrator to inform the protestant of the grounds for his decision denying a protest, including all matters of which he has taken official notice. (§ 203 (a).) In view of the provisions for the introduction of further evidence both before and after the Administrator has announced his determination, we cannot say that if petitioners had filed a protest ade-

[4] Revised Procedural Regulation No. 1, 7 Fed. Reg. 8961, authorized by § 203 (a), contains detailed provisions for extending the time for presentation of evidence when appropriate. §§ 1300.30 (c), 1300.33, 1300.35 (a) (3).

quate opportunity would not have been afforded them to meet any arguments and evidence put forward by the Administrator, or that if such opportunity had been denied the denial would not have been corrected by the Emergency Court.

The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court. Compare *White* v. *Johnson*, 282 U. S. 367, 374.[5]

In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regula-

[5] Nor is the inconvenience to petitioners of being required to make their objection to the Administrator in Washington, D. C. sufficient to outweigh the public interest, in the circumstances of this case, in having a centralized, unitary scheme of review of the regulations. The protest procedure is designed to be conducted primarily upon documentary evidence, § 203 (a); Revised Procedural Regulation No. 1, §§ 1300.29–1300.31, 1300.39. There would thus be no purpose in the personal presence of the protestant unless the protest were set for hearing by the Administrator, and in such a case the hearing may be held at any place designated by the Administrator and before a person designated by him. *Id.*, §§ 1300.39, 1300.42. The Emergency Court of Appeals is likewise authorized to "hold sessions at such places as it may specify" and does in fact hold sessions throughout the country as needed. § 204 (c): Rule 4 (a) of its Rules of Procedure, 50 U. S. C. App. Supp. II following § 924.

tions promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. See *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53–4; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331. For as we have seen, § 4 (d) specifically provides that no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act. Compare *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 667–9.

The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity. It is true that if the Administrator denies a protest no stay or injunction may become effective before the final decision of the Emergency Court or of this Court if review here is sought. It is also true that the process of reaching a final decision may be time-consuming. But while courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.

The Administrator, who is the author of the regulations, is given wide discretion as to the time and conditions of their issue and continued effect. Section 2 (a) authorizes him to issue such regulations as will effectuate the purposes of the Act, whenever, in his judgment, such action is necessary. Section 201 (d) similarly authorizes him "from time to time" to issue regulations when necessary and proper to effectuate the purposes of the Act. One of the objects of the protest provisions is to enable the Administrator more fully to inform himself as to the wisdom

of a regulation through evidence of its effect on particular cases. In the light of that information he is authorized by § 203 (a) to grant or deny a protest "in whole or in part." And § 204 (a) authorizes the Administrator to modify or rescind a regulation "at any time." [6] Moreover § 2 (a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days, "establishing as a maximum . . . the price . . . prevailing with respect to any commodity . . . within five days prior to the date of issuance of such temporary regulations. . . ."

Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. *Natural Gas Co.* v. *Slattery, supra,* 310.

In any event, we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation would, in the special circumstances of this case, involve a denial of constitutional right. If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Compare

[6] Revised Procedural Regulation No. 1 authorizes the filing at any time of a petition to amend a regulation (§ 1300.20), and authorizes the Administrator to treat a protest as a petition for amendment as well (§ 1300.49).

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Miller v. *Schoene*, 276 U. S. 272, in which we held that the Fourteenth Amendment did not preclude a state from compelling the uncompensated destruction of private property in order to preserve important public interests from destruction.

The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4, 10 and cases cited. Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *Rice & Adams Corp.* v. *Lathrop*, 278 U. S. 509, 514. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 51; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815.

But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.[7] *Virginian*

[7] Congress has sought to minimize the burden so far as would be consistent with the public interest by providing expeditious procedure for the review, on protest and complaint, of a regulation's validity. Thus a protest must be filed within 60 days (§ 203 (a)); the Administrator must take initial action on it within a reasonable time but not more than 30 days after its filing or 90 days after the issuance of the

Ry. Co. v. *United States,* 272 U. S. 658, 672–3; *Petroleum Exploration Co.* v. *Public Service Comm'n,* 304 U. S. 209, 222–3; *Dryfoos* v. *Edwards,* 284 F. 596, 603, affirmed, 251 U. S. 146; see *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 91, 92. Compare *Wisconsin* v. *Illinois,* 278 U. S. 367, 418–21. This is but another application of the principle, declared in *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552, that "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."

Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts

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regulation (§ 203 (a)); the complaint to the Emergency Court must be filed within 30 days (§ 204 (a)); that Court is directed to "prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction" (§ 204 (c)); in order to promote that end, as many judges as are needed may be designated to serve on it, it may sit in divisions, and may hold sessions at such places as it may specify (§ 204 (c)), and in fact it does sit in various parts of the country as the convenience of the parties may require; under its rules it is "always . . . open for the transaction of business," (Rule 4 (a); 50 U. S. C. App., Supp. II following § 924); petitions for certiorari to review its decisions must be filed within 30 days (§ 204 (d)); and this Court is directed to advance on the docket and expedite the decision of all cases from the Emergency Court (§ 204 (d)). We cannot assume that the Administrator, who has a vital interest in the prompt and effective enforcement of the Act, would unreasonably delay action upon a protest; if he should, judicial remedies are not lacking, see *Safeway Stores* v. *Brown,* 138 F. 2d 278, 280.

could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Cf. *Demorest* v. *City Bank Co.*, 321 U. S. 36.[8]

Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. *Phillips* v. *Commissioner*, 283 U. S. 589, 595–7 and cases cited. It may take possession of property presumptively abandoned by its owner, prior to determination of

[8] For other instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions, see: 1. Section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code § 267, 28 U. S. C. § 384, denying relief in equity where there is adequate remedy at law. 2. Section 5 of the Act of March 2, 1793, 1 Stat. 334, Judicial Code § 265, 28 U. S. C. § 379, prohibiting injunction of state judicial proceedings. 3. Act of March 2, 1867, 14 Stat. 475, 26 U. S. C. § 3653, prohibiting suits to enjoin collection or enforcement of federal taxes. 4. The Johnson Act of May 14, 1934, 48 Stat. 775, 28 U. S. C. § 41 (1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates. 5. Act of Aug. 21, 1937, 50 Stat. 738, 28 U. S. C. § 41 (1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes. 6. Section 17 of the Act of June 18, 1910, 36 Stat. 557 and § 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U. S. C. §§ 380 and 380 (a), requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury. 7. The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–15, regulating the issue of injunctions in labor disputes and prohibiting their issue "contrary to the public policy" declared in the Act. In several cases such statutes were held to be merely declaratory of a previously obtaining rule for the guidance of judicial discretion. See, e. g., *State Railroad Tax Cases*, 92 U. S. 575, 613 (Act of March 2, 1867); *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (Judicial Code § 267); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297 (Act of Aug. 21, 1937).

its actual abandonment. *Anderson National Bank* v. *Luckett,* 321 U. S. 233. For the protection of public health it may order the summary destruction of property without prior notice or hearing. *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306; *Adams* v. *Milwaukee,* 228 U. S. 572, 584. It may summarily requisition property immediately needed for the prosecution of the war. Compare *United States* v. *Pfitsch,* 256 U. S. 547. As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 566; *Stoehr* v. *Wallace,* 255 U. S. 239, 245. Similarly public necessity in time of war may justify allowing tenants to remain in possession against the will of the landlord. *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170. Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety. *Hirabayashi* v. *United States, supra;* cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Measured by these standards we find no denial of due process under the circumstances in which this Act was adopted and must be applied, in its denial of any judicial stay pending determination of a regulation's validity.

IV.

As we have seen, Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in *Bradley* v. *Richmond, supra,* and in *Wadley Southern Ry. Co.* v. *Georgia, supra,* 667, 669, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil* v. *Vermont,* 144 U. S. 323, 331; *Barbour* v. *Georgia,* 249 U. S. 454, 460; *Whitney* v. *California,* 274 U. S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co.* v. *Watson,* 287 U. S. 86. While this Court in its

discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney* v. *California, supra,* 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey* v. *Best,* 299 U. S. 1 with *Ex parte Siebold,* 100 U. S. 371.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81; *United States* v. *Adams Express Co.,* 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. *United States* v. *Vacuum Oil Co.,* 158 F. 536, 539–41; *Lehigh Valley R. Co.* v. *United States,* 188 F. 879, 887–8. See also *United States* v. *Standard Oil Co.,* 155 F. 305, 309–10, reversed on other grounds, 164 F. 376. Compare *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, 196–7; *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370, 384. Similarly it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of those orders, *United States* v. *Corrick,* 298 U. S. 435, 440;

White v. *Johnson, supra,* 373–4. See also *Natural Gas Co.* v. *Slattery, supra,* 309–10.[9]

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation there would not be adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial. During the present term of court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. *Falbo* v. *United States,* 320 U. S. 549; and see *Bowles* v. *United States,* 319 U. S. 33. We perceive no tenable ground for distinguishing that case from this.

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation

[9] Compare the provisions of the Packers and Stockyards Act, 7 U. S. C. §§ 194 and 195, and of the Commodity Exchange Act, 7 U. S. C. § 13 (a), imposing criminal sanctions, and those of the Federal Trade Commission Act as amended, 15 U. S. C. §§ 45 (g)–(l) imposing heavy penalties, for violation of an administrative order which has become final by its affirmance upon the exclusive statutory method of review provided, or by the expiration of the time allowed for review without resort to the statutory procedure.

may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. *Block* v. *Hirsh, supra,* 158. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the

Administrator, was properly submitted to the jury. Cf. *Falbo* v. *United States, supra.*

Affirmed.

MR. JUSTICE ROBERTS:

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred.

When, in his judgment, commodity prices have risen, or threaten to rise, "to an extent or in a manner inconsistent with the purposes" of the Act, the Administrator may establish "such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act.

"So far as practicable" in establishing any maximum price, he is to ascertain the prices prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments "for such relevant factors as he may determine and deem to be of general applicability," including several factors mentioned. Before issuing any regulation, he shall "so far as practicable" advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judg-

ment, are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U. S. C. § 902).

It will be seen that whether, and, if so, when, the price of any commodity [1] shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

The Supposed Standards for the Administrator's Guidance.

The Act provides that any regulation or order must be "generally fair and equitable" in the Administrator's judgment; but coupled with this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

Section 1 (a) (50 U. S. C. § 901 (a)) states seven purposes, which should be set forth separately as follows:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;"

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict

[1] The Act gives the Administrator no power with respect to wages, and limits his powers as respects fishery commodities (50 U. S. C. § 902 (i)), and agricultural commodities (50 U. S. C. § 903).

anyone of error of judgment in so classifying a given economic phenomenon.

"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;"

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative discretion were not sufficiently broad there is added the phrase "other disruptive practices," which seems to leave the Administrator at large in the formation of opinion as to whether any practice is disruptive.

"to assure that defense appropriations are not dissipated by excessive prices;"

It is not clear—to me at least—what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say.

"to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;"

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be "undue impairment of their standard of living" would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

"to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the

Federal, State, and local governments, which would result from abnormal increases in prices;"

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the "standard" any more vague.

"to assist in securing adequate production of commodities and facilities;"

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as "arbitrary or capricious."

"to prevent a post emergency collapse of values;"

This purpose, or "standard," seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If, in his judgment, any action by him is necessary or appropriate to the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy

in the postwar period. His judgment, founded, as it may be, on his studies and investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in *Bowles* v. *Willingham, post,* p. 503. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in *Schechter Corp.* v. *United States,* 295 U. S. 495, leaves no doubt that the decision is now overruled. There, as here, the "code" or regulation, to become effective, had to be found by the Executive to "tend to effectuate the policy" of the Act. (See footnote 3, p. 521.)

The Administrator's Procedure.

I have not yet spoken of the statutory provisions respecting the permissible procedure of the Administrator in imposing prices. Sec. 202 (a) (50 U. S. C. § 922 (a)) authorizes him to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order, or in the administration and enforcement of the Act and regulations, orders, and price schedules thereunder. The remaining subsections give him broad powers to compel disclosure of information. And he may take official notice of economic data and other facts, including facts found as a result of his investigations and studies (§ 203 (b), 50 U. S. C. § 923 (b)).

Each regulation or order must be accompanied by a "statement of the considerations involved" in its issue (§ 2 (a), 50 U. S. C. § 902 (a)). This is not a statement or finding of fact. Webster defines the term "consideration" as "that which is, or should be, considered as a ground of opinion or action; motive; reason." The citizen,

therefore, is merely to be advised of the reasons for the Administrator's action.

How is he to proceed if he desires to challenge that action? The answer is found in § 203 (50 U. S. C. § 923). Within a specified time after the issue of a regulation any person subject to any provision of it may file a protest "specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." The Administrator may receive statements in support of the regulations and incorporate them in his proceedings. Within a time fixed he must (1) grant or deny the protest in whole or in part, (2) note it for hearing, or (3) provide an opportunity to present further evidence. His is the choice.

If he denies the protest in whole or in part he must inform the protestant of the grounds upon which his decision was based and of any economic data or other facts of which he has taken official notice.

This, then, is the first opportunity the protestant has to know on what the Administrator has based his "considerations" or reasons for action. As the Emergency Court of Appeals held in *Lakemore Co.* v. *Brown*, 137 F. 2d 355: [2]

"Thus, consistently with statutory requirements, the Administrator could have waited until he had entered his order denying the protest before informing the protestant of the economic data of which he had taken official notice and of the economic conclusions which he had derived therefrom and the other grounds upon which the denial was based."

And it is to be observed that, after seeing the protestant's affidavits and the evidence, the Administrator may load the record with all sorts of material, articles, opinions,

[2] In citing cases decided by that court, I do so with no thought that in construing the Act's provisions that court has erred. On the contrary, I cite its interpretations of the statute as supporting my views that, as properly construed, the Act is invalid.

compilations, and what not—pure hearsay—subject to no cross-examination, to persuade the court that his order could, "in his judgment," promote one of the "purposes" of the Act.

Thus is the "record" weighted against formal complaint in court.

Chatlos v. *Brown*, 136 F. 2d 490, *Spaeth* v. *Brown*, 137 F. 2d 669, and *Bibb Manufacturing Co.* v. *Bowles*, 140 F. 2d 459, amongst other cases, indicate the sort of data—although they do not exclude the use of other sorts—on which the Administrator seems to be accustomed, and to be entitled, to act. He need make no findings of fact.

The Court Review.

The protestant who is aggrieved by the denial or partial denial of his protest may, within a set time, file a complaint with a specially created Emergency Court of Appeals "specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." The court is given exclusive jurisdiction and all other courts are forbidden to take jurisdiction to grant such relief. The court may set aside the order, dismiss the complaint, or remand the proceeding. Upon the filing and service of the complaint, the Administrator is to certify and file a transcript of such portion of the proceedings before him as are material to the complaint (§ 204 (a); 50 U. S. C. § 924 (a)).

The section proceeds:

"No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not

reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court."

It is not difficult to picture the plight of the protestant. The Administrator's statement of considerations, without more, constitutes proof in the cause.

In *Montgomery Ward & Co.* v. *Bowles,* 138 F. 2d 669, the Administrator in his statement of considerations said that he took official notice of three propositions of the most general scope. No evidence in support of these or of any other facts upon which he relied was included in the transcript. The complainant suggested to the court the omission of pertinent matter, namely, the evidence in support of the propositions of which the Administrator said he took official notice, the evidence of various other assertions of fact in his opinion, and the particular facts and evidence upon which he based the conclusions expressed in his statement of considerations that "the maximum prices established in this regulation are fair and equitable." The Administrator objected to the suggestion and the court rejected it. It was held that the Act requires "only a summary statement of the basic facts which justify the regulation."

Referring to § 204 (b), 50 U. S. C. § 924 (b), the court held that the requirement that the complainant must establish "to the satisfaction of the court" that the regulation, order, or price schedule is not in accordance with law or is arbitrary or capricious throws upon the protestant

the burden "to bring forward and satisfactorily prove the invalidating facts," and added: "Unless and until he does so the regulation is to be taken as valid and the existence of a state of facts which justify it is to be assumed without the necessity of proof thereof by the Administrator."

The court added that the protestant is given means of carrying this burden by filing affidavits and other evidence, but omits to refer to the fact that these affidavits and other evidence must be addressed to the Administrator's order and his most general and sweeping statement of considerations, which merely means his reasons for making the order. These affidavits and this evidence under the procedure prescribed are to be put in before the protestant even knows what data the Administrator relied upon or sees the Administrator's opinion denying his protest. It is hardly necessary to dilate upon the burden thus placed on a protestant or the extent to which he is compelled to fill the record with what he may think relevant matter only to find that he has been shooting at straws. The court further adverted to the fact that the Act permits the protestant to state in detail in connection with his protest the nature and sources of any further evidence not subject to his control upon which he believes he can rely in support of the facts alleged in his protest. Here again the protestant is under the same handicap. He must disclose all he has in mind to the Administrator before the Administrator makes any disclosure to him of the facts and data upon which that official has relied.

Finally the court refers to the privilege given the protestant to file a brief with the Administrator and to "request an oral hearing," without mentioning the facts that the brief can be addressed only to the reasons given in the statement of consideration, and that the Administrator is at liberty to deny the request.

A procedure better designed to prevent the making of an issue between parties can hardly be conceived.

And the extent of the burden is further emphasized by what the Emergency Court of Appeals has said in *Lakemore Co.* v. *Brown, supra:*

"It is objected that the Administrator thus in effect has prejudged the case; that as witness, immune from cross-examination, he has rendered an opinion which concludes the matter which is before him as judge.

"This overlooks the fact that the Administrator, from the necessities of the case, does not come with a virgin mind to the consideration of a protest. He has previously performed the official act of issuing the regulation, the terms of which of course reflect his conclusions on many economic, administrative and legal questions. In this sense, he necessarily approaches consideration of a protest with certain 'preconceived notions'—to use complainant's phrase. It is the object of the protest procedure to give the Administrator a chance to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. What the Administrator did here was to lay his cards on the table in the protest proceedings, offering protestant an opportunity to play its trump cards, if it had any.

"Of course such statements of economic conclusions thus incorporated in the record are not 'evidence.' Section 204 (a) requires the transcript of the protest proceedings, filed in this court, to 'include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice.' Insofar as any economic generalizations or conclusions formulated by the Administrator constitute indispensable steps in his process of reasoning in denying the protest, it is for this court to say whether they have any rational basis, in performance of our statutory duty to consider whether the regulation or order should be set aside in whole or in part as being 'arbitrary or capricious.' This is so, whether the Administrator includes such generalizations and con-

clusions in his opinion accompanying the denial of the protest or, as in this case, incorporates them into the record of the protest proceedings at an earlier stage in order to afford protestant an opportunity for rebuttal."

To this may be added what the Emergency Court said in *Madison Park Corp.* v. *Bowles,* 140 F. 2d 316, 324:

"We do not decide that this Court should limit the application of the term 'generally fair and equitable' to standards mentioned in the law and in discussions of its enactment while pending in Congress. It may be possible that a case will occur in which the effect of a regulation established by the Administrator clearly will be shown to be generally unfair and inequitable on grounds not mentioned. But in such a case the reasons must be clear and compelling. The Act provides the Administrator may establish such rents as *in his judgment* will be generally fair and equitable. Review in this Court is plainly limited. It may not substitute its judgment for the judgment of the Administrator, but may act in review only when it finds the regulation is not in accordance with law or is arbitrary and capricious. Thus if the Court finds any reasonable basis to support the view that the regulation deals fairly and equitably with the industry concerned, the regulation must stand." (Italics in original.)

When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.

No court is competent, on a mass of economic opinion consisting of studies by subordinates of the Administrator,

charts and graphs prepared in support of the studies, and economic essays gathered hither and yon, to demonstrate, beyond doubt, that the considerations or conclusions of the Administrator from such material cannot support the Administrator's judgment that what he has done by way of regulation or price schedule tends to prevent postwar collapse of values, or to prevent dissipation of defense appropriations through excessive prices, or to prevent impairment of the standard of living of persons dependent on life insurance, or to prevent hardship to schools—to enumerate but a few of the stated purposes of the Act.

It is not surprising that, in the thirty-one cases decided by the Emergency Court of Appeals of which I have found reports, complaints have been dismissed in twenty-eight, and but three have been remanded to the Administrator for further proceedings.[3] Two of the three involved no question of merits under the statutory provisions.

The War Power.

The Emergency Court of Appeals in *Taylor* v. *Brown,* 137 F. 2d 654, overruled a challenge to the constitutional validity of the Act's delegation of legislative power to the Administrator by invocation of the "War Power" of Congress, the powers embodied in Article I, § 8, of the Constitution "to declare War," "to raise and support Armies," "to provide and maintain a Navy," and "to make all Laws which shall be necessary and proper for carrying into Execution" those powers. After showing, what needs no argument, that these powers of Congress are very different from those to be exercised in peace, the court then—without a sign that it realizes the great gap in the process—assumes that one of Congress' war powers is the power to transfer its legislative function to a delegate. By the

[3] *Armour & Co.* v. *Brown,* 137 F. 2d 233; *Montgomery Ward & Co.* v. *Bowles,* 138 F. 2d 669; *Hillcrest Terrace Corp.* v. *Brown,* 137 F. 2d 663.

same reasoning it could close this court or take away the constitutional prerogatives of the President as "War measures."

I am not sure how far this court's present opinion adopts the same view. There are references in it to the war emergency, and yet the reasoning and the authorities cited seem to indicate that the delegation would be good in peacetime and in respect of peacetime administration. And the Emergency Court of Appeals, in spite of its decision in *Taylor* v. *Brown, supra,* and its statement in *Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349, that, as the Act is an exercise of the war power and therefore does not deprive citizens of property without due process, has, nevertheless, weighed provisions of the Act as against the guaranty of the Fifth Amendment in *Wilson* v. *Brown,* 137 F. 2d 348, and in *Avant* v. *Bowles,* 139 F. 2d 702.

I am sure that my brethren, no more than I, would say that Congress may set aside the Constitution during war. If not, may it suspend any of its provisions? The question deserves a fair answer. My view is that it may not suspend any of the provisions of the instrument. What any of the branches of government do in war must find warrant in the charter and not in its nullification, either directly or stealthily by evasion and equivocation. But if the court puts its decision on the war power I think it should say so. The citizens of this country will then know that in war the function of legislation may be surrendered to an autocrat whose "judgment" will constitute the law; and that his judgment will be enforced by federal officials pursuant to civil judgments, and criminal punishments will be imposed by courts as matters of routine.

If, on the contrary, such a delegation as is here disclosed is to be sustained even in peacetime, we should know it.

MR. JUSTICE RUTLEDGE, dissenting:

I agree with the Court's conclusions upon the substantive issues. But I am unable to believe that the trial af-

forded the petitioners conformed to constitutional requirements. The matter is of such importance as requires a statement of the reasons for dissent.

The Emergency Price Control legislation is unusual, if not unique. It is streamlined law in both substance and procedure. More than any other legislation except perhaps the Selective Service Act, in the combined effect of its provisions it attenuates the rights of affected individuals. The Congress regarded this as necessary, though it sought to preserve as much of individual right as it felt was consistent with controlling wartime inflation. To that judgment we owe all deference, saving only what we owe to the Constitution.

War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be impaired. But not all are lost. War expands the nation's power. But it does not suspend the judicial duty to guard whatever liberties will not imperil the paramount national interest.

I.

Judged by normal peacetime standards, over-all nationwide price control hardly has accepted place in our institutions. Notwithstanding the considerable expansion of recent years in this respect, the extension has been piecemeal.[1] Until now it has not enveloped the entire economy.[2] Whether control so extensive might be upheld in some emergency not created by war need not now be de-

[1] Cf., e. g., *Nebbia* v. *New York*, 291 U. S. 502.

[2] Perhaps the nearest previous approach to control so extensive was in the National Industrial Recovery legislation.

cided. That it can be supported in the present circumstances and for the declared purposes there can be no doubt. It is enough, as the Court points out, that legal foundation exists in the nation's power to make war, as this has been given to Congress and the Chief Executive. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81.[3]

The foundation has relevance for each of the issues. And generally it has significance for the application of peacetime precedents. Decisions made then with limitations, explicit or implied, not affected by influence of the war power and the conditions of a state of war, cannot be wholly conclusive in their limiting effect upon the exercise of war-making authority. Care must be taken therefore, in applying them, both to see that they are observed so far as the dominant necessity permits and to be equally sure they are not misapplied to hamstring essential authority.[4]

As it is with the substantive control, so it is with delegating legislative power. War begets necessities for this, as for imposing substantive controls, not required by the lesser exigencies of more normal periods. In this respect certainly there is as much room for difference as exists when Congress is dealing wholly with internal matters and when it is acting with the President about foreign affairs. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304. Not only the broader power of Congress, but its conjunction in the particular delegation with the wider authority of the President, both as chief magistrate and as commander-in-chief, goes to sustain the greater delegation. Cf. *Hirabayashi* v. *United States, supra.* But the present legislation, as the Court's opinion demon-

[3] Cf. note 18 *infra.*

[4] It goes without saying that whatever scope is allowed for operation of governmental authority in peace continues to be effective in war.

strates, does not go beyond the limits allowed by peacetime precedents in the substantive delegation.[5]

II.

My difficulty arises from the Act's procedural provisions. They too are unusual. That is true, though each save one has been used before, and sustained, in separate applications. No previous legislation has presented quite this combination of procedural devices.[6] In the combination, if in nothing more, unique quality would be found. But there is more.

Congress sought to accomplish two procedural objectives. One was to afford a narrow but sufficient method for securing review and revision of the regulations. At the same time, the Act created broad and ready methods for enforcement. The short effect of the procedure is to give the individual a single channel for questioning the validity of a regulation, through the protest procedure and the Emergency Court of Appeals, with review of its decisions here on certiorari. § 204. On the other hand, the varied and widely available means for enforcement include criminal proceedings, suits in equity, and suits for recovery of civil penalties, in the federal district courts and in the state courts. § 205 (a), (b), (c). See also

[5] E. g., the administrator has no power to adopt codes of fair competition generally, such as was given under N. I. R. A. His principal function is single, to determine and make effective by regulation the maximum price at which a commodity may be sold. The task is vast and complex, in comparison with previously sustained price-fixing delegations, by virtue of the number of industries and items affected and the nation-wide scope of the authority. But the focus of the price-fixing function is narrow, although powerful, in its incidence upon a particular industry or operator.

[6] Cf. Judicial Review of Price Orders under the Emergency Price Control Act (1942) 37 Ill. L. Rev. 256, 263–264; and other materials cited *infra* notes 20, 21.

§ 205 (d), (e), (f).[7] And in all these enforcement proceedings the mandate of § 204 (d) is that the court shall have no "jurisdiction or power to consider the validity of" a regulation, order or price schedule. The statute thus affords the individual, to question a regulation's validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many. And in the enforcement proceedings the issues are cut down so that, in a practical sense, little else than the fact whether a violation of the regulation as written has occurred or is threatened may be inquired into.[8]

Disparity in remedial and penal measures does not necessarily invalidate the procedure, though it has relevance to adequacy of the remedy allowed the individual.[9] Congress has broad discretion to open and close the doors to litigation. In doing so it may take account of the necessities presented by such a situation as it was dealing with here. To follow the usual course of legislation and permit challenge by restraining orders, injunctions, stay orders and the normal processes of litigation would have been, in this case, to lock the barn door after the horse had been stolen. There was therefore compelling reason for Congress to balance the scales of litigation unevenly, if only it did not go too far. In no other way could it protect the paramount national interest. If the result, within the permissible limits, is harsh or inconvenient for

[7] By § 205 (f) (1), (2) licensing authority is given to the administrator, with special provisions for suspension for not more than twelve months by proceedings in state, territorial or federal district courts.

[8] It is conceded that questions concerning the validity of statutory provisions, as distinguished from regulations, remain determinable by enforcing courts. See Sen. Rep. No. 931, 77th Cong., 2d Sess., 24–25, and compare H. R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency on H. R. 5479, 77th Cong., 2d Sess., 4, 7–8.

[9] Cf. Parts IV, V, *infra*.

the individual, that is but part of the price he, with all others, must pay for living in a nation which ordinarily gives him so much of protection but in a world which has not been organized to give it security against events so disruptive of democratic procedures.

I have no difficulty with the provision which confers jurisdiction upon the Emergency Court of Appeals to determine the validity of price regulations or, if that had been all, with the mandate which makes its jurisdiction in that respect exclusive. Equally clear is the power of Congress to deprive the other federal courts of jurisdiction to issue stay orders, restraining orders, injunctions or other relief to prevent the operation of price regulations or to set them aside. So much may be rested on Congress' plenary authority to define and control the jurisdiction of the federal courts. Constitution, Article III, § 2; *Lockerty* v. *Phillips*, 319 U. S. 182. It may be taken too, for the purposes of this case, that Congress' power to channel enforcement of federal authority through the federal courts sustains the like prohibitions it has placed on the state courts.[10] Without more, the statute's provisions would seem to be unquestionably within the Congressional power. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

Congress however was not content to create a single national tribunal, give it exclusive jurisdiction to determine all cases arising under the statute, and deny jurisdiction over them to all other courts.[11] It provided for en-

[10] *The Moses Taylor*, 4 Wall. 411; *Bowles* v. *Willingham*, *post*, p. 503; cf. *Claflin* v. *Houseman*, 93 U. S. 130; *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511.

[11] This it might have done, subject only to the requirement that the procedure specified for the single competent court afford a constitutionally adequate mode for determining the issues. *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*. In case criminal jurisdiction were conferred, observance of the requirements of Article III, § 2, and of the

forcement by civil and criminal proceedings in the federal district courts and in the state courts throughout the country.

This, too, it could do, though only if adequate proceedings, in the constitutional sense, were authorized. And I agree that the enforcing jurisdiction would not be made inadequate merely by the fact that no stay order or other relief could be had pending the outcome of litigation. Confronted as the nation was with the imminent danger of inflation and therefore the necessity that price controls should become effective at once and continue so without interruption at least until invalidated in particular instances, Congress could require individuals to sustain, in deference to the paramount public interest, whatever harm might ensue during the period of litigation and until each had demonstrated the invalidity of the regulation as it affected himself.[12] Runaway inflation could not have been avoided in any other way. The lid had to go on, go on tight and stay tight. This necessity united with the general presumption of validity which attaches to legislation [13] and Congress' power to control the jurisdiction of the courts to sustain its denial of power to all courts, including the enforcing courts, the Emergency Court and this one,[14] to suspend operation of the regulations pending final determination of validity.

Fifth and Sixth Amendments concerning such trials would be required. Cf. text *infra*, Parts V, VI.

[12] Cf. *L'Hote* v. *New Orleans*, 177 U. S. 587; *Welch* v. *Swasey*, 214 U. S. 91; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.

[13] *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–154.

[14] By § 204 (b) of the Act, the effectiveness of a judgment of the Emergency Court enjoining or setting aside the regulation, in whole or in part, is postponed until the expiration of thirty days from its entry and, if certiorari is sought here within that time, the postponement continues until this Court's denial of the writ becomes final or until other

The crux of this case comes, as I see it, in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them "jurisdiction or power to consider the validity" of the regulations for which enforcement is thus sought. This question which the Court now says "presents no novel constitutional issue" was expressly and carefully reserved in *Lockerty* v. *Phillips, supra.* The prohibition is the statute's most novel feature. In combination with others it gives the procedure a culminating summary touch and presents questions different from those arising from the other features.

The prohibition is unqualified. It makes no distinction between regulations invalid on constitutional grounds and others merely departing in some respect from statutory limitations, which Congress might waive, or by the criterion whether invalidity appears on the face of the regulation or only by proof of facts. If the purpose and effect are to forbid the enforcing court to consider all questions of validity and thus to require it to enforce regulations which are or may be invalid for constitutional reasons, doubt arises in two respects. First, broad as is Congress' power to confer or withhold jurisdiction, there has been none heretofore to confer it and at the same time deprive the parties affected of opportunity to call in question in a criminal trial whether the law, be it statute or

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final disposition of the case by this Court. By § 204 (d) the Emergency Court and this Court are given exclusive jurisdiction to determine the validity of the regulation and all other courts are denied "jurisdiction or power to consider" this question and to stay, restrain, enjoin or set aside any provision of the regulation or its enforcement. The net effect is to deprive all courts of power to suspend operation of the regulation pending final decision on its validity and to keep it in force until a final judgment of the Emergency Court, or of this Court on review of its decision, becomes effective.

regulation,[15] upon which the jurisdiction is exercised squares with the fundamental law. Nor has it been held that Congress can forbid a court invested with the judicial power under Article III to consider this question, when called upon to give effect to a statutory or other mandate.

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.

III.

The idea is entirely novel that regulations may have a greater immunity to judicial scrutiny than statutes have, with respect to the power of Congress to require the courts to enforce them without regard to constitutional require-

[15] Cf. text *infra*, Part III, at notes 16, 17.

ments. At a time when administrative action assumes more and more of the law-making function,[16] it would seem the balance of advantage, if any, should be the other way. But there is none. The statute has impact upon individuals only through the regulations. They are in effect part of the Act itself, unless invalid. If invalid, they rule, just as the statute does, until set aside. And, in respect to constitutional requirements, they have no more immunity than the statute itself.[17]

Clearly Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation. And it is conceded that Congress could not have compelled judicial enforcement of all price regulations, without regard to their validity, if it had not given opportunity for attack upon them through the Emergency Court or if that opportunity is inadequate. But because the opportunity is afforded and is deemed adequate in the unusual circumstances, at any rate for some of its purposes, and because it was not followed, the Court holds that criminal enforcement must be given and the enforcing court cannot consider the question of validity.

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[16] There hardly can be question that whenever an administrative agency, acting within the discretion validly conferred upon it by Congress, promulgates a regulation or issues an order of general applicability it is "making the law," as effectively as is Congress when it enacts a specific prescription, by whatever name this may be called. *United States* v. *Grimaud,* 220 U. S. 506; *Avent* v. *United States,* 266 U. S. 127; *United States* v. *Michigan Portland Cement Co.,* 270 U. S. 521.

[17] Cf. the dissenting opinion of Mr. Justice Roberts. The notion that Congress somehow could cut off review of regulations for constitutional invalidity when it could not do so for statutes, of which suggestions appear in the legislative history and the briefs, was not adhered to in the oral argument as to regulations void on their face and is not tolerable when the effect would be to make the courts instruments for enforcing unconstitutional mandates. Cf. Part VI, *infra.*

If I understand it, the argument to sustain the conviction, in its broadest form, rests upon the proposition that Congress, by providing in one proceeding a constitutionally adequate mode for deciding upon the validity of a law or regulation, and requiring this to be followed within a limited time, can cut off all other right to question it and make that determination, or the failure to secure it in time, conclusive for all purposes and in all other proceedings. The proposition cannot be accepted in that broad form. To do so would mean, for instance, that if in this case a regulation had prescribed one maximum price for sales by merchants of one race or religion and a lower one for distributors of another, the judicial power of the United States would have to be exercised to convict the latter for selling at the formers' price, if they had not availed themselves of the limited review afforded by this Act. It hardly would be consistent with accepted ideas of due process or equal protection for any court to impose penalty or restraint in such a case.[18] And I cannot imagine this Court as sustaining such a conviction or any other as imposing it.[19]

The illustration is extreme and improbable of occurrence. But it serves to test the broad contention. Such a doctrine established as generally applicable would contain seeds of influence too dangerous for acceptance, more especially for the determination of criminal matters. No authority compels or enjoins this. And I am unwilling to give the idea adherence in particular applications without stating qualification which confines its possible effects

[18] See note 17 *supra*. The unique circumstances involved in *Hirabayashi* v. *United States*, 320 U. S. 81, confine that case to its facts, including the particular emergency with which legislation there under review had dealt, as respects the issue of equal protection.

[19] Cf. notes 23, 33 *infra*.

to situations where the gravest dangers to the nation's interest exist and cannot be escaped in any other way.

The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes? This question is the most important one in the case and demands explicit attention. "It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding." [20] But to make this easy assumption is at once to decide the rock-bottom issue and, in my opinion, one this Court has not determined heretofore with effects upon the criminal process like those produced in this case.[21]

IV.

It is true that in a variety of situations and for a variety of reasons a person is foreclosed from raising issues, including some constitutional ones, where he has failed to exercise an earlier opportunity. Thus ordinarily issues cannot be raised on appeal which were not presented in

[20] McAllister, Statutory Roads to Review of Federal Administrative Orders (1940) 28 Calif. L. Rev. 129, 166.

[21] *Ibid.* Cf. Judicial Review of Price Orders Under the Emergency Price Control Act (1942) 37 Ill. L. Rev. 256, 263; Stason, Timing of Judicial Redress from Erroneous Administrative Action (1941) 25 Minn. L. Rev. 560, 575, 576–581; Administrative Features of the Emergency Price Control Act (1942) 28 Va. L. Rev. 991, 998, 999; Reid and Hatton, Price Control and National Defense (1941) 36 Ill. L. Rev. 255, 283–284. For an analysis of litigation under this Act see Sprecher, Price Control in the Courts (1944) 44 Col. L. Rev. 34.

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the trial court. And a variant is that federal questions not raised in the state courts generally will not be considered here.[22]

But such instances of foreclosure, whether legislative or judicial in origin, do not support the broader basis of argument in this case. Two things are to be emphasized. One is that the previous opportunity is in an earlier phase of the same proceeding, not as here a separate and independent one of wholly different character. In other words, the determination of guilt or other matter ultimately in issue is not cut up into two separate, distinct and independent proceedings in different tribunals, in which neither body has power to consider and decide all the issues, but each can determine them only in part. The other thing for stress is that the foreclosure by failure to take the earlier chance is not universally effective. And this is true particularly of constitutional questions, some of which may be raised at any time.[23] While Congress has plenary power to confer

[22] The foreclosure may be founded upon notions of waiver, comity, putting an end to litigation, securing orderly procedure or the advantages of having available for consideration in the later stages the informed judgment of the trial tribunal, or some combination of these and other considerations. Cf. Stason, Timing of Judicial Review from Erroneous Administrative Action (1941) 25 Minn. L. Rev. 560, 576–581; Berger, Exhaustion of Administrative Remedies (1939) 48 Yale L. J. 980, 1006. And the rule against allowing collateral attack, where a judgment is involved, is relevant to the broad problem of foreclosure.

[23] Commonly it is said that "jurisdictional" questions, particularly concerning the court's power to deal with the subject matter, may be raised at any stage or in a collateral attack. And this seems to be true also of some other constitutional issues through challenge to judgments by habeas corpus proceedings long after the judgment has become final. Cf., e. g., *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371; *Johnson* v. *Zerbst*, 304 U. S. 458; *Mooney* v. *Holohan*, 294 U. S. 103. Compare Revised Rules of the Supreme Court of the

or withhold appellate jurisdiction, cf. *Ex parte McCardle*, 7 Wall. 506, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court "power to consider" constitutional questions relating to the law in issue.

If the foreclosure is not always effective when the earlier phase of litigation is wholly judicial, it hardly should be when this consists of administrative or of both administrative and judicial proceedings, still less when these are civil in character and the later enforcement phase is criminal. In the enforcement of administrative orders the courts have been assiduous, perhaps at times extremely so,[24] to see that constitutional protections to the persons affected are observed. By trial and error, ways have been found to give the administrative process scope for effective action and yet to maintain individual security against abuse, especially in respect to constitutional rights.[25] The instances closest to the problem here have provided for attaching penalties, including criminal sanctions, to violations of orders. But generally by one method or another means have been supplied for postponing their impact, at any rate irrevocably, until after the order's validity has

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United States, Rule 27, paragraph 6; cf. *Weems* v. *United States*, 217 U. S. 349, 362; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547; *Brasfield* v. *United States*, 272 U. S. 448; *Mahler* v. *Eby*, 264 U. S. 32, 45.

[24] Compare *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Crowell* v. *Benson*, 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 306 U. S. 56, with *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

[25] E. g., compare *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 with *Labor Board* v. *Mackay Radio Co.*, 304 U. S. 333; cf. also *Morgan* v. *United States*, 298 U. S. 468; 304 U. S. 1; *United States* v. *Morgan*, 307 U. S. 183. Compare note 24 *supra*; and see *Ng Fung Ho* v. *White*, 259 U. S. 276.

been established.[26] And in that effort this Court has joined.[27]

Whatever may be the limitations on judicial review in criminal proceedings under other administrative enforcement patterns,[28] no one of these arrangements goes as far as the combination presented by this Act. It restricts the individual's right to review to the protest procedure and appeal through the Emergency Court of Appeals Both are short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations. Protest must be filed within the sixty-day period. After that time, no protest can be made and no review can be

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[26] Thus, in some cases review and enforcement are concentrated exclusively in the same court. Cf. National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, giving the circuit courts of appeal exclusive jurisdiction to review and enforce the board's orders, to which no penalty attaches until the board has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority. Likewise, when there is provision for stay or suspension of the order pending determination of its validity, e. g., the Securities Act of 1933, 48 Stat. 81, 15 U. S. C. § 77i; the Securities Exchange Act of 1934, 48 Stat. 902, 15 U. S. C. § 78y; the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. § 79x. And this is true where the enforcing court is not forbidden to consider the validity of the order, a prohibition entirely novel to the Emergency Price Control Act.

[27] Cf. *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, and authorities cited. In notable instances, also, where no specific provision has been made for either judicial review or avoiding the irrevocable impact of possibly invalid administrative action, and review has not been expressly denied, the courts have been ready to find means for review and for averting the impact of the penalty until it has been had. E. g., *Ex parte Young*, 209 U. S. 123; cf. *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190.

[28] Cf. McAllister, *op. cit. supra*, note 20; and note 26 *supra*.

had, except upon grounds arising later. § 203 (a).[29] The only *right* is to submit written evidence and argument to the administrator. § 203 (c). There is none to present additional evidence to the court.[30] Necessarily there is none of cross-examination. No court can suspend the order unless or until a judgment of the Emergency Court invalidating it becomes final.[31] The penalties, civil and criminal, attach at once on violation and, it would seem, until the contrary is decided, with finality.[32] At any rate,

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[29] Apparently it is contemplated that the "affidavits or other written evidence" submitted in support of the objections be filed with the protest, though later submissions may be made at times and under regulations prescribed by the administrator, or when ordered by the Emergency Court, or to that court when the administrator requests. §§ 203 (a), 204 (a). The administrator is authorized to permit filing of protest after the sixty days have expired solely on grounds arising after that time. § 203 (a). He is required to grant or deny the protest, in whole or in part, notice the protest for a hearing, or provide an opportunity to present further evidence, within thirty days after the protest is filed or ninety days after issuance of the regulation or order, or in the case of a price schedule ninety days from the effective date, whichever occurs later. *Ibid.*

[30] Cf. note 29 *supra*. In the Emergency Court of Appeals, "no objection to [the] regulation . . . and no evidence in support of any objection thereto, shall be considered . . . unless such objection" has been set forth in the protest or such evidence is in the transcript. Additional evidence can be admitted only if it was "either offered to the Administrator and not admitted [by him] or . . . could not reasonably have been offered to . . . or included by the Administrator in such proceedings." In that case it is to be presented to the administrator, received by him and certified to the court together with any modification he may make in the regulation. Where the administrator so requests, however, such additional evidence "shall be presented directly to the court." § 204 (a).

[31] Cf. note 14 *supra*.

[32] That is true whether the infraction occurs before or after the time for protest or appeal has passed and, it would seem, notwithstanding the protestant may proceed with all diligence. The statute makes no provision for relieving from its penal sanctions one who follows the protest procedure to the end in case the protest eventually

that is the statute's purport. In short, the statute as drawn makes not only the regulation but also the penalties immediately and fully effective without regard to whether protest is made, the protest proceeding is carried to conclusion, or what the conclusion may be, except, and this is by inference, that violation after the order finally is held invalid may not be punishable.

This is the scope and reach of the statute. It is greater than any this Court heretofore has sustained.[33] It places

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is sustained, if meanwhile he disobeys the order. Punishment is not made dependent on or required to await the outcome of that proceeding. Rather, the enforcing court is commanded not to consider validity. The command is unqualified, unvarying and universal. It is cast in the compelling terms of "jurisdiction." Under the statute's provisions, it applies as much when trial and conviction occur before the Emergency Court's decision is final as afterwards.

[33] Cf. *Bradley* v. *Richmond*, 227 U. S. 477, which involved a state prosecution for violating a state law. In affirming the conviction this Court rejected the contention that the administrative determination on which prosecution rested was unconstitutional. But it would not follow from the fact a state might thus condition its criminal proceedings consistently with the Fourteenth Amendment's requirement of due process that Congress can do likewise for federal criminal trials. Cf. *infra* Part V. *Wadley Southern Ry. Co.* v. *Georgia*, *supra*, also involved a state suit for civil penalty for violation of a state administrative order, to which the limitations of the Sixth Amendment would not apply. The dicta which the Court regards as pointing to the validity of the procedure here do not sustain it, not only for this reason, but because the special procedure was different, did not purport to foreclose defense to enforcement if not followed, and expressly asserted that, if followed, penalty could be imposed only for violations taking place after the order was adjudicated valid, not beforehand. This case involves the very risk the Court there said could not be imposed.

Other instances relied on by the Court involve only civil, not criminal consequences, or distinguishable instances of criminal prosecution, and therefore have no conclusive bearing here. As the Court seems to recognize, the question now presented was not presented or considered in *Armour Packing Co.* v. *United States*, 209 U. S. 56, or in *United States* v. *Adams Express Co.*, 229 U. S. 381. And it was not

the affected individual just where the Court, speaking through Mr. Justice Lamar in *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 662, said he could not be put: "He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order." Yet the Court holds this special proceeding "adequate" and therefore effective to foreclose all opportunity for defense in a criminal prosecution on the ground the regulation is void.

This is no answer. A procedure so summary, imposing such risks, does not meet the requirements heretofore considered essential to the determination or foreclosure of issues material to guilt in criminal causes. It makes no difference that petitioners did not follow the special procedure. The very question, posed in the Court's own terms, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide. Unless it is decided, the question of adequacy, in any sense heretofore received, has not been determined, or an entirely new conception of adequacy has been approved.

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involved or determined in the cited decisions, either here or in the inferior federal courts, dealing with carriers who violate tariffs framed and filed by themselves and thereby become subject to penalty. The same is true of the cases holding that threatened criminal prosecution for violation of administrative orders cannot be enjoined.

In these decisions, none of the statutes forbade the enforcing court "to consider the validity" of the orders, none afforded a special proceeding so summary as that provided here, and only *United States* v. *Vacuum Oil Co.,* 158 F. 536, raised a constitutional question relevant here. *Falbo* v. *United States,* 320 U. S. 549, involved a different procedure and a different and more urgent problem. Compare Part VII *infra.* It may be doubted the decision's effect is to preclude the enforcing court from examining constitutional questions affecting the order's validity.

V.

But there is a deeper fault, even if we assume what neither the statute nor the Court's opinion today justifies, that a potential offender who successfully challenges the constitutionality of a regulation or begins a challenge on constitutional grounds in the Emergency Court at any time before or during the criminal prosecution, cannot be convicted, at least until after final decision that the order is valid. There still remain those cases where he has either challenged unsuccessfully in the Emergency Court or has not challenged at all. In them the would-be offender is subject to criminal prosecution without a right to question in the criminal trial the constitutionality of the regulation on which his prosecution and conviction hinge. And this seems to be true without distinction as to the character of the ground on which he seeks to make the issue. To say that this does not operate unconstitutionally on the accused because he has the choice of refraining from violation or of testing the constitutional questions in a civil proceeding beforehand entirely misses the point. The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question. In short, his trial for the crime is either in two parts in two courts or on only a portion of the issues material to guilt in one court. This may be all very well for some civil proceedings. But, so far as I know, criminal proceedings of this character never before have received the sanction of Congress or of this Court. That, like many other criminals, an offender here can be punished for making the wrong guess as to the constitutionality of the regulation, I have no doubt. But that, unlike all other criminals, he can be convicted on a trial in two parts, one so summary and civil and the other criminal

or, in the alternative, on a trial which shuts out what may be the most important of the issues material to his guilt, I do deny.

The Sixth Amendment guarantees to the accused "in all criminal prosecutions . . . the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." By Article III, § 2, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." And, by the same section, "The judicial Power," which is vested in the supreme and inferior courts by § 1, "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority."

By these provisions the purpose hardly is to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed.[34] If the validity of the

[34] Nor, according to accepted notions of the criminal process, has it ever been contemplated that some of the issues of fact should be provable by confrontation of witnesses and others by written evidence only, when other evidence is or may be available. If, for instance, Congress should define an act as a crime, but should require that in the trial issues relating to the validity of the law furnishing the basis for the charge should be proven only by affidavit, though others by the normal processes of proof, the proceeding hardly could be held to comport with the kind of trial the Constitution, and more particularly the Sixth Amendment requires. And if Congress should go further and provide for determination of the issues triable only by affidavit in a court or other body sitting elsewhere than in the state and district of the crime, with other issues triable before a court with a jury empanelled there, but with that court compelled to give finality

order, on constitutional or other grounds, has any substantial relationship to the petitioners' guilt, and it cannot be denied that it does, the short effect of the procedure is to chop up their trial into two separate, successive and distinct parts or proceedings, in each of which only some of the issues determinative of guilt can be tried, the two being connected only by the thread of finality which runs from the decision of the first into the second. The effect is to segregate out of the trial proper issues, whether of law or of fact, relating to the validity of the law for violation of which the defendants are charged, and to leave to the criminal court only the determination of whether a violation of the regulation as written actually took place and whether in some other respect the statute itself is invalid. If Congress can remove these questions, it can remove also all questions of validity of the statute or, it would seem, of law.

The consequences of this splitting hardly need further noting. On facts and issues material to validity of the regulation the persons charged are deprived of a full trial in the state or district where the crime occurs, even if the Emergency Court sits there, as it is not required to do. Their right to try those constitutional issues both of fact and of law on which a criminal conviction ultimately will hinge, is restricted rigidly to the introduction of written evidence before the administrator in a proceeding barely adequate, even under special circumstances like these, to meet the requirements of due process of law in civil proceedings. The court which makes the decision on these issues cannot consider the facts constituting the violation. It has no power to pass judgment of guilty or not guilty upon the whole of the evidence. It can only pronounce

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to the other's findings against the accused, the departure from constitutional requirements would seem to be only the more obvious. This is not far in effect, if it is at all, from what has been done here.

the law valid or invalid in a setting wholly apart from any charge of crime, from the facts alleged as its commission, and from the usual protections which surround its trial.

On the other hand the special tribunal's judgment, rendered it may be on disputed facts as well as law, becomes binding against the accused, in the later proceeding. He cannot then dispute it, regardless of whether meanwhile the facts have changed [35] or new and additional evidence has been discovered and might be tendered with conclusive effect, if it were admissible. He can tender no evidence on what may be the most vital issue in his case and one, it may likewise be, that the evidence then available would sustain overwhelmingly. The trial court must shut its eyes to all such offers of proof and, moreover, to any such issue of law.

VI.

A procedure so piecemeal, so chopped up, so disruptive of constitutional guaranties in relation to trials for crime, should not and, in my judgment, cannot be validated, as to such proceedings, under the Constitution. Even war does not suspend the protections which are inherently part and parcel of our criminal process. Such a dissection of the trial for crime could be supported, under our system, only upon some such notions as waiver and estoppel or res judicata, whether or not embodied in legislation.[36] These too are strange and inadequate vehicles for trying whether the citizen has been guilty of criminal conduct. They bar defense, while keeping prosecution open, before it begins.

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[35] His only remedy is to begin a new protest proceeding (§ 203 (a)), which is not only as limited in character as the original one, but under the administrator's procedural regulations must be "filed within . . . sixty days after the protestant has had, or could reasonably have had, notice" of the changed facts. Revised Procedural Regulation 1, § 1300.26. Cf. notes 29, 30 *supra*.

[36] Cf. note 22 *supra*.

Res judicata, by virtue of a judgment in some prior civil proceeding, where different constitutional guaranties relating to the mode and course of trial have play, has not done duty heretofore to replace either proof of facts before a jury or decision of constitutional questions necessary to make up the sum of guilt in the criminal proceeding itself. Congress can invade the judicial function in criminal cases no more by compelling the court to dispense with proof, jury trial or other constitutionally required characteristics than it can by denying all effect of finality to judicial judgments. Cf. *Schneiderman* v. *United States,* 320 U. S. 118, concurring opinion at 167–168. And while, as noted above, notions of waiver and estoppel have had place in criminal proceedings to an extent not wholly defined, in some instances harshly and artificially,[37] they have not had effect heretofore to enable Congress to force a waiver of defense upon the individual by offering a choice between two kinds of trial, neither of which satisfies constitutional requirements for criminal trials. Certainly when the consequences are so novel and far reaching as they may be under this procedure, both for the individual and for the judicial system, these conceptions should not be given legal establishment to bring them into being.

To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake. The question is not merely whether the protest proceeding is adequate in the constitutional sense for some of the purposes pertinent to that proceeding. It is rather what effect shall be given to the civil determination in the later and entirely different criminal trial. It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose

[37] Compare *Johnson* v. *Zerbst,* 304 U. S. 458; *Glasser* v. *United States,* 315 U. S. 60; with *Patton* v. *United States,* 281 U. S. 276; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269.

the accused from having them decided in that trial and thereby deprive him of the protections in trial guaranteed all persons charged with crime and thus of full and adequate defense. It is not the equivalent of that sort of defense to force one to initiate a curtailed civil suit or to cut him off shortly from all defense on the issues allocated to it, if he does not do so. Again, the question is not merely whether the individual can waive his constitutional trial of the issue of validity. It is rather whether Congress can force him to do so in the manner attempted and, beyond this, whether he and Congress together, in the combined effects of what they do, can so strip the criminal forum of its power and of its duty to abide the law of the land. And if the issue is further whether Congress can do this in some situations, respecting some issues, under more usual safeguards, the question requires attention to these important limitations.[38]

The procedural pattern is one which may be adapted to the trial of almost any crime. Once approved, it is bound to spawn progeny. If in one case Congress thus can withdraw from the criminal court the power to consider the validity of the regulations on which the charge is based, it can do so for other cases, unless limitations are pointed out clearly and specifically. And it can do so for statutes as well. In short the way will have been found to avoid, if not altogether the power of the courts to review legislation for consistency with the Constitution,[39] then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control or definition of jurisdiction. It

[38] Cf. note 41 *infra*.

[39] Cf. McLaren, Can a Trial Court of the United States Be Completely Deprived of the Power to Determine Constitutional Questions? (1944) 30 A. B. A. J. 17.

is rather unwarranted abridgement of the judicial power in the criminal process, unless at the very least it is confined specifically to situations where the special proceeding provides a fair and equal substitute for full defense in the criminal trial or other adequate safeguard is afforded against punishment for violating an order which itself violates or may violate basic rights. So much should not be accomplished merely by giving to the failure to take advantage of opportunity for summary civil determination, coupled with a short statute of limitations upon its availability, the effect of a full and final criminal adjudication. To do this hardly observes the substance of "adequacy" in criminal trials.

From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order invalid on its face. Any other view would permit Congress to compel the courts to enforce unconstitutional laws. Nor, in my opinion, can Congress forbid consideration of validity in all cases, if it can in any, where the invalidity appears only from proof of facts extrinsic to the regulation. Again the racial or religious line is obvious and pertinent. If, for instance, one charged criminally with violating the regulation should tender proof it was being enforced in a manner to deny him the equal protection of the laws, because of his racial or religious connections, it is difficult to believe the evidence could be excluded consistently with the judicial obligation. The Constitution does not make judicial observance or enforcement of its basic guaranties depend on whether their violation appears from the face of legislation or only from its application to proven facts. *Snowden* v. *Hughes,* 321 U.S. 1; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373–374; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–154.

For legislation not void on its face, a presumption of constitutionality attaches and remains until it is proven

invalid or so in operation. In such cases there is no unfairness, nor any invasion of the court's paramount obligation, in requiring one who would avoid the regulations' impact to show they are not what they appear to be or that they are made to operate otherwise than as they purport or were intended. But it is one thing to say that burden must be borne within the enforcement proceeding itself and another to say it must be carried entirely outside it. To require the defendant to prove invalidity in such a situation in the criminal trial itself, upon a showing of violation of the statute, is wholly permissible. But for the court to be unable to receive tendered evidence which might disclose the statute's invalid character and effect, is quite different. Certainly, under the circumstances of this case, it would seem to be as much a violation of individual right and as much an invasion of the judicial function for Congress to command the court not to receive the evidence, regardless of its character or effect, as for it to direct the court to enforce a law or an order void on its face.

VII.

To sanction conviction of crime in a proceeding which does not accord the accused full protection for his rights under the Fifth and Sixth Amendments, and which entails a substantial legislative incursion on the constitutionally derived judicial power, if indeed this ever could be sustained, would require a showing of the greatest emergency coupled with an inability to accomplish the substantive ends sought in any other way. No one questions the seriousness of the emergency the Price Control Act was adopted to meet. And it has been urged with great earnestness that the nation's security in the present situation requires that the statute's procedure, followed in this case, be sustained to its full extent.

That argument would be more powerful if enforcement of the statute, and thus maintenance of price control, were

dependent upon accepting every feature. No doubt to impose the criminal sanction as has been done in this case implements the enforcement process with the deterrent effects which usually accompany that sanction. But neither its use nor enforcement of the statute's substantive prohibitions requires that the criminal court shall not consider the validity of the regulations.

With the arsenal of other valid legal weapons available, there can be no lack of speedy and effective measures to secure compliance. The regulations are effective until invalidated. They cannot be suspended by any court, pending final decision here, if the last source of relief is sought. All the armory of equity, and with it the sanctions of contempt, are available to keep the regulations in force and to prevent violations, at least until decision here is sought and had that the regulations are invalid. The same weapons are available to enforce them permanently if they are found valid. Apart from defense when charged with crime, the individual's only avenue of escape, and that not until final decision of invalidity has been made, is by protest and appeal through the single route prescribed. Finally, in addition to all this, the dealer may be punished for crime if he violates the regulation willfully and cannot show it is invalid either in his defense or by securing a judgment to this effect through the protest procedure. In either case, in view of the statute's curtailment of his substantive rights and the consequent increase in the burden of proving facts sufficient to nullify the regulation,[40] his chance for escape

[40] That burden is heavy, as this case illustrates. Petitioners attacked the regulation's constitutionality on the ground that, by compelling them to sell at prices less than cost, it deprived them of their property without due process of law. And, on the same ground, they urged the regulation violates the statute's requirement that the price fixed allow margins which are "generally fair and equitable." But the Fifth Amendment does not insure a profit to any given individual

becomes remote, to say the least. In view of all these resources and advantages, the assertion hardly is sustained that enforcement requires also depriving the accused of his opportunity for full and adequate defense in his criminal trial.

War requires much of the citizen. He surrenders rights for the time being to secure their more permanent establishment. Most men do so freely. According to our plan others must do so also, as far as the nation's safety requires. But the surrender is neither permanent nor total. The great liberties of speech and the press are curtailed but not denied. Religious freedom remains a

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or group not under legal compulsion to render service, where doing so would contravene an enacted policy of Congress sustainable on a balance of public necessity and private hardship. Cf. the Court's opinion herein and authorities cited; also *Bowles* v. *Willingham, post,* p. 503. And in this case both the statute's basic purpose and its terms, as well as the legislative history, cf. Sen. Rep. No. 931, 77th Cong., 2d Sess., 15, show that Congress intended to forbid only a price so low that the trade in general, not merely some individual dealers or groups, could not have the margin prescribed. *Bowles* v. *Willingham, supra.* Petitioners' offers of proof, in this respect, which the trial court rejected, went only to show that they, or at most the meat wholesalers of Boston, could sell beef only at a loss. Harsh as this may seem in individual instances, it was Congress' judgment that the interests of dealers who could not operate profitably at a level of prices permitting a fair margin generally to the trade, would have to give way, in the acute prevailing circumstances, to the paramount national necessity of keeping prices stabilized; and that judgment, by virtue of those circumstances, was for Congress to make. Accordingly the tendered proof hardly was sufficient to raise an issue of confiscation giving ground for setting aside the regulation.

It is likely that by far the greater number of challenges would arise on grounds of supposed confiscation, in which this burden would have to be met. Once it is made clear just what that burden is, the fear hardly seems justified that enforcement would swamp the agency with litigation. In any event, the remedy for that would be by providing a more adequate enforcing staff, not by cutting off defense to criminal prosecutions based on invalid orders.

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living thing. With these, in our system, rank the elemental protections thrown about the citizen charged with crime, more especially those forged on history's anvil in great crises. They secure fair play to the guilty and vindication for the innocent. By one means only may they be suspended, even when chaos threatens. Whatever else seeks to dispense with them or materially impair their integrity should fail. Not yet has the war brought extremity that demands or permits them to be put aside. Nor does maintaining price control require this. The effect, though not intended, of the provision which forbids a criminal court to "consider the validity" of the law on which the charge of crime is founded, in my opinion, would be greatly to impair these securities. Hence I cannot assent to that provision as valid.

Different considerations, in part at any rate, apply in civil proceedings.[41] But for the trial of crimes no proce-

[41] Cf. concurring opinion in *Bowles* v. *Willingham, post,* p. 503. Limitations applicable solely to criminal proceedings fall to one side. Giving the decision in the special proceeding, or failure to seek it after reasonable opportunity, the effect of res judicata in later civil proceedings does not therefore deprive the party affected of opportunity for full and adequate defense in his criminal trial, where not only his rights of property, but his liberty or his life may be at stake.

However widely the character of the special remedy may be varied to meet different urgencies, with consequences of foreclosure for civil effects, the foreclosure of criminal defense should be allowed, if at all, only by a procedure affording its substantial equivalent, in relation to special constitutional issues and in such a manner that the failure to follow it reasonably could be taken as an actual, not a forced waiver. Thus, possibly foreclosure of criminal defense could be sustained, when validity turns on complex economic questions, usually of confiscatory effects of legislation, and proof of complicated facts bearing on them. But, if so, this should be only when the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings, so that, if followed, the party would have a sub-

dure should be approved which dispenses with trial of any material issue or splits the trial into disjointed segments, one of which is summary and civil, the other but a remnant of the ancient criminal proceeding.

The judgment should be reversed.

I am authorized to say that MR. JUSTICE MURPHY joins in this opinion.

VINSON, DIRECTOR OF ECONOMIC STABILIZATION, ET AL. *v.* WASHINGTON GAS LIGHT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 396. Argued February 11, 14, 1944.—Decided March 27, 1944.

The Emergency Price Control Act of 1942 specifically withheld from the Administrator authority to regulate the rates of any public utility. The amendatory Act of October 2, 1942 provided "That no . . . public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having

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stantial equivalent to defense in a criminal trial. And the opportunity should be long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender. So safeguarded, the foreclosure of such questions in this way would not work a substantial deprivation of defense.

In respect to other questions, such as the drawing of racial or religious lines in orders or by their application, of a character determinable as well by the criminal as by the special tribunal, in my opinion the special constitutional limitations applicable to federal criminal trials, and due enforcement of some substantive requirements as well, require keeping open and available the chance for full and complete defense in the criminal trial itself.

jurisdiction to consider such increase." In a proceeding pursuant to a sliding scale arrangement authorized by the local law, the Public Utilities Commission of the District of Columbia granted an increase in the rates of a public utility. The Director of Economic Stabilization was permitted to intervene, but only for the purpose of adducing evidence as to the inflationary effect of the proposed increase, and no such evidence was offered. *Held:*

1. By the Emergency Price Control Act, as amended, Congress did not intend to prohibit local regulatory authorities from permitting any increase in utility rates which was not shown to be necessary to prevent actual hardship. P. 498.

2. Upon the record, the Commission, in refusing to enlarge the scope of the proceeding and to reexamine the basis of the sliding scale arrangement, did not deny the Director a fair hearing. P. 499.

3. Upon the issues as properly limited by the Commission, the Director was afforded opportunity for a full hearing. P. 500.

137 F. 2d 547, affirmed.

CERTIORARI, 320 U. S. 730, to review the reversal of a judgment, 48 F. Supp. 703, which set aside an order of the Public Utilities Commission of the District of Columbia authorizing an increase in the rates of a public utility company.

Mr. Paul A. Freund, with whom *Solicitor General Fahy* and *Messrs. Richard H. Field* and *Harry R. Booth* were on the brief, for petitioners.

Mr. Stoddard M. Stevens, Jr., with whom *Messrs. E. Barrett Prettyman, C. Oscar Berry,* and *John C. Bruton* were on the brief, for the Washington Gas Light Co.; and *Mr. Richmond B. Keech,* with whom *Messrs. Vernon E. West* and *Lloyd B. Harrison* were on the brief, for the Public Utilities Commission of the District of Columbia,—respondents.

Mr. John H. Connaughton filed a brief on behalf of the Federation of Citizens' Associations, as *amicus curiae,* urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Certiorari was granted in this case, at the instance of the Director of Economic Stablization and the Administrator, Office of Price Administration, of the United States, to review a rate order of the Public Utilities Commission of the District of Columbia. The application and effect of the Emergency Price Control Act of 1942,[1] and the Act of October 2, 1942,[2] are involved.

The petitioners, who were intervenors before the Commission, appealed from its order to the District Court of the District of Columbia, which set aside the order as arbitrary and illegal.[3] The Court of Appeals for the District of Columbia reversed the District Court.[4] Understanding of the questions presented requires a detailed statement of their historical background.

The Commission was created, and its powers and duties defined, by Act of Congress in 1913, supplemented in 1926, 1935, and 1939.[5] References will be to the District of Columbia Code, 1940 edition. The statutes require public utilities within the District to furnish safe and adequate facilities, just and reasonable service, at reasonable, just and nondiscriminatory rates, and to obey the lawful orders of the Commission (§ 43–301). There are detailed provisions respecting rates and depreciation (§ 43–315). For the purpose of its functions, the Commission is directed to value "the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation." (§ 43–306.) Nothing in the statute is to

[1] 56 Stat. 23.

[2] 56 Stat. 765.

[3] 48 F. Supp. 703.

[4] 137 F. 2d 547.

[5] c. 150, 37 Stat. 974; c. 8, 44 Stat. 920; c. 742, 49 Stat. 882; c. 40, 53 Stat. 569. D. C. Code, 1940 Ed., Tit. 43 §§ 101–1006.

be "taken to prohibit a public utility, with the consent of the Commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested." But no such arrangement is lawful until found by the Commission, after investigation, to be reasonable, just, and not inconsistent with the purposes of the Act. Such arrangement must operate under the supervision and regulation of the Commission, may be altered and amended, and may be terminated by the Commission (§ 43–317). Usual powers to fix rates, charges, and make rules and regulations are conferred (§ 43–411). The Commission may make rules and regulations to govern its proceedings and to regulate the mode and manner of investigations and hearings before it (§ 43–402). Appeal from its orders is authorized, and the scope of review defined (§§ 43–705 to 43–706).

Pursuant to its authority, the Commission initiated in 1931 and concluded in 1935 a proceeding for the valuation of the property of the Washington Gas Light Company, at an expense of some $750,000, and arrived at a depreciated rate base as of 1932. It then entered upon a further inquiry as to rates. After this had lasted some time it approved and adopted a sliding scale arrangement, which involved a rate base, to be adjusted annually by adding net property additions at cost, a rate of return, and a rate of accrual to retirement reserve, in the light of which the rates of the company were to be adjusted annually. It found that the plan was practical and would be advantageous to all parties interested. This plan calls for an annual determination of the rate of return earned during the "test year," and of the amount available for rate increase or decrease for the succeeding "rate year," and schedules and regulations to accomplish such increase or decrease. Such determination is to be made after public

notice and opportunity for hearing. The plan defines a rate year as "the twelve months' period from September 1st to August 31st, inclusive," and the test year as "the twelve months' period ending . . . June 30th preceding the rate year." At the inception of the plan, rates were reduced by some $800,000 annually, and subsequent annual hearings and determinations resulted in rate reductions in each year after 1935, except in 1937 and 1941, when no changes were made.

The duration of the system was not prescribed but in its order the Commission stated that it construed the statute to permit a termination upon reasonable notice, and found that ninety days' written notice of termination by Commission or Company would be reasonable.

March 20, 1942, the Commission issued its order of investigation in conformity with the sliding scale arrangement. After preliminary investigation by its agents and the representatives of the company, the Commission, pursuant to statutory requirement, issued, on July 21, 1942, notice of hearing as to rates, charges, and regulations which were to become effective September 1, 1942, in accordance with the sliding-scale arrangement. The Price Administrator was given leave to intervene and was represented at a prehearing conference and at all hearings, and his counsel was permitted to cross-examine witnesses and to offer testimony. These began August 18 and continued on August 19, September 4, 8, 11, and 14, and closed on the last-named date. The Commission stated that it would welcome testimony with relation to the aims and purposes of the Office of Price Administration during the national emergency and the relation of those aims and purposes to the proceedings, and expressed the hope that the Administrator, as intervenor, would develop testimony along lines which would enable the Commission to determine whether an increase should be granted in view

of the national emergency. The Administrator's counsel offered evidence, cross-examined witnesses, argued and filed a brief.

On application of other parties, the proceedings were reopened and further hearing had September 30th. Counsel for the Administrator participated and filed a second brief. The hearings were again closed, and, October 13, the Commission issued its findings, opinion and order.

The petitioners' standing in the proceedings deserves notice. Section 302 (c) of the Emergency Price Control Act of 1942 [6] provides: "Nothing in this Act shall be construed to authorize the regulation of . . . rates charged by any common carrier or other public utility." [7] The admission of the Administrator as intervenor was, therefore, not pursuant to statute but was governed by the Commission's rules. The Commission had provided for intervention in its rules. Rule 7.3 is: "The Commission may grant or deny a petition for leave to intervene, or may grant the petition upon such conditions and limitations as it may prescribe." Rule 7.5 is: "The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

After final submission, and before promulgation of the Commission's order, the Emergency Price Control Act was amended by the Act of October 2, 1942, which, while prohibiting the President from suspending that portion of the original Act exempting public utilities from the scope of the statute, provided: "That no common carrier or other

[6] 56 Stat. 36, 50 U. S. C. § 942 (c).

[7] Compare *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the federal, state, or municipal authority having jurisdiction to consider such increase." 50 U. S. C., Supp. III, § 961.

On the showing of the Commission's staff, the company would have been entitled, under the sliding scale, to an increase in rates of $324,718. The increase approved by the Commission was $201,424, effective September 1, 1942. In its order, however, the Commission directed the company's attention to the provisions of the Act of October 2, 1942, and quoted its language. Accordingly the company, October 14, 1942, served notice upon the Director of Economic Stabilization, who had been designated for the purpose by the President, of the proposed increase in rates together with a copy of the Commission's order, and later consented to his intervention. The court below has found that the requisite notice and consent to intervention was given by the company in accordance with the Act.

Counsel who had participated in all the prior proceedings for the Administrator filed with the Commission October 19 a petition in the name of the Administrator, and on behalf of the Director, asking that the Commission vacate its order and reopen the proceedings to allow the Director to intervene. The Commission reopened the proceeding and set a hearing for November 2 "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose." When the reopened proceedings came on for hearing, the same counsel who had theretofore participated in behalf of the Administrator appeared before the Commission, offered no

witnesses, but renewed a motion previously filed that the proceeding be reopened "without restriction as to the type of evidence to be presented" and that the Commission vacate its order. The motion was denied, the Commission announcing that it was ready to receive evidence in accordance with the order reopening the proceeding. The petitioners offered no evidence. On being asked whether they had any testimony to present in accordance with the order to reopen the proceedings, they asked for a continuance so that they might consult their associates. The request was granted. On November 4, counsel recalled a witness for further examination but offered no other evidence. The proceedings were then closed for the third time without the offer of any testimony relating to the national economic policy developed under the Emergency Price Control Act as amended "and the effect thereon of increase in rates or charges of common carriers or other public utilities."

The Commission reconsidered the record and the testimony and, November 9, issued its order in which it reviewed the proceedings and found that the evidence adduced failed to show that the rates authorized by order No. 2401 were unduly inflationary. It denied the Director's petition to vacate the order. Thereafter the company put the new rates into effect as of November 16th. On appeal by the petitioners, the District Court held that the action of the Commission, in the light of the record, was arbitrary and illegal, and vacated the order. The Court of Appeals reversed, holding that the Commission had afforded petitioners full opportunity for a hearing upon any question which, under the law and the rules of the Commission, was open in the proceeding and that it was not arbitrary or illegal for the Commission, on the record made, to deny the abandonment of the sliding-scale plan and the prosecution of an entirely new rate investigation involving fair value, depreciation, rate of return,

and other elements commonly considered in such an investigation.

The petitioners seek vacation of the order on the ground that the Commission denied them a full and fair hearing. This contention is based upon the substantive contention that under the Acts of January 30 and October 2, 1942, they were entitled to demand that the Commission enlarge the scope of the hearing and convert the inquiry into one whether an increase of rates was necessary to the company to prevent hardship. The Commission, on the other hand, insists that it was entitled to conduct the proceedings in accordance with its statutory powers as they existed prior to 1942, and, at most, accord the petitioners a full hearing as to the effect of any order in its relation to inflation in the war emergency. Thus it appears that the controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances.

In view of the petitioners' insistence that they were entitled, in effect, to control and direct the inquiry without regard to the statutory powers of the Commission, we shall first examine the extent of the authority conferred upon petitioners by Congress.

The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of "commodities," which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase.

It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they were approved by the President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body, "he had nothing to say about its decision," was made and not contradicted on the Senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this Court has recently said in *Davies Warehouse Co.* v. *Bowles, supra,* was careful "to avoid paralyzing or extinguishing local institutions." Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.

If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement

show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which was not shown to be necessary to prevent actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra,* as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers.[8] This we are unable to do.

The other contention of the petitioners stems from their view as to the effect of the Emergency Price Control Act and the Stabilization Act. They insisted below that they were denied a fair hearing because the Commission refused, in the current proceeding, to alter and enlarge the scope and the character of the inquiry. It will be remembered that, under the Commission's existing order, a termination of the sliding scale arrangement required ninety days' written notice. There was no application of any rate payer or any purpose of the Commission in the spring of 1942 to abrogate the arrangement. On the contrary, the Commission gave the required notice for the usual annual adjustment under the plan; and, after the necessary investigations by its agents, gave notice of hearing with respect to such adjustment. At that point, and at a time when no notice of increase of rates was required by any Act of Congress, the Administrator, upon his application was permitted to intervene in the proceeding.

In his petition, and at the hearings, he asserted and reiterated that he had the right to go into the propriety of the rate base, the operating expenses, including depreciation expenses, taxes, and rate of return, summarizing his

[8] *Davies Warehouse Co.* v. *Bowles, supra; Yonkers* v. *United States,* 320 U. S. 685.

demand as "a full and complete inquiry for the purpose of determining what are fair and reasonable rates . . ." The petitioners now insist that their desire was limited to examination of certain factors involved in the sliding scale. But the courts below did not so understand. The District Court, which sustained the appeal, said: "The Commission was requested to reconsider the basic principle of the sliding-scale arrangement . . ." The Court of Appeals said "the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." These characterizations of the Administrator's contentions before the Commission are supported by the record.

If we consider the petitioners' present position we find that the Commission heard all evidence offered, and says it weighed it. The Administrator urged that the straight-line method of depreciation embodied in the sinking fund plan must be discarded in favor of a sinking fund method under the force of decisions of this Court, a position unsupported by our cases, and evidence was offered to show the result which would ensue the substitution. Some testimony was adduced as to rate of return, and the Commission's report shows this was considered. In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and over-all conditions in the national

economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

This case goes hand in hand with *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144. That decision expanded the "public utility" exemption in the Emergency Price Control Act to include a wide variety of enterprises. The present decision illustrates the value of that preferred treatment.

The Stabilization Act prohibits any "utility" from making "any general increase in its rates or charges which were in effect on September 15, 1942" without giving the President's agent the right to intervene in the proceedings. The present decision goes far towards making that provision ineffective. It allows the Commission so to shape the issues of the rate proceeding as to exclude the data most relevant to a determination of whether any rate increase should be allowed. The power of a commission to shape the issues as it desires and to restrict the Director of Economic Stabilization to those issues is not a power which is apt to be neglected. The Director may of course proclaim against rate increases. But he does not need the right to intervene to prove that rate increases are inflationary. That is self-evident. The right to intervene, if it is not a right to introduce relevant data bearing on the true earnings and returns of the utility, is an empty right indeed.

I agree that Congress did not transfer rate-making powers from the commissions to the Director. I agree that Congress must have contemplated that some rate increases might take place or else it would have treated

the whole problem quite differently. But I find not the slightest indication that the Director was to be denied a full hearing. And I do not see how a full hearing could be accorded unless he was given the opportunity to establish, if he could, that the case under consideration showed no real hardship, that wartime demands were not causing the company to suffer, that its financial integrity and its ability to render service remained unimpaired, that its property was not being confiscated, that it was not being treated unfairly as compared with other companies.

We are told that this company has an inflated rate base of some $1,000,000. We are told that its excessive charges for depreciation expense were over $225,000 a year as compared with the rate increase of about $200,000 a year. We are told that a full hearing would have disclosed that the company was in fact earning more than 6½%. I do not know what the evidence would show. But an offer of proof in a rate case could not be more relevant.

I believe, moreover, that when Congress halted general rate increases and gave the Director a right to intervene, it did not sanction rate increases regardless of need and regardless of inflationary effect. I think it meant to make utility commissions at least partial participants in the war against inflation and gave them a sector of the front to control. Though it did not remove the established standards for rate-making, I do not think it intended utility commissions to proceed in disregard of the requirements of emergency price control and unmindful of the dangers of general rate increases. To the contrary, I think Congress intended that there should be as great an accommodation as possible between the old standards and the new wartime necessities. The failure of the Commission to make that accommodation is best illustrated perhaps by its treatment of taxes. The Commission allowed the company to deduct as operating expenses all income taxes up to and including 31%. That this amount

includes wartime taxes is evident from the fact that the highest corporate tax rate which prevailed from 1936 to 1939 was 19%. We all know that the extraordinary expenditures incurred for the defense of the nation started with the Revenue Act of 1940. It has been accepted practice to deduct income taxes as well as other taxes from operating expenses in determining rates for public utilities. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 399. But this is war, not business-as-usual. When income taxes are passed on to consumers, the inflationary effect is obvious. And it is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed.

BOWLES, PRICE ADMINISTRATOR, *v.* WILLINGHAM ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA.

No. 464. Argued January 7, 10, 1944.—Decided March 27, 1944.

1. Under § 205 (a) of the Emergency Price Control Act of 1942 and § 24 (1) of the Judicial Code, and in view of § 204 (d) of the Act, a federal district court in a suit by the Administrator has authority to enjoin a proceeding in a state court to restrain issuance by the Administrator of rent orders; and § 265 of the Judicial Code, forbidding federal courts to enjoin proceedings in state courts, is inapplicable. P. 510.

(a) Congress may determine whether the federal courts should have exclusive jurisdiction of controversies which arise under the Constitution and laws of the United States and which are therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution, or whether they should exercise that jurisdiction concurrently with the courts of the States. P. 511.

(b) The authority of Congress to withhold from state courts all jurisdiction of controversies arising under the Constitution and laws of the United States includes the power to restrict the occasions when that jurisdiction may be invoked. P. 512.

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2. By the rent control provisions of the Emergency Price Control Act of 1942, authorizing the Price Administrator to fix maximum rents for housing accommodations in defense-rental areas, Congress did not delegate its legislative power. *Yakus* v. *United States*, *ante*, p. 414. P. 514.

   The standards prescribed by the Act are adequate for the judicial review which is afforded. The fact that there is a zone for the exercise of discretion by the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts.

3. The requirement that the maximum rent or rents established by the Administrator be "generally" fair and equitable, § 2 (b), does not render the Act violative of the Fifth Amendment. P. 516.

   (a) That price-fixing is on a class basis, rather than on an individual basis, does not render it invalid. P. 518.

   (b) The restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. P. 518.

   (c) Congress was dealing here with conditions created by activities resulting from a great war effort; it was under no constitutional necessity of providing a system of price control which would assure each landlord a "fair return" on his property. P. 519.

   (d) And though the legislation may have reduced the value of the property being regulated, there was no "taking" of it. P. 517.

4. That landlords are not afforded a hearing before the order or regulation fixing rents becomes effective does not render the Act violative of the Fifth Amendment. Provision for judicial review after the order or regulation becomes effective satisfies the requirements of due process under these circumstances. P. 519.

5. Questions as to the validity of orders or regulations issued pursuant to the Act may be considered only by the Emergency Court of Appeals on the review provided by § 204. P. 521.

Reversed.

DIRECT APPEAL from an order of the District Court dismissing a suit by the Price Administrator on the ground of the unconstitutionality of the rent provisions of the Emergency Price Control Act of 1942 and regulations promulgated pursuant thereto.

Mr. Paul A. Freund, with whom *Solicitor General Fahy* and *Mr. Thomas I. Emerson* were on the brief, for appellant.

Mr. Charles J. Bloch for appellees.

Briefs of *amici curiae* were filed by *Messrs. Maxwell C. Katz, Otto C. Sommerich,* and *Benjamin Busch,* and by *Mr. R. H. Fryberger,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee, Mrs. Willingham of Macon, Georgia, sued in a Georgia court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. (Supp. II) § 901) on the ground that the orders and the statutory provisions on which they rested were unconstitutional. The state court issued, *ex parte,* a temporary injunction and a show cause order. Thereupon appellant, Administrator of the Office of Price Administration, brought this suit in the federal District Court pursuant to § 205 (a) of the Act and § 24 (1) of the Judicial Code to restrain Mrs. Willingham from further prosecution of the state proceedings and from violation of the Act, and to restrain appellee Hicks, Bibb County sheriff, from executing or attempting to execute any orders in the state proceedings. The District Court in reliance on its earlier ruling in *Payne* v. *Griffin,* 51 F. Supp. 588, dismissed the Administrator's suit on bill and answer, holding that the orders in question and the provisions of the Act on which they rested were unconstitutional. The case is here on direct appeal. 50 Stat. 752, 28 U. S. C. § 349 (a).

Sec. 2 (b) of the Act provides in part that, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the neces-

sity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area." Pursuant to that authority the Administrator on April 28, 1942, issued a declaration designating twenty-eight areas in various parts of the country, including Macon, Georgia, as defense-rental areas. 7 Fed. Reg. 3193. That declaration stated that defense activities had resulted in increased housing rents in those areas [1] and that it was necessary and proper in order to effectuate the purposes of the Act to stabilize and reduce such rents. It also contained a recommendation pursuant to § 2 (b) that the maximum rent for housing accommodations rented on April 1, 1941, should be the rental for such accommodations on that date;[2] and that in case of accom-

[1] The declaration recited that the designated areas were the location of the armed forces of the United States or of war production industries, that the influx of people had caused an acute shortage of rental housing accommodations, that most of the areas were those in which builders could secure priority ratings on critical materials for residential construction, that new construction had not been sufficient to restore normal rental markets, that surveys showed low vacancy ratios for rental housing accommodations in the areas, that defense activities had resulted in substantial and widespread increases in rents affecting most of these accommodations in the areas, and that official surveys in the areas had shown a marked upward movement in the general level of residential rents.

[2] Sec. 2 (b) provides: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment

modations not rented on April 1, 1941, or constructed thereafter provisions for the determination, adjustment, and modification of maximum rents should be made, such rents to be in principle no greater than the generally prevailing rents in the particular area on April 1, 1941. The declaration also stated in accordance with the provisions of § 2 (b)[3] that if within sixty days after April 28, 1942, such rents within the areas in question had not been

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will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."

And § 2 (c) provides: "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

[3] See the provisions of § 2 (b) in note 2, *supra*.

stabilized or reduced by state or local regulation or otherwise in accordance with the Administrator's recommendation, the Administrator might fix the maximum rents.

On June 30, 1942, the Administrator issued Maximum Rent Regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing in these defense areas, including Macon, Georgia. 7 Fed. Reg. 4905. It recited that the rentals had not been reduced or stabilized since the declaration of April 28, 1942, and that defense activities had resulted in increases in the rentals on or about April 1, 1941, but not prior to that date. The maximum rentals fixed for housing accommodations rented on April 1, 1941 were the rents obtained on that date. § 1388.1704 (a). As respects housing accommodations not rented on April 1, 1941, but rented for the first time between that date and the effective date of the regulation, July 1, 1942—the situation involved in this case—it was provided that the maximum rent should be the first rent charged after April 1, 1941. § 1388.1704 (c). But in that case it was provided that the Rent Director (designated by § 1388.1713) might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the area for comparable housing accommodations on April 1, 1941. § 1388.1704 (c), §1388.1705 (c) (1). By Procedural Regulation No. 3, as amended (8 Fed. Reg. 526, 1798, 3534, 5481, 14811) issued pursuant to § 201 (d) and § 203 (a) of the Act [4] provision was made that when the Rent Direc-

[4] Sec. 201 (d) provides: "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Sec. 203 (a) provides in part: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance

tor proposed to take such action he should serve a notice upon the landlord involved, stating the proposed action and the grounds therefor. § 1300.207. Within 60 days of the final action of the Rent Director the landlord might file an application for review by the regional administrator for the region in which the defense-rental area office was located and then file a protest with the Administrator for review of the action of the regional office (§ 1300.209, § 1300.210); or he might proceed by protest immediately. § 1300.209, § 1300.215. As we develop more fully hereafter, the Act provides in § 203 (a) for the filing of protests with the Administrator. The machinery for a hearing on a protest and a determination of the issue by the Administrator (§ 1300.215–§ 1300.240) was designed to provide the basis of judicial review by the Emergency Court of Appeals as authorized by § 204 (a) of the Act.

In June, 1943, the Rent Director gave written notice to Mrs. Willingham that he proposed to decrease the maximum rents for three apartments owned by her, and which had not been rented on April 1, 1941, but were first rented in the summer of 1941, on the ground that the first rents for these apartments received after April 1, 1941, were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. Mrs. Willingham filed objections to that proposed action together with supporting affidavits. The Rent Director thereupon ad-

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with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator."

vised her that he would proceed to issue an order reducing the rents. Before that was done she filed her bill in the Georgia court. The present suit followed shortly, as we have said.

I. We are met at the outset with the question whether the District Court could in any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132–134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205 (a) the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2. Moreover, by § 204 (d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204 (c) and to this Court.[5] As

[5] Sec. 204 (d) provides in part: "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

we recently held in *Lockerty* v. *Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts.[6] The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co.*, *supra*) thus does not come into play. The powers of the District Court under § 205 (a) of the Act and § 24 (1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created.

The suggestion is made that Congress could not constitutionally withhold from the courts of the States jurisdiction to entertain suits attacking the Act on constitutional grounds. But we have here a controversy which arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitu-

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court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, 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."

It should also be noted that § 204 (c) withholds from the Emergency Court power "to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206."

[6] It is true that § 205 (c) gives to state and territorial courts concurrent jurisdiction of all proceedings (except criminal proceedings) under § 205 of the Act. But they embrace only enforcement suits brought by the Administrator, not suits brought to restrain or enjoin enforcement of the Act or orders or regulations thereunder.

tion. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the States. *Plaquemines Fruit Co.* v. *Henderson,* 170 U. S. 511, 517; *The Moses Taylor,* 4 Wall. 411, 428–430. And see *Tennessee* v. *Davis,* 100 U. S. 257; *McKay* v. *Kalyton,* 204 U. S. 458, 468–469. Under the present Act all jurisdiction has not been withheld from state courts, since they have concurrent jurisdiction over all civil enforcement suits brought by the Administrator. § 205 (c). But the authority of Congress to withhold all jurisdiction from the state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked.

II. The question of the constitutionality of the rent control provisions of the Act [7] raises issues related to those considered in *Yakus* v. *United States, ante,* p. 414.

When it came to rents Congress pursued the policy it adopted respecting commodity prices. It established standards for administrative action and left with the Administrator the decision when the rent controls of the Act should be invoked. He is empowered to fix maximum rents for housing accommodations in any defense-rental area,[8] whenever in his judgment that action is necessary or proper in order to effectuate the purposes of the Act. A defense-rental area is any area "designated by the Administrator as an area where defense activities have re-

[7] Here as in *Yakus* v. *United States, supra,* the Administrator concedes that in an enforcement suit the constitutionality of the Act as distinguished from the constitutionality of orders or regulations under the Act is open. As pointed out in the *Yakus* case, reliance is placed on § 204 (d), *supra* note 5. And see S. Rep. No. 931, 77th Cong., 2d Sess., pp. 24–25.

[8] The terms rent, defense-rental area, defense-area housing accommodations, and housing accommodations are defined in § 302 of the Act.

sulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes" of the Act. § 302 (d). The controls adopted by Congress were thought necessary "in the interest of the national defense and security" and for the "effective prosecution of the present war." § 1 (a). They have as their aim the effective protection of our price structures against the forces of disorganization and the pressures created by war and its attendant activities.[9] § 1 (a); S. Rep. No. 931, 77th Cong., 2d Sess., pp. 1–5. Thus the policy of the Act is clear. The maximum rents fixed by the Administrator are those which "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." § 2 (b). But Congress did not leave the Administrator with that general standard; it supplied criteria for its application by stating that so far as practicable the Administrator in establishing any maximum rent

[9] Sec. 1 (a) provides in part: "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

should ascertain and give consideration to the rents prevailing for the accommodations, or comparable ones, on April 1, 1941. The Administrator, however, may choose an earlier or later date if defense activities have caused increased rents prior or subsequent to April 1, 1941. But in no event may the Administrator select a date earlier than April 1, 1940. And in determining a maximum rent "he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." § 2 (b). And Congress has provided that the Administrator "may provide for such adjustments and reasonable exceptions" as in his judgment are "necessary or proper in order to effectuate the purposes of this Act." § 2 (c).

The considerations which support the delegation of authority under this Act over commodity prices (*Yakus* v. *United States*) are equally applicable here. The power to legislate which the Constitution says "shall be vested" in Congress (Art. I, § 1) has not been granted to the Administrator. Congress in § 1 (a) of the Act has made clear its policy of waging war on inflation. In § 2 (b) it has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 144.

There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases. Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threaten to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standard and the base period to guide the Administrator in determining what the maximum rentals should

be in a given area. The criteria to guide the Administrator are certainly not more vague than the standards governing the determination by the Secretary of Agriculture in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 576–577, of marketing areas and minimum prices for milk. The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398. We recently stated in connection with this problem of delegation, "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills* v. *Administrator, supra,* p. 145. In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue. Congress here has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective. But that is not all. The Administrator on the denial of protests must inform the protestant of the "grounds upon which" the decision is based and of any "economic data and other facts of which the Administrator has taken official notice." § 203 (a). These materials and the grounds for decision which they furnished are included in the transcript on which judicial review is based. § 204 (a). We fail to see how more

could be required (*Taylor* v. *Brown,* 137 F. 2d 654, 658–659) unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact.

As we have pointed out and as more fully developed in *Yakus* v. *United States, supra,* § 203 (a) of the Act provides for the filing of a protest with the Administrator against any regulation or order under § 2. Moreover, any person "aggrieved" may secure judicial review of the action of the Administrator in the Emergency Court of Appeals. § 204 (a). And that review is on a transcript which includes "a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice." § 204 (a). Here, as in the *Yakus* case, the standards prescribed by the Act are adequate for the judicial review which has been accorded. The fact that there is a zone for the exercise of discretion by the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts. *Opp Cotton Mills* v. *Administrator, supra; Yakus* v. *United States, supra.*

Thus so far as delegation of authority is concerned, the rent control provisions of the Act, like the price control provisions (*Yakus* v. *United States, supra*), meet the requirements which this Court has previously held to be adequate for peacetime legislation.

III. It is said, however, that § 2 (b) of the Act is unconstitutional because it requires the Administrator to fix maximum rents which are "generally fair and equitable." The argument is that a rental which is "generally fair and equitable" may be most unfair and inequitable as applied to a particular landlord and that a statute which does not

provide for a fair rental to each landlord is unconstitutional. During the first World War the statute for the control of rents in the District of Columbia provided machinery for securing to a landlord a reasonable rental. *Block* v. *Hirsh,* 256 U. S. 135, 157. And see *Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U. S. 242. And under other price-fixing statutes such as the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. § 717) Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons or companies. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591. Congress departed from that pattern when it came to the present Act. It has been pointed out that any attempt to fix rents, landlord by landlord, as in the fashion of utility rates, would have been quite impossible. *Wilson* v. *Brown,* 137 F. 2d 348, 352–354. Such considerations of feasibility and practicality are certainly germane to the constitutional issue. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 299; *Opp Cotton Mills* v. *Administrator, supra,* p. 145. Moreover, there would be no constitutional objection if Congress as a war emergency measure had itself fixed the maximum rents in these areas. We are not dealing here with a situation which involves a "taking" of property. *Wilson* v. *Brown, supra.* By § 4 (d) of the Act it is provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case (320 U. S. p. 601), that does not mean that the regulation is unconstitutional. Mr. Justice Holmes, speaking for the Court, stated in *Block* v. *Hirsh, supra,* p. 155: "The fact that tangible property is also visible tends to give a rigidity

to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. *L'Hote* v. *New Orleans,* 177 U. S. 587, 598; *Welch* v. *Swasey,* 214 U. S. 91; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Pierce Oil Corp.* v. *City of Hope,* 248 U. S. 498; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 157; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Hamilton* v. *Kentucky Distilleries Co., supra; United States* v. *Darby,* 312 U. S. 100.

It is implicit in cases such as *Nebbia* v. *New York,* 291 U. S. 502, which involved the power of New York to fix the minimum and maximum prices of milk, and *Sunshine Anthracite Coal Co.* v. *Adkins, supra,* which involved the power of the Bituminous Coal Commission to fix minimum and maximum prices of bituminous coal, that high cost operators may be more seriously affected by price control than others. But it has never been thought that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis. Indeed, the decision in *Munn* v. *Illinois,* 94 U. S. 113, the pioneer case in this Court, involved a legislative schedule of maximum prices for a defined class of warehouses and was sustained

on that basis. We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activites resulting from a great war effort. *Yakus* v. *United States, supra.* A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.

IV. It is finally suggested that the Act violates the Fifth Amendment because it makes no provision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia. See 55 Stat. 788. We agree with the Emergency Court of Appeals (*Avant* v. *Bowles,* 139 F. 2d 702) that Congress need not make that requirement when it delegates the task to an administrative agency. In *Bi-Metallic Investment Co.* v. *State Board,* 239 U. S. 441, a suit was brought by a taxpayer and landowner to enjoin a Colorado Board from putting in effect an order which increased the valuation of all taxable property in Denver 40 per cent. Such action, it was alleged, violated the Fourteenth Amendment as the plaintiff was given no opportunity to be heard. Mr. Justice Holmes, speaking for the Court, stated, p. 445: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power,

immediate or remote, over those who make the rule." We need not go so far in the present case. Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in *Yakus* v. *United States, supra,* that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States,* 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland,* 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Language in the cases that due process requires a hearing before the administrative order becomes effective (*Morgan* v. *United States,* 304 U. S. 1, 19–20; *Opp Cotton Mills* v. *Administrator, supra,* pp. 152–153) is to be explained on two grounds. In the first place, the statutes there involved required that procedure.

Secondly, as we have held in *Yakus* v. *United States, supra,* Congress was dealing here with the exigencies of wartime conditions and the insistent demands of inflation control. Cf. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471. Congress chose not to fix rents in specified areas or on a national scale by legislative fiat. It chose a method designed to meet the needs for rent control as they might arise and to accord some leeway for adjustment within the formula which it prescribed. At the same time, the procedure which Congress adopted was selected with the view of eliminating the necessity for "lengthy and costly trials with concomitant dissipation of the time and ener-

gies of all concerned in litigation rather than in the common war effort." S. Rep. No. 931, 77th Cong., 2d Sess., p. 7. To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control. Or Congress might well have thought so. National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed.

We fully recognize, as did the Court in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426, that "even the war power does not remove constitutional limitations safeguarding essential liberties." And see *Hamilton* v. *Kentucky Distilleries Co., supra,* p. 155. But where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.

Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by § 204. *Yakus* v. *United States, supra.*

Reversed.

MR. JUSTICE RUTLEDGE, concurring:

I concur in the result and substantially in the Court's opinion, except for qualifications expressed below. In view of these and my difference from the Court's position in *Yakus* v. *United States, ante,* p. 414, a statement of reasons for concurrence here is appropriate.

I.

With reference to the substantive aspects of the legislation, I would add here only the following. Since the phases in issue in this case relate to real estate rentals, it is not amiss to note that these ordinarily are within the state's power to regulate rather than that of the federal government. But their relation, both to the general

system of controlling wartime price inflation and to the special problems of housing created in particular areas by war activities, gives adequate ground for exercise of federal power over them.

Likewise, with respect to the delegation of authority to the administrator to designate "defense rental areas" and to fix maximum rentals within them, the same considerations, and others, sustain the delegation as do that to fix prices of commodities generally. The power to specify defense rental areas, rather than amounting to an excess of permissible delegation, is actually a limitation upon the administrator's authority, restricting it to regions where the facts, not merely his judgment, make control of rents necessary both to keep down inflation and to carry on the war activities concentrated in them. Accordingly, I concur fully with the Court's expressed views concerning the substantive features of the legislation.

II.

This appeal presents two kinds of jurisdictional and procedural questions, though they are not unrelated. The first sort relate to the power of the District Court to restrain the further prosecution of the state court proceedings and the execution of, or attempts to execute, orders issued in them. The other issues relate to the District Court's power to restrain Mrs. Willingham from violating the Emergency Price Control Act and the orders issued pursuant to it affecting her interests.

As to the former, I have no doubt that the District Court had power, for the reasons stated by the Court, to restrain the prosecution of the suit in the state court and the execution of orders made by it. By § 204 (d) of the Act, Congress withheld from all courts, including the state courts, with an exception in the case of the Emergency Court of Appeals and this Court on review of its judg-

ments, "jurisdiction . . . 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." The single exception was the power of the Emergency Court by its final judgment, or of this Court on final disposition in review thereof, § 204 (a), (b), to set aside an order or regulation. Congress clearly had the power thus to confine the equity jurisdiction of the federal courts and to make its mandate for uninterrupted operation of the rent control system effective by prohibiting the state courts so to interfere with the statutory plan, at least until it should be shown invalid by the channel created for this purpose.[1] Any effort of the state court therefore to enjoin the issuance of rent orders or suspend their operation, whether on constitutional or other grounds, was directly in the teeth of the statute's explicit provisions and a violation of its terms. By this mandate the state courts were not required to give their sanction to enforcement of an unconstitutional act or regulation or even of one which might turn out to be such. They were merely commanded to keep hands off and leave decision upon the validity of the statute or the regulations, for purposes of suspending or setting them aside, to another forum established for that purpose. Congress clearly had the power and the intent to authorize federal courts to enforce this command, by injunction if necessary.

III.

In vesting jurisdiction in the federal district courts to enjoin violations of the Price Control Act and regulations

[1] *The Moses Taylor,* 4 Wall. 411; cf. *Claflin* v. *Houseman,* 93 U. S. 130, *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U. S. 511.

issued pursuant to it, Congress included not only violations of the statute's prohibition directed to the state courts against staying enforcement but other violations as well. The District Court, acting in the exercise of that jurisdiction, rested its judgment on the decision of a question it was authorized to consider, namely, whether the Act, rather than merely a regulation issued under it, is invalid. Since the court decided that question erroneously in disposing of this case, reversal of its judgment would be required. And perhaps in strictness this is all that it would be necessary to decide at this time.

But the contention has been made earnestly all through these proceedings that the regulations, on the basis of which any injunction obtained by the administrator must rest, are invalid and beyond his authority under the Act. And the Court, relying upon the decision in the *Yakus* case, has indicated that these contentions may not be considered in a proceeding of this character.

From what already has been said, it is clear the contention misconceives the administrator's rights with respect to an injunction restraining the further prosecution of the state suit and execution of the state court's orders. His right to such an injunction may rest on considerations entirely different from those governing his right to secure an injunction restraining Mrs. Willingham from violating the regulation. The former could be founded wholly upon the power of Congress to require the state courts to keep hands entirely off, in the discharge of federal functions by federal officials, at any rate during such time as might be required for decision, with finality, upon the validity of the statute and regulations issued under it by an appropriate alternative federal method. The latter, however, presents the different question whether Congress can require the federal district courts, organized under Article III and vested by it with the judicial power, not merely to keep hands off, but by affirmative exercise

of their powers to give permanent sanction to the legislative or administrative command, notwithstanding it is or may be in conflict with some constitutional mandate.

That Congress can require the court exercising the civil jurisdiction in equity to refrain from staying statutory provisions and regulations is clear. Whether the enforcing court acts civilly or criminally, in circumstances like these, Congress can cut off its power to stay or suspend the operation of the statute or the regulation pending final decision that it is invalid. But this leaves the question whether Congress also can confer the equity jurisdiction to decree enforcement and at the same time deprive the court of power to consider the validity of the law or regulation and to govern its decree accordingly.

Different considerations, in part, determine this question from those controlling when enforcement is by criminal sanction. The constitutional limitations specially applicable to criminal trials fall to one side. Those relating to due process of law in civil proceedings, including whatever matters affecting discrimination are applicable under the Fifth Amendment, and to the independence of the judicial power under Article III, in relation to civil proceedings, remain applicable. Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consequences, though serious, are not of the same moment under our system, as appears from the fact they are not secured by the same procedural protections in trial. It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property.

All this is pertinent to whether Congress, in providing for civil enforcement of the Act and the regulations, can do what in my opinion it cannot require by way of criminal enforcement of this statute, namely, by providing the single opportunity to challenge the validity of the

regulation and making this available for the limited time, constitute the method afforded the exclusive mode for securing decision of that question and, either by virtue of the taking advantage of it or by virtue of the failure to do so within the time allowed, foreclose further opportunity for considering it.

In my opinion Congress can do this, subject however to the following limitations or reservations, which I think should be stated explicitly: (1) The order or regulation must not be invalid on its face; (2) the previous opportunity must be adequate for the purpose prescribed, in the constitutional sense; and (3), what is a corollary of the second limitation or implicit in it, the circumstances and nature of the substantive problem dealt with by the legislation must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available.

In this case, in my judgment, these conditions concur to justify the procedure Congress has specified. Except for the charge that the regulations, or some of them, are so vague and indefinite as to be incapable of enforcement, there is nothing to suggest they are invalid on their face. And they clearly are not so, either in the respect specified or otherwise.[2] The proceeding by protest and appeal through the Emergency Court, even for civil consequences

[2] The maximum rentals established in the regulation are definite and easily enough ascertainable. Appellee's complaint against the regulation on the score of vagueness is addressed to the indefiniteness of the standards which the administrator has prescribed as a guide for his office in making decreases in maximum rentals, more particularly to § 5 (c) (1), which authorizes a decrease in the maximum if it is "higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941." But assuming this complaint is otherwise meritorious, the standards thus provided are no less definite than those contained in the Act itself and the contention is therefore disposed of by the determination of the constitutionality of the Act.

only, approaches the limit of adequacy in the constitutional sense, both by reason of its summary character [3] and because of the shortness of the period allowed for following it.[4] A reservation perhaps is in order in the latter respect, when facts are discovered after the period which, if proven, would invalidate the regulation and which by reasonable diligence could not have been discovered before the period ends. Finally, it hardly can be disputed that the substantive problem and the circumstances which created and surrounded it were such as, if ever they could be, to justify a procedure of this sort.[5]

Accordingly, I agree that, as against the challenges made here, the special remedy provided by the Act was adequate and appropriate, in the constitutional sense, for the determination of appellee's rights with civil effects, had she followed it. And her failure to follow it produced no such irrevocable and harmful consequences, for such purposes, as would ensue if she were charged with violation as a crime. Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived where she might well have expected, at the wrong end.

No doubt this was due to a misconception of her rights,

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[3] Cf. the writer's dissenting opinion in *Yakus* v. *United States, ante,* p. 460.

[4] Under the Act a protest against a regulation must be made within sixty days of its issuance, but if based on grounds arising after the sixty days, it may be filed "at any time" thereafter.

But under the Administrator's Revised Procedural Regulation No. 3, § 1300.216, "a protest against a provision of a maximum rent regulation based solely on grounds arising after the date of issuance of such maximum rent regulation shall be filed within a period of sixty days after the protestant has had, or could reasonably have had, notice of the existence of such grounds."

[5] Cf. the writer's dissenting opinion in *Yakus* v. *United States, ante,* p. 460.

both as a matter of substance and as one of procedure, due perhaps to failure to take full account of the reach of the nation's power in war. Nevertheless, the Court not improperly has set at rest some of her misconceptions concerning the effects of the regulations. Thus, it is held that the statute is not invalid in providing for maximum rents which are "generally fair and equitable." § 2 (b). It does not lessen the effect of this ruling for purposes of deciding the regulation's validity, that Maximum Rent Regulation Number 26, § 5 (c) (1), of which appellee complained on various constitutional grounds, including confiscation, provided that the administrator might order a decrease of the maximum rent for specified housing accommodations only on the ground that that rent "is higher than the rent *generally prevailing in the defense rental area* for comparable housing accommodations on April 1, 1941." (Italics added.)

Other issues raised by the appellee with respect to the regulations likewise are disposed of by the rulings upon the statute's provisions.[6] In so far as the regulations are identical with the statute, therefore, and the objections to them are identical, the disposition of these objections to the Act disposes also of those made to the regulations. In so far as the latter raised questions not raised concerning the statute, and since none of these, except as mentioned above, called attention to any feature making a regulation void on its face, the appellee has foreclosed her opportunity to assert them, as to facts existing when the suit was begun, by her failure to follow the prescribed special remedy. It is not unreasonable, in a matter of this importance and urgency, to require one, whose only valid objection to the law, including the regulations, rests in proof of facts not apparent to the administrator or the

[6] E. g. the contention that the regulation, like the Act, improperly delegates to the administrator and his agents "legislative" power.

court, to make his proof in the manner provided and to do so promptly, as a condition to securing equitable or other civil relief.

MR. JUSTICE ROBERTS:

I should be content if reversal of the District Court's decision were upon the ground that that court lacked power to enjoin prosecution of the appellees' state court suit. The policy expressed in § 265 of the Judicial Code applies in this instance. Moreover, if the provision of § 204 (d) of the Emergency Price Control Act is valid, the lack of jurisdiction of the state court could, and should, have been raised in that court and review of its ruling could have been obtained by established means of resort to this court. Since, however, the court has determined that the District Court acted within its competency in enjoining further prosecution of the state court suit, other issues must be faced.

The appellant in his complaint charged that the appellees threatened to disobey the provisions of the Act and the regulations made pursuant to it. The appellees answered that the Act and the regulations were void because in excess of the powers of Congress. I do not understand the Administrator to contend that the court below was precluded by the terms of the statute from passing upon the question whether the Act constitutes an unconstitutional delegation of legislative power. I am not sure whether he asserts that the provisions of § 204 (d), which purport to prohibit any court, except the Emergency Court of Appeals created by the Act, from considering the validity of any regulation or order made under the Act, prevent consideration of the Administrator's rent regulations and orders here under attack. If so, I think the contention is untenable.

The statute of its own force is not applicable in any area except the District of Columbia unless and until so

made by a regulation of the Administrator. The statutory provisions respecting rentals amount only to conference of authority on the Administrator to make regulations and do not themselves prescribe or constrain any conduct on the part of the citizen. In short, one cannot violate the provisions of the statute unless they are implemented by administrative regulations or orders. To say then that, while the court in which the Administrator seeks enforcement of the Act, and regulations made under it, has jurisdiction to pass upon the constitutionality of the Act, it may not consider the validity of pertinent regulations, is to say that the court is to consider the Act *in vacuo* and wholly apart from its application to the defendant against whom enforcement is sought. Under the uninterrupted current of authority the argument must be rejected.

This brings me to a consideration of the appellees' principal contention, namely, that, as applied to rent control, the Emergency Price Control Act is an unconstitutional delegation of legislative power to an administrative officer. In approaching this question it is hardly necessary to state the controlling principles which have been reiterated in recent decisions.[1] Congress may perform its legislative function by laying down policies and establishing standards while leaving administrative officials free to make rules within the prescribed limits and to ascertain facts to which the declared policy is to apply. But any delegation which goes beyond the application and execution of the law as declared by Congress is invalid.

Congress cannot delegate the power to make a law or refrain from making it; to determine to whom the law shall be applicable and to whom not; to determine what the law shall command and what not. Candid appraisal

[1] *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Corp.* v. *United States,* 295 U. S. 495.

of the rent control provisions of the Act in question discloses that Congress has delegated the law-making power *in toto* to an administrative officer.

As already stated, the Act is not in itself effective with respect to rents. It creates an Office of Price Administration to be under the direction of a Price Administrator appointed by the President (50 U. S. C. § 921 (a)). This official is authorized, "whenever in [his] judgment . . . such action is necessary or proper in order to effectuate the purposes" of the Act, to issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for accommodations within a particular defense-rental area. If within sixty days such rents within such area have not "in the judgment of the Administrator" been stabilized or reduced in accordance with his recommendations, he may, by regulation or order, establish such maximum rent or maximum rents for such accommodations "as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act. "So far as practicable" in establishing maximum rents he is to ascertain and duly consider the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted, or threaten to result, in increases in rents of housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date (not earlier than April 1, 1940) which, "in the judgment of the Administrator" does not reflect such increases); and he shall make adjustments "for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." "In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting

persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable," consider recommendations made by State and local officials (50 U. S. C. § 902 (b)). The form and the manner of establishing a regulation or order, the insertion of classifications and differentiations, the provisions for adjustments and reasonable exceptions lie wholly "in the judgment of the Administrator" as to their necessity or propriety in order to effectuate the purposes of the Act (50 U. S. C. § 902 (c)).

The "judgment of the Administrator" as to what is necessary and proper to effectuate the purposes of the Act is the only condition precedent for his issue of an order, regulation, or prohibition affecting speculative or manipulative practices or renting or leasing practices in connection with any defense-area housing accommodations, which practices "in his judgment" are equivalent to or are likely to result in rent increases inconsistent with the purposes of the Act (50 U. S. C. § 902 (d)).

At the moment these statutory provisions were adopted rent control was not effective in any part of the nation. The Administrator was appointed for the purpose of enacting such control by regulations and orders. As will be seen, the first step he was authorized to take was to issue a declaration stating the necessity for reduction of rents within a particular defense-rental area and recommendations as to the nature of such reductions.

How is the reader of the statute to know what is meant by the term "defense-rental area"? The statutory "standard" is this:

"The term 'defense-rental area' means the District of Columbia and any area designated by the Administrator as an area where *defense activities* have resulted or *threaten* to result in an increase in the rents for housing accommodations *inconsistent with the purposes of this Act.*" (Italics supplied.) (50 U. S. C. § 942 (d).)

Save for the District of Columbia, the designation of an area where the Act is to operate depends wholly upon the Administrator's judgment that so-called defense activities have resulted or threaten to result in an increase of rents inconsistent with the purposes of the Act. Note that the judgment involved is solely that of the Administrator. He need find no facts, he need make no inquiry, he need not, unless he thinks it practicable, even consult local authorities. In exercising his judgment the Administrator must be persuaded that "defense activities" have caused or will cause a rise in rents. The statute nowhere defines or gives a hint as to what defense activities are. In time of war it is conceivable that an honest official might consider any type of work a defense activity. His judgment, however exorbitant, determines the coverage of the Act. It is true that he is authorized to make such studies and investigations as he deems necessary or proper to assist him in prescribing regulations or orders (50 U. S. C. § 922 (a)), but his unfettered judgment is conclusive whether any are necessary or proper.

But is not the Administrator's judgment channeled and confined by the final limitation that his action must be the promotion of the "purposes of this Act"? What are they? So far as material they are: "To prevent speculative, unwarranted, and abnormal increases in . . . rents" (50 U. S. C. § 901 (a)). There are other general phrases in the section which may be claimed to throw some light on the considerations the Administrator may entertain but, so far as rents are concerned, they are so vague as to be useless; as, for example, the protection of persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities, and pensions from undue impairment of their standard of living, and more of the same. I have discussed these "standards" in an opinion filed in *Yakus* v. *United States, ante,* p. 448.

Language could not more aptly fit this grant of power than that used in *Schechter Corp.* v. *United States, supra,* at p. 551: "Here in effect is a roving commission to inquire into evils and upon discovery correct them." Equally apposite is what was said at p. 541: "It [the Act] does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Placing the relevant sections of the statute together we find that the term "defense-rental area" means any area designated by the Administrator as an area where "defense activities" have resulted, or threaten to result, in "speculative, unwarranted, and abnormal increases in . . . rents." Can anyone assert that Congress has thus laid down a standard to control the action of the executive? The Administrator, and he alone, is to say what increase is speculative, what increase is unwarranted, and what increase is abnormal. What facts is he to consider? Such as he chooses. What facts did he consider in the instant case? One cannot know.

But the matter does not stop here. We have now only arrived at the designation of an area by the Administrator. As we have seen, his next step is to issue a declaration or recommendation. How shall he determine whether to do so or not? As seen by the above summary of the Act's provisions, the matter rests in the judgment of the Ad-

ministrator as to whether such action is necessary or proper to effectuate the purposes of the Act. We have just seen what those purposes are. Again, his sole and untrammeled judgment as to what is needed to prevent speculative, unwarranted or abnormal increases is the only criterion of his action. The public records show that declarations made by him merely state that, in his judgment, the basic fact exists. He makes no findings; he is not bound to make any specific inquiry; he issues a fiat. No one is to be advised as to the basis of his judgment; no one need be heard.

Does the statute afford a standard for the Administrator to follow in deciding the quantity of the reduction? Again his judgment alone is determinative. And, more, in his judgment alone rests the decision as to what accommodations within the area are to be affected by the decreed reduction. He may recommend the reduction of rent for "any accommodations" within the defense-rental area.

After the issue of his declaration and recommendations the Administrator must wait sixty days before putting his recommendations into effect. If, in his sole and unfettered judgment, stabilization has not been accomplished, he may then, by regulation or order, establish such maximum rent or maximum rents as "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." His order may be based upon nothing but his own opinion. It may be made without notice, without hearing, without inquiry of any sort, without consultation with local authorities. The rents established may vary from street to street, and from subdivision to subdivision, all in accordance with the Administrator's personal judgment. The order may involve classification and exemption if the Administrator, in his sole discretion, deems that this course will "effectuate the purposes of this Act." Which means, of course, if he thinks non-specula-

tion, non-abnormality, or sufficient warrant justifies the discriminations involved.

How shall he fix the amount of the maximum rent? The only standard given him is the exercise of his own judgment that the rents fixed will be "generally fair and equitable and will effectuate the purposes of this Act." "Fair and equitable" might conceivably be a workable standard if inquiry into the specific facts were prescribed and if the bearing of those facts were to be given weight in the ultimate decision, but the addition of the word "generally," and the failure to prescribe any method for arriving at what is fair and equitable leaves the Administrator such room for disregard of specific injustices and particular circumstances that no living person could demonstrate error in his conclusion. And, again, even the phrase "generally fair and equitable" is qualified by empowering the Administrator to consider also questions of speculation, unwarranted action or abnormality of condition. Such a "standard" is pretense. It is a device to allow the Administrator to do anything he sees fit without accountability to anyone.

But, it is said, this is an unfair characterization of the statute because, "so far as practicable," the Administrator must ascertain and duly consider rents prevailing for "such accommodations, or comparable accommodations, on or about April 1, 1941," and that, although he may pick out some other period which he thinks more representative, he must not select any period earlier than April 1, 1940, and, therefore, he is definitely confined and prohibited in exercising control over rentals. This argument will not do. The mere fact that he may not go to any period for comparison earlier than April 1, 1940, although he may take any later period he thinks appropriate, does not serve to obliterate the fact that after such wide and unrestricted choice of a period he can make any regulation he sees fit.

Without further elaboration it is plain that this Act creates personal government by a petty tyrant instead of government by law. Whether there shall be a law prescribing maximum rents anywhere in the United States depends solely on the Administrator's personal judgment. When that law shall take effect, how long it shall remain in force, whether it shall be modified, what territory it shall cover, whether the different areas shall be subject to different regulations, what is the nature of the activity that shall motivate the institution of the law,—all these matters are buried in the bosom of the Administrator and nowhere else.

I am far from urging that, in the present war emergency, rents and prices shall not be controlled and stabilized. But I do insist that, war or no war, there exists no necessity, and no constitutional power, for Congress' abdication of its legislative power and remission to an executive official of the function of making and repealing laws applicable to the citizens of the United States. No truer word was ever said than this court's statement in the *Minnesota Mortgage Moratorium Case* [2] that emergency does not create power but may furnish the occasion for its exercise. The Constitution no more contemplates the elimination of any of the coordinate branches of the Government during war than in peace. It will not do to say that no other method could have been adopted consonant with the legislative power of Congress. "Defense-rental areas" and "defense activities" could have been reasonably defined. Rents in those areas could have been frozen as of a given date, or reasonably precise standards could have been fixed, and administrative or other tribunals could have been given power according to the rules and standards prescribed to deal with special situations after hearing and findings and exposition of the reasons for action. I say this only be-

[2] *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 425, 426.

cause the argument has been made that the emergency was such that no other form of legislation would have served the end in view. It is not for this court to tell Congress what sort of legislation it shall adopt, but in this instance, when Congress seems to have abdicated and to have eliminated the legislative process from our constitutional form of Government, it must be stated that this cannot be done unless the people so command or permit by amending the fundamental law.

The obvious answer to what I have said is that this court has sustained, and no one would now question, the constitutional validity of Acts of Congress laying down purported standards as vague as those contained in the Act under consideration. But the answer is specious. Generally speaking, statutes invoking the aid of the administrative arm of the Government for their application and enforcement fall into two classes,—those in which a policy is declared and an administrative body is empowered to ascertain the facts in particular cases so as to determine whether that policy in a particular case had been violated. Of this type of legislation the Interstate Commerce Act and the Federal Trade Commission Act are classical examples. In the one, carriers are required to charge just and reasonable rates for their services. In the other, citizens are forbidden to indulge in unfair methods of competition. If it be asserted that these are but vague standards of conduct, it must at once be said that, in adopting them, Congress adopted common law concepts, the one applying to those pursuing a public calling and the other to business competitors in general, and that the standards announced carried with them concepts and contours attaching as a result of a long legal history. But more, in such instances, the standards were not to be applied in the uncontrolled judgment of the administrative body. On the contrary, the statutes require a complaint specifying the conduct thought to violate the statute and opportunity for answer, for hearing, for production of evidence, and for findings

which are subject to judicial review. With such a background for administrative procedure, what seems a loose and vague standard becomes in fact a reasonably ascertainable one that can fairly, equitably, and justly be applied.

The other and distinct class of cases is that in which Congress, as in the present instance, declares a policy and entrusts to an administrative agent, without more, the making of general rules and regulations for the implementation of that policy. These rules are, in all but name, statutes. Here, unless the rule for the guidance of the Administrator is clear, and the considerations upon which he may act are definite and certain, it must inevitably follow that, to a greater or less degree, he will make the law. No citizen can question the motive or purpose of Congress in enacting a specific statute to control and define conduct as long as Congress acts within the powers granted it by the Constitution. As has been pointed out, Congress, in passing the Emergency Price Control Act, has attempted to clothe its delegate—an Administrator—with the same unchallengeable legislative power which it possesses. In this respect the delegation is no different from that involved in the National Industrial Recovery Act which was held invalid in *Schechter Corp.* v. *United States, supra.*

We are told that "Congress has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective." This means, I take it, that the Administrator need find no facts, in the accepted sense of the expression. He need only form an opinion,—for every opinion is a conclusion of fact. And "basic" means, evidently, that his opinion is that one of the "purposes of the Act" requires the making of a law applicable to a given situation. It is not of material aid that he discloses the reasons for his action. Such a test of constitutionality was unanimously rejected in the *Schechter* case.

The statute there in question declared the policy of Congress to be "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Under that Act the President was required to find that the promulgation by him of a code of fair competition in any industry would "tend to effectuate the policy" of Congress as above declared. He did so find in promulgating the code there under attack.

I have already quoted what this court said with respect to the so-called standards established by the statute. That case and this fall into exactly the same category. There it was held that the President's basic conclusions of fact amounted to an exercise of his judgment as to whether a law should come into being or not. Here it is said that the Administrator's basic conclusions of fact are but the enforcement of an enactment by Congress. Whether explicitly avowed or not, the present decision overrules that in the *Schechter* case.

The judgment of the Administrator is, by this Act, substituted for the judgment of Congress. It is sought to make that judgment unquestionable just as the judg-

ment of Congress would be unquestionable once exercised and embodied in a definite statutory proscription. But Congress, under our form of Government, may not surrender its judgment as to whether there shall be a law, or what that law shall be, to any other person or body.

The Emergency Price Control Act might have been drawn so as to lay down standards for action by the Administrator which would be reasonably definite; it might have authorized inquiries and hearings by him to ascertain facts which affect specific cases within the provisions of the statute. That would have been a constitutional and practicable measure. It has done no such thing.

But it is said the Administrator's powers are not absolute, for the statute provides judicial review of his action. While the Act purports to give relief from rulings of the Administrator by appeal to the Emergency Court of Appeals and to this court, the grant of judicial review is illusory. How can any court say that the Administrator has erred in the exercise of his judgment in determining what are defense activities? How can any court pronounce that the Administrator's judgment is erroneous in defining a "defense-rental area"? What are the materials on which to review the judgment of the Administrator that one or another period in the last three years reflects, in a given area, no abnormal, speculative, or unwarranted increase in rent in particular defense housing accommodations in a chosen defense-rental area? It is manifest that it is beyond the competence of any court to convict the Administrator of error when the supposed materials for judgment are so vague and so numerous as those permitted by the statute.

One only need read the decisions of the Emergency Court of Appeals to learn how futile it is for the citizen to attempt to convict the Administrator of an abuse of judgment in framing his orders, how illusory the purported

judicial review is in fact. I have spoken more at length on this subject in my opinion in *Yakus* v. *United States*, *ante*, p. 448.

I think the judgment of the District Court was right and should be affirmed.

BILLINGS *v.* TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY.

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

No. 215. Argued February 2, 1944.—Decided March 27, 1944.

1. A registrant under the Selective Training and Service Act of 1940 becomes "actually inducted" within the meaning of § 11 of the Act when in obedience to the order of his draft board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed. P. 559.
2. Until "actually inducted" within the meaning of § 11 of the Selective Training and Service Act, a registrant under that Act is subject solely to civil and not to military jurisdiction. P. 557.
3. A registrant under the Selective Training and Service Act of 1940, whose claim that he was a conscientious objector had been rejected, was ordered by his board to report for induction. At the induction center he was examined and put in Class 1–B. He informed the officers in charge that he refused to serve in the Army and that he wanted to turn himself over to the civil authorities. He refused to take the oath, but it was read to him and he was told that he was in the Army. He was then ordered to submit to fingerprinting, but refused to obey. Military charges were preferred against him for willful disobedience of that order. *Held* that he was not subject to trial by court martial but was subject solely to civil jurisdiction. Pp. 544, 558.

135 F. 2d 505, reversed.

CERTIORARI, 320 U. S. 725, to review the affirmance of an order, 46 F. Supp. 663, discharging a writ of habeas corpus and remanding the petitioner to the custody of the respondent.

Mr. Lee Bond submitted for petitioner.

Mr. Edward G. Jennings, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl, Valentine Brookes,* and *Malcolm A. Hoffmann* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sec. 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. § 311) provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."[1] Petitioner Billings, who is held by the Army on a charge of a violation of the Articles of War, claims that this provision of the Act exempts him from military jurisdiction and makes him responsible solely to the civil authorities. The answer turns on whether or not Billings has been "actually inducted" into the Army. These are the facts.

[1] Sec. 11 so far as material here provides: "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, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

Billings claims to be a conscientious objector. He registered under the Act with Local Board No. 1 of Ottawa County, Kansas, stating on his card at the time that he would never serve in the Army. He was given a 1–B classification because of defective eyesight but was reclassified as 1–A in January, 1942. The local board rejected his claim that he was a conscientious objector. He appealed to the board of appeal which affirmed the ruling of the local board. Though petitioner resolved never to serve in the Army, he desired to comply with all of the requirements of Selective Service short of actual induction, so that he might avoid all civil penalties possible. Accordingly, he consulted with draft officials in Texas and faculty members at the University of Texas where he taught and concluded that taking the oath was a prerequisite to induction into the armed forces. He thought he might be finally rejected by the Army on account of defective eyesight. But he resolved that if he was not rejected at the induction station, he would not take the oath but would turn himself over to the civil authorities. He was ordered by his local board to report on August 12, 1942 and to proceed to the induction center at Fort Leavenworth. He joined the group selected for induction and was transported to Fort Leavenworth where he and the others in his group spent the night in the barracks. The next morning after breakfast in the mess hall petitioner was given both the physical and mental examinations during which he made clear to the examining officials his purpose not to serve in the Army. He then reported to the officer who passed on the results of the examinations and who told him that he had been put in Class 1–B. He then reported to the induction office and told the officers in charge that he refused to serve in the Army and that he wanted to turn himself over to the civil authorities. They said that he was already under the jurisdiction of the military and put him under guard to prevent him from

leaving the reservation. With their consent, however, he used the telephone and procured the services of an attorney whom he retained to file a petition for *habeas corpus* on his behalf. Thereupon an Army officer read petitioner the oath of induction which petitioner refused to take. He was advised that his refusal made no difference, that "You are in the army now." He was then ordered to submit to fingerprinting. He refused to obey. Military charges were preferred against him for willful disobedience of that order.

On August 14, 1942, petitioner filed this petition for a writ of *habeas corpus* alleging that he was not a member of the armed forces of the United States, that he was not subject to military jurisdiction, and that if he had violated any laws they were the civil laws of the United States. The writ issued. Respondent filed a return and a hearing was had at which petitioner testified. The District Court discharged the writ and remanded petitioner to respondent's custody, holding that petitioner was subject to military jurisdiction. 46 F. Supp. 663. The Circuit Court of Appeals affirmed, holding that "Induction was completed when the oath was read to petitioner and he was told that he was inducted into the Army." 135 F. 2d 505, 507. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Act.

I.

It is conceded that petitioner was not "actually inducted" in the Army within the meaning of § 11 of the Act when he was ordered to report to the induction station. But it is contended that from that time on he was subject to at least a limited military jurisdiction by reason of the Articles of War.

Among those whom Article 2 of the Articles of War (41 Stat. 787, 10 U. S. C. § 1473) subjects to military law are

all persons "lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same." This provision standing alone would have made petitioner subject to military law from August 12, 1942, the date when he was required by the local board to present himself for induction. That was indeed the consequence under the Selective Draft Act of 1917 (40 Stat. 76). *Franke* v. *Murray,* 248 F. 865; *United States* v. *Bullard,* 290 F. 704; Digest Op. J. A. G. 1912–1930, § 2238; 2 Op. J. A. G. (1918) 327.3; Second Report, Provost Marshal General (1918), p. 221. The Articles of War then in force (39 Stat. 651) had substantially the same provision as the present Article 2. Sec. 2 of the 1917 Act provided, moreover, that "All persons drafted into the service of the United States . . . shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army . . ." 40 Stat. 78. And the regulations under the 1917 Act stated that when a registrant was ordered to report to a local board or a state adjutant general for duty he was "in the military service" from and after the day and hour thus specified. §§ 133, 159D, 159E, 159F, 159G, 161. And see *United States* v. *McIntyre,* 4 F. 2d 823. But the present Act and the regulations promulgated under it are differently designed.

Sec. 3 of the Act provides that "no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined." Moreover, as we have noted, Congress by § 11 withheld from military courts martial jurisdiction over cases arising under the Act unless the person involved had been "actually inducted" or "unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." The "actually inducted"

clause of § 11 was offered as an amendment on the floor of the Senate by Senator Bone. 86 Cong. Rec. 10895. It was designed, as stated by the Senate conferees, to give civil courts jurisdiction over violations of the Act prior to induction for training in substitution for the House provisions that civil and military courts should have concurrent jurisdiction in such cases. 86 Cong. Rec. 11710, 12039, 12084. In view of this legislative history the Congress can hardly be presumed to have restored by the second "unless" clause in § 11 what it took away by the first "unless" clause. That is to say, § 11 of the Act read together with § 3 indicates to us a purpose to vest in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction. It is suggested, however, that prior to that time a selectee may be subject to military jurisdiction by reason of Art. 2 of the Articles of War and be prosecuted before courts martial for all offenses proscribed by the Articles, provided those acts are not made criminal by the Act. Under that view a selectee who failed to report for induction (*Bowles* v. *United States,* 319 U. S. 33) or who, having reported, refused to be examined (*United States* v. *Collura,* 139 F. 2d 345) could be prosecuted for such offenses only in civil courts. § 11. But since by Art. 2 he became a soldier when ordered to report, he could be prosecuted by the military for those offenses which were proscribed by the Articles of War but not by the Act.

We think that is too narrow a reading of § 11 of the Act. As we pointed out in *Falbo* v. *United States,* 320 U. S. 549, 552, the mobilization program established by the Selective Service System is designed to operate "as one continuous process for the selection of men for national service"—a process in which the civil and military agencies perform integrated functions. The examination of men at induction centers and their acceptance or rejection are parts of that process. Induction marks its

end. But prior to that time a selectee is still subject to the Act and not yet a soldier. A case involving his rights or duties as a selectee prior to that event is a case arising under the Act. The civil authorities, not the military, are charged with the duties of enforcement at that stage of the process. That necessarily means that the measure of a selectee's rights and duties is to be found in the Act, not in the Articles of War. For § 16 (a) of the Act suspends all laws or parts thereof which are in conflict with its provisions.

We are supported in that view by the administrative construction of the Act. The regulations promulgated under it define a "delinquent" as one who is "liable for training and service" under the Act and "who fails or neglects to perform any duty required of him" by the Act or the regulations made pursuant thereto. § 601.5. And Part 642, which contains detailed provisions concerning the rights and duties of "delinquents," provides: "Every registrant who has heretofore or who hereafter fails to comply with an Order to Report for Induction or an Order to Report for Work of National Importance shall be reported promptly to the United States Attorney . . .; provided that if the local board believes that by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report for a period not in excess of 30 days." § 642.41 (a). Moreover, § 642.42 (a) provides: "After a delinquent has been reported to the United States Attorney, it is the responsibility of the United States Attorney to determine whether he shall be prosecuted. Before permitting such a delinquent to be inducted or assigned to work of national importance, the local board should obtain the views of the United States Attorney concerning such action." We will develop shortly the place of such regulations in the Selective Service System. It is sufficient at this point to

note that the regulations treat the problems of "delinquents" as matters exclusively for the civil authorities.[2] We cannot believe that the Act would have been given that construction if, as is now contended, the selectee became subject to even a limited military jurisdiction prior to induction.

II.

Respondent argues in the second place that petitioner became a soldier when the Army accepted him after his examinations were completed. That argument is based largely on the War Department Regulations.

The War Department Regulations [3] in force in August, 1942 (Mobilization Regulations No. 1–7, October 1, 1940) provided in § II, par. 6, that "The function of the induction station is to provide the final examinations for registrants selected for induction and the induction of those acceptable to the Army." Sec. II, par. 13 (e) entitled "induction ceremony" provided: "All men successfully passing the

[2] While the regulations governing "delinquents" cited in the text are those presently in force, the ones in effect at the time of Billings' refusal to be inducted were of the same tenor and were then included in § 601.5, § 642.4, § 642.5.

It should also be noted that these regulations contain detailed provision for the parole of persons convicted of violations of the Act. §§ 643.1 *et seq.* Those required to register under the Act may be paroled by the Attorney General on the recommendation of the Director of Selective Service for induction or for other assignments. § 643.2. The Attorney General has the power to impose "such terms and conditions as he may deem proper" upon the parolee and shall supervise him, and may suspend or revoke the parole, except when the parolee is "in the active land or naval forces of the United States." §§ 643.8, 643.9. And Army Regulations No. 615–500, § II, par. 7 (b) (5) provide that registrants convicted of violation of the Act "will be accepted for induction at any time," provided the Attorney General of the United States has granted parole "for the purpose of induction."

[3] These were superseded September 1, 1942, by Army Regulations No. 615–500.

physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, AW 109: 'I, ————————, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War.' They will be informed that they are now members of the Army of the United States and given an explanation of their obligations and privileges. In the event of refusal to take an oath (or affirmation) by any individual he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States."

The argument is that since the Army Regulations do not condition a selectee's entry into the Army on his subscribing to the oath,[4] induction must take place at some anterior point of time. It is said that while § 3 of the Act provides that a selectee shall not be inducted "until he is acceptable" to the Army, there is nothing in the Act which postpones induction beyond that time. The induction ceremony described in § II, par. 13 (e) of the regulations is said to be a formal exercise which solemnifies the occasion and during which the soldier is advised concerning his obligations and responsibilities to the United States. See *United States* v. *Smith*, 47 F. Supp. 607. The statement in § II, par. 13 (e) that those who pass the examination "will be immediately inducted into the Army" is read to mean that selectees

[4] The case of a selectee is distinguished from that of an enlistee who is required by Art. 109 of the Articles of War to take the oath. Identical requirements in the predecessor Articles of War applicable to enlistees were construed as inapplicable to draftees under the Selective Draft Act of 1917. See 1 Op. J. A. G. 169 (1917); *Franke* v. *Murray*, *supra*, pp. 868–869.

shall thereupon be accepted as soldiers. A statement by an officer in authority that they are accepted, followed by the reading of the oath and such other explanation as may be required completes the ceremony.

That view finds support in informal rulings of the Judge Advocate General's office.[5] And War Department Regulations have the force of law as we recently had occasion to reaffirm in *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484.

But that circumstance is complicated here by the division of jurisdiction between the civil and military authorities which the Act creates. The President is authorized "to select and induct" men into the armed forces "in the manner provided in this Act." § 3 (a). No man shall be "inducted for training and service under this Act unless and until he is acceptable" to the armed services. § 3 (a). And the civil authorities retain jurisdiction over him until

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[5] The following propositions were submitted to the Chief, Military Affairs Section of the Judge Advocate General's office: "1. That the only purpose of the administration of the oath as set out in MR 1–7, Paragraph 13e, is for the purpose of informing the individual of his obligations and responsibilities to the United States of America, and his acquiescence in, or acknowledgment of this obligation, by some overt act indicating acceptance thereof is immaterial. 2. That induction is complete immediately upon full acceptance of the individual by the government. The oath or any act or requirement thereafter is ministerial only and is not necessary to the completion of induction. 3. For induction no acquiescence or acceptance on the part of the individual is required."

On June 6, 1941, the following informal ruling was made: "Generally speaking, the above-quoted conclusions are believed to be sound, and it therefore follows that a refusal on the part of a selectee to take the prescribed oath does not legally affect the validity of his induction." We are advised by the Judge Advocate General on February 4, 1944, in a supplemental memorandum filed by the Solicitor General that although that opinion was expressed informally by letter and not in a formal opinion it "represented the views of The Judge Advocate General" and that those views "have not been modified and are hereby adhered to."

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he is "actually inducted." § 11. Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men. The manner and method of effecting an induction into the Army are thus left for the War Department. But the power of the President under the Act "to select and induct" men includes the power to determine when the selective process is completed. It is only after that process is finished that a selectee is eligible for induction.

That view runs throughout the Selective Service Regulations promulgated under the Act. They are the regulations which have special relevancy here. The rule-making power under the Act is vested in the President. § 10 (a) (1). The President in turn is given the power to delegate that authority.[6] § 10 (b). And during the period here in question, as at the present time,[7] the President had delegated it to the Director of Selective Service. Exec. Order, No. 8545, Sept. 23, 1940, 5 Fed. Reg., pp. 3779, 3781. The Act and the regulations promulgated under it give the selective process its integrated nature. *Falbo* v. *United States, supra.* They determine the role which the military as well as the civilian authorities are to play in the administrative process of selection. *Id.* As in other instances (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Gray* v. *Powell*, 314 U. S. 402) the interpretations of an Act of Congress by those

[6] Sec. 10 (b) as originally enacted contained no limitation as to the persons to whom that authority might be delegated. But by the Act of December 5, 1943, 57 Stat. 598, § 10 (b) was amended to read: "The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9)."

[7] See Exec. Order No. 9410, December 23, 1943, 8 Fed. Reg. 17319.

charged with its administration are entitled to persuasive weight.

As we have said, the Selective Service Regulations support our interpretation of the Act. Thus it is provided that while a selectee is appealing or otherwise contesting his classification, his induction shall be stayed. §§ 625.3, 626.14, 627.41, 628.7. And, as we have noted, when a "delinquent" has been reported to a United States Attorney, the local board shall not order him to report for induction without obtaining the views of the United States Attorney. These provisions, as well as those governing the control of the local boards over the orders to report for induction, which we will come to shortly, are framed on the theory that the time when a selectee's status may change from civilian to soldier is subject to the terms and requirements of the Act. Thus they confirm our construction of the Act.

The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction. During the period here in question an inducted man was defined as "a man who has become a member of the land or naval forces through the operation of the Selective Service System." 32 Code Fed. Reg. 1941 Supp. § 601.7. Induction station was defined as any camp, etc. "at which selected men are received by the military authorities and, if found acceptable, are inducted into military service." § 601.8. And though the regulation governing the reception of selected men at the induction station referred to their treatment "pending their induction or rejection" (§ 633.8), "induction" was not otherwise used in the sense of "acceptance." For it was defined in the very next regulation in the following manner: "Induction. At the induction station, the selected men found acceptable will be inducted into the land or naval forces." § 633.9.

These regulations thus suggest that induction follows acceptance and is a separate process. Read in that light the War Department Regulations may be reconciled with the regulations under the Act. For as we have seen, the War Department provided by regulation at the time Billings appeared at Fort Leavenworth that the "induction *will be performed* by an officer in a short, dignified ceremony in which the men are administered the oath," etc. (Italics added.)

We are confirmed in this conclusion by recent amendments both to the Army Regulations and to the Selective Service Regulations. The Army Regulations, as amended March 30, 1943, now state respecting the "induction ceremony," that "The induction will be performed by an officer who, prior to administering the oath, will give the men *about to be inducted* a short patriotic talk" (italics added). This makes unambiguous the fair inference in the earlier Army Regulations that selectees were inducted *by* the ceremony and not before it.

Moreover, the Selective Service Regulations have been amended in recent months so as to provide for preinduction physical examinations before a registrant "is ordered to report for induction." § 629.1. As under the former regulations, the group to be forwarded for examination by the military authorities is assembled by the local board and given certain instructions and credentials. § 629.22. Registrants in certain classes "may be inducted into service at the induction station upon being found qualified for service," provided they make written request of their boards and provided there is no appeal pending in their cases and the appeal period has expired. § 629.23. All other registrants who are given the preinduction examination are returned to their local board when the examination is completed. § 629.22 (e). Those found acceptable by the Army or Navy are later ordered to report for induction. §§ 632.1 *et seq.* Local boards, in filling

calls received, are authorized to allow twenty-one days before induction to those who "have been found to be acceptable to the Army." § 632.4. This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs. Army Reg. No. 615–500, September 1, 1942, § II, par. 16.

We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station. That these amendments do not effect any change in the concept of "induction" is apparent from the fact that its definition has remained practically the same from the time when Billings reported at the induction station to the present time.[8] It could hardly be maintained that a selectee who has passed his preinduction physical examination but who has not been ordered to report for induction is subject to military jurisdiction. And it would not seem permissible to hold that he who failed to report for induction at the end of the so-called twenty-one day furlough period could be prosecuted by a court martial because he had been "actually inducted" within the meaning of § 11. But if that is true, it is difficult to see why there would be a difference in result if the interval between the time when he is found acceptable or is accepted and the ceremony of induction were only a few minutes, as in the present case, rather than a few weeks.

[8] As we have indicated, the Selective Service Regulations in § 633.9 defined "induction" at the time Billings reported to the induction station as follows: "At the induction station, the selected men found acceptable will be inducted into the land or naval forces." At the present time § 633.25 defines "induction" as follows: "At the Army Reception Center, the Navy Recruiting Station, or the induction station, as the case may be, the selected men who have been forwarded for induction and found acceptable will be inducted into the land or naval forces."

III.

It is finally contended, as the Circuit Court of Appeals held, that petitioner was inducted when the oath was read to him and he was told that he was in the Army. At that time he had been placed under guard and was retained against his will. But the argument is that the military has authority to exercise force for the purpose of inducting selectees into the service.

We have no doubt of the power of Congress to enlist the manpower of the nation for prosecution of the war and to subject to military jurisdiction those who are unwilling, as well as those who are eager, to come to the defense of their nation in its hour of peril. *Arver* v. *United States,* 245 U. S. 366. But Congress did not choose that course in the present emergency. It imposed a separate penalty on those who defied the law—prosecution by the civil authorities and a maximum penalty of five years imprisonment or a $10,000 fine or both. § 11. We say that that penalty was aimed at those who defied the law, though in the words of § 11 it includes, of course, only those who have not been "actually inducted." But we give "inducted" the meaning it has in the Act and in the regulations. As we have pointed out, an inducted man is defined by the Selective Service Regulations as one "who has become a member of the land or naval forces through the operation of the Selective Service System." § 601.7. That suggests that he becomes "actually inducted" within the meaning of the Act by submitting to the Selective Service System. The fact that he is not a volunteer is, of course, irrelevant as the Act was designed as a "fair and just system of selective compulsory military training and service." § 1 (b). But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board.

It must be remembered that § 11 imposes on a selectee a criminal penalty for any failure "to perform any duty required of him under or in the execution" of the Act "or the rules or regulations made pursuant thereto." He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura, supra.* The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied,[9] it is now express. The Selective Service Regulations state that it is the "duty" of a registrant who receives from his local board an order to report for induction "to appear at the place where his induction will be accomplished," "to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished," and "to submit to induction." § 633.21 (b). Thus it is clear that a refusal to submit to induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status. That circumstance throws light on the meaning of the words "actually inducted" as used in § 11 of the Act. Congress by accepting the Bone amendment to § 11 specified the maximum penalty to be imposed on those who violated the Act or disobeyed an order of their board prior to their induction.[10] It also withheld from military courts

[9] See §§ 633.1, 633.2, 633.6 in force in August, 1942.

[10] The Conference Report stated: "The Senate bill provided that persons subject to the bill who fail to report for duty as ordered should be tried exclusively in the district courts of the United States and not by military and naval courts martial, unless such persons had actually been inducted for the training and service prescribed in the bill or unless they were subject to trial by court martial under laws in force prior to the enactment of the bill. The House amendment in such cases gave the courts martial and the district courts concurrent jurisdiction, and made failure of persons to report for duty subject to the

jurisdiction over those offenders. At the same time, Congress did not authorize the Army to search out delinquents wherever they might be and induct them without more. We must therefore assume that Congress as a matter of policy decided that those who disobeyed the order of their board and refused to be inducted were to be punished by the civil authorities and by them alone.[11] If forcible seizure or detention of such offenders by the Army were sanctioned, the Congressional policy of providing the maximum punishment for their delinquency would be undermined.

Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported

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laws and regulations concerning that branch of the land and naval forces to which they were assigned from the date they were required by the terms of the order to obey the same, even though they had not actually been inducted.

"The conference agreement contains the provisions of the Senate bill in this respect." 86 Cong. Rec. 12039.

[11] It is true that for other purposes Congress has treated selectees who are ordered to report for induction the same as those in military service. Thus the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. App. § 501, 54 Stat. 1178), which originally obtained only to "persons in the military service," were extended by an Act of October 6, 1942, to selectees from the date of receiving an order to report until the time of actually reporting for induction. 50 U. S. C. App. Supp. II, § 516, 56 Stat. 770. But, as we have pointed out, the Selective Service Act and the regulations under it have not made the selectee's civilian status change to that of soldier at either point of time.

for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report.

These considerations together indicate to us that a selectee becomes "actually inducted" within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed.

We are not concerned with the wisdom of either the "actually inducted" clause in § 11 or the procedure for selection and induction which has been prescribed under the Act. Nor is it for us to decide whether the maximum penalty provided by Congress is adequate for those who flout the Act while the nation fights for its very existence. But where Congress has drawn the line between civil and military jurisdiction it is our duty to respect it.

Reversed.

MR. JUSTICE ROBERTS is of the view that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 135 F. 2d 505.

MR. JUSTICE FRANKFURTER:

Under the Selective Service Act of 1940, unlike that of 1917, a selectee is not subject to trial by a military court martial until he has been "actually inducted" for training and service. But Congress did not define when he was so "inducted." It thus left to judicial construction when the civilian status ceased and the military status began. In a matter of this sort, involving as it does the process of compulsory recruiting of the nation's Army in the midst of war, it is of vital importance that the line be drawn as definitely as the legislation reasonably permits in order that ambiguity and controversy be reduced to a minimum.

In the *Falbo* case we held the other day that "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army . . ." 320 U. S. 549, 553. The line that was thus drawn—when "the connected series of steps" has ended—seems to me to be the line to draw between the civil and military status of a registrant. In other words, when acceptance of a registrant is communicated by the Army, the Army has made its choice. The man is then in the Army. Such was the ruling, and I believe the correct ruling, of the court below. 135 F. 2d 505. According to the Court's opinion, as I understand it, the Act itself does not draw this line but Congress has authorized such a line to be drawn by appropriate regulations. On that assumption, I do not dissent.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 492. Argued March 8, 9, 1944.—Decided March 27, 1944.

1. Upon review of decisions of the Tax Court, it is not the function of the reviewing court to draw inferences from facts or to supplement stipulated facts. P. 563.
2. A decision of the Tax Court on review may be modified or reversed only if it is "not in accordance with law." P. 563.
3. "Interest" usually denotes an amount which one has contracted to pay for the use of borrowed money. P. 564.
4. Upon the record, "excess interest dividends" paid by the life insurance company were not, as a matter of law, "interest" within the meaning of § 203 (a) (8) of the Revenue Act of 1932; and the Tax Court's disallowance of their deduction as "interest on indebtedness" may not be set aside. P. 564.
5. Provisions of the Revenue Acts for deductions from taxes are to be strictly construed. P. 564.

137 F. 2d 623, affirmed.

CERTIORARI, 320 U. S. 733, to review the affirmance of a decision of the Tax Court, 44 B. T. A. 293, disallowing taxpayer's deduction of excess interest dividends.

Mr. John L. Grant for petitioner.

Mr. Chester T. Lane, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch, L. W. Post,* and *Robert L. Stern* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether petitioner, a mutual life insurance company, was entitled to deduct from its gross income for 1933 "excess interest dividends" paid within that year. The deduction was authorized if the amounts were "interest" paid on "indebtedness" [1] within the meaning of § 203 (a) (8) of the Revenue Act of 1932, 47 Stat. 169, 225. The Tax Court denied the deduction. 44 B. T. A. 293. The Circuit Court of Appeals affirmed. 137 F. 2d 623. The case is here on a petition for a writ of certiorari which we granted because the decision below and *Penn Mutual Life Ins. Co.* v. *Commissioner,* 92 F. 2d 962, from the Third Circuit conflicted with *Commissioner* v. *Lafayette Life Ins. Co.,* 67 F. 2d 209, from the Seventh.

The facts are stipulated and show the following: During and prior to 1933 petitioner issued life insurance policies which gave to the insured (and in some cases to the beneficiary) the right to have petitioner hold the face amount of the policies upon their maturity under one or more of several optional modes of settlement in lieu of

[1] This provision of the Act reads in part as follows: "In the case of a life insurance company the term 'net income' means the gross income less . . . All interest paid or accrued within the taxable year on its indebtedness" with exceptions not relevant here.

payment in a lump sum. These optional modes of settlement are exercised under supplementary contracts. Thus one form of supplementary contract provides that the amount of the policy shall be left on deposit with petitioner. And it is provided in case of this, as well as the other types of supplementary contracts which are involved,[2] that "if in any year the Society declares" that funds held under these options shall receive interest in excess of 3% per annum, the payments under them "shall be increased for that year by an Excess Interest Dividend as determined and apportioned by the Society." During the year 1933 some $534,000 of excess interest dividends was paid by petitioner under these supplementary contracts. The amount so paid accrued during the year at the rate which had been declared by petitioner's board of directors at the beginning of that year.

Petitioner's argument runs as follows: Nothing in the supplementary contracts or underlying policies conditions the payment of excess interest dividends on the existence of a surplus. The policies and the statutes authorizing their issuance negative the idea that the payment of these excess interest dividends constitute a distribution of surplus or of earnings of prior years. Petitioner's declaration at the beginning of 1933 that it would pay excess interest dividends in that year at a specific rate constituted an offer. Those who elected in 1933 to keep the funds on deposit, rather than to withdraw the amounts of the policies which had become payable during the year, accepted that offer. It is reasonable to assume that but for the declaration at the beginning of the year the new supplementary contracts would not have been made. In at least some of the cases where the funds were already on

[2] The other types of optional settlements involved here are instalment options for a fixed period and instalment options in a fixed amount.

deposit at the beginning of 1933 the beneficiaries could have withdrawn them on demand. By refusing to exercise that right and by leaving the funds on deposit the beneficiaries accepted petitioner's offer. And, it is again asserted, but for the declaration of excess interest dividends, it is reasonable to assume that petitioner would not have been permitted to retain and use those funds during that year. As to funds on deposit at the beginning of 1933 and over which the beneficiaries had no power of withdrawal, the argument is that the original promise to pay the excess interest dividends, though conditional, was a promise to pay "interest." [3]

While these are interesting questions which are propounded, the facts on which most of them turn were not determined by the Tax Court. Its findings of fact did not go beyond the stipulation. And it apparently was not asked to go farther. It based its ruling on *Penn Mutual Life Ins. Co.* v. *Commissioner, supra.* It may be that custom or a course of dealing or other circumstances would warrant findings of fact which would support at least part of the claimed deduction. But more proof is needed than the provisions of the policies and the contents of the stipulation. It is not our task to draw inferences from facts or to supplement stipulated facts. That function rests with the Tax Court. We may modify or reverse the decision of the Tax Court only if it is "not in accordance with law." 44 Stat. 110, 26 U. S. C. § 1141 (c) (1); *Wilmington Trust Co.* v. *Helvering,* 316 U. S. 164; *Dobson* v. *Commissioner,* 320 U. S. 489. We must make our determination on the record before us. If relevant evidence was offered before the Tax Court but rejected by it, we could remand the case to it for appropriate findings. But no such situation is presented here. Accordingly we

[3] The amount of funds in each of these three categories does not appear, though petitioner has offered its rough estimates.

can reverse the judgment below only if we can say on the basis of the provisions of policies and the meager stipulation that the excess interest dividends were "interest" within the meaning of the Act [4] as a matter of law.

The "usual import" of the word interest is "the amount which one has contracted to pay for the use of borrowed money." *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Deputy* v. *Du Pont*, 308 U. S. 488, 498. We cannot say as a matter of law that the excess interest dividends fall within that category. They appear to be amounts which may be declared or withheld at the pleasure of the board of directors. An obligation to pay may of course arise after the declaration, the same as in case of dividends on stock. But an obligation to pay declared dividends on stock would hardly qualify as "interest" within the meaning of the Act. The analogy of course is not perfect, as these excess interest dividends may not be payable from surplus or earnings of prior years and the obligation to pay the principal amount under each option was absolute. Yet payments made wholly at the discretion of the company have a degree of contingency which the notion of "interest" ordinarily lacks. If we expanded the meaning of the term to include these excess interest dividends, we would indeed relax the strict rule of construction which has obtained in case of deductions under the various Revenue Acts. *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440: *Deputy* v.

[4] Sec. 163 (a) of the Revenue Act of 1942, 56 Stat. 798, 868, includes within the definition of "interest paid" the following: "All amounts in the nature of interest, whether or not guaranteed, paid within the taxable year on insurance or annuity contracts (or contracts arising out of insurance or annuity contracts) which do not involve, at the time of payment, life, health, or accident contingencies." The Senate Report points out that this provision was designed to include both guaranteed interest and excess interest dividends. S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 146–147.

Du Pont, supra, p. 493. Appropriate findings of fact might well bring such payments within the meaning of "interest," as for example a finding that their declaration was the basis on which new contractual engagements were made. But such is not this case.

Affirmed.

NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, *v.* WARNER COMPANY.

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

No. 362. Argued February 28, 29, 1944.—Decided March 27, 1944.

1. On review under § 21 (b) of the Longshoremen's & Harbor Workers' Compensation Act, the court may not set aside a compensation award deemed contrary to the weight of the evidence, but may set an award aside only for error of law. P. 568.
2. A barge, though without motive power, is a vessel within the meaning of the Longshoremen's & Harbor Workers' Compensation Act, since it is a means of transportation by water. P. 571.
3. Upon the facts of this case, *held* that a bargeman—though the barge which he tended was without motive power and though he was the sole employee aboard—was a "member of a crew" within the meaning of the Longshoremen's & Harbor Workers' Compensation Act and excluded from the coverage of that Act by §§ 2 (3) and 3 (a) (1) thereof. P. 571.

137 F. 2d 57, affirmed.

CERTIORARI, 320 U. S. 729, to review the reversal of a judgment, 45 F. Supp. 835, which dismissed a suit to set aside an award of compensation under the Longshoremen's & Harbor Workers' Compensation Act.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Mr. Melvin Richter* were on the brief, for petitioner.

Mr. Samuel B. Fortenbaugh, Jr., with whom *Mr. Everett H. Brown, Jr.*, was on the brief, for respondent.

By special leave of Court, *Mr. Abraham E. Freedman*, with whom *Messrs. William L. Standard* and *E. Burke Finnerty* were on the brief, for the National Marine Engineers Beneficial Association et al., as *amici curiae*, urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether Nicholas Rusin, a bargeman employed by respondent, is entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. § 901) for injuries received when a capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall. The answer turns on whether Rusin was a "master or member of a crew of any vessel." If he was, he is not entitled to the compensation because such persons are expressly excluded from the coverage of the Act by § 2 (3) and § 3 (a) (1).

The Deputy Commissioner found that Rusin was a harbor worker, not a "master or member of a crew," and granted him a compensation award.[1] The District Court upheld the Deputy Commissioner in a suit which respondent-employer brought to set aside the award. 45 F. Supp. 835. The Circuit Court of Appeals reversed. 137 F. 2d 57. The case is here on a petition for a writ of certiorari which we granted because of the asserted failure of the court below to give proper effect to our decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251.

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[1] Cf. the finding of the Deputy Commissisoner in *Diomede* v. *Lowe*, 14 F. Supp. 380; 87 F. 2d 296.

The facts, as found by the Deputy Commissioner and amplified by additional evidence adduced before the District Court, are not in dispute. Rusin was employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing or, for shorter distances, by the winding up of a cable by means of a capstan operated by hand. The barge, which was documented as a vessel of the United States, never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia. Rusin was employed under a union contract with respondent which stated that all bargemen assigned to specific barges in active operation were to be paid a monthly salary of $80 and were to be provided with quarters. It also stated that that compensation was "for all work performed by Bargemen in the operation of his own vessel" and that the rates provided were "based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays." Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge. When he worked on any other boat, he received wages at an hourly rate, in addition to the monthly salary. Rusin had little experience as a seaman except that which he obtained as a bargeman. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. He could not set the course or control or change it at any time. He was subject to orders of respondent's marine superintendent

except when in tow, at which time he was subject to the control of the tugboat captain. But he had no duties in connection with the handling of cargo and no shore duties. At the time of the injury he was the sole person aboard or employed upon the barge.

Sec. 19 (a) of the Act gives the Deputy Commissioner "full power and authority to hear and determine all questions in respect of" claims for compensation. And § 21 (b) gives the federal district courts power to suspend or set aside, in whole or in part, compensation orders if "not in accordance with law." In considering those provisions of the Act in the *Bassett* case, we held that the District Court was not warranted in setting aside such an order because the court would weigh or appraise the evidence differently. The duty of the District Court, we said, was to give the award effect, "if there was evidence to support it." 309 U. S. at 258. And we stated that the findings of the Deputy Commissioner were conclusive even though the evidence permitted conflicting inferences. *Id.* p. 260. And see *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 246. This statement of the finality to be accorded findings of the Deputy Commissioner under the Act was not new. It had been stated in substantially similar terms in *Voehl* v. *Indemnity Insurance Co.,* 288 U. S. 162, 166, and in *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287. The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it.[2]

[2] Sec. 14 (b) makes the first instalment of compensation due on the fourteenth day after the employer has knowledge of the injury or death. Sec. 14 (f) provides that if compensation, payable under an award, is not paid within ten days after it is due, a penalty of twenty per cent is added. Sec. 18 provides for the issuance by the Deputy Commissioner of a supplementary order when an employer is in default of payment of compensation due under an award for a period of thirty days. On such an order judgment and execution may be obtained in the federal district courts, the supplementary order of the Deputy

By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by § 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act.

We think the award granted by the Deputy Commissioner had such an infirmity.[3]

If the award were to stand, there would be brought within the Act a group of workers whom we do not believe Congress intended to include. The Senate Report makes clear that "The purpose of this bill is to provide for com-

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Commissioner being final. Any waiver of the right to compensation under the Act is made invalid by § 15 (b). Agreements for compensation not made in accordance with the Act are outlawed. §§ 15 (a), 16. Limitations on the granting of interlocutory injunctions staying payment of compensation while an award is being contested are contained in § 21 (b). And the United States Attorney is directed to appear on behalf of the Deputy Commissioner and defend compensation orders. 45 Stat. 490, 33 U. S. C. § 921a.

[3] In *Davis* v. *Department of Labor*, 317 U. S. 249, we were dealing with the problem of determining whether a so-called harbor worker could be compensated under a state act or must come under the Longshoremen's and Harbor Workers' Act. That problem was embarrassed by the fact that the line between federal and state domain had been drawn with reference to the rule of the *Jensen* case. There are no such complications here. In this case the line is one which Congress has drawn between two mutually exclusive federal systems. The risk of employees choosing the wrong remedy has been anticipated by Congress and at least partially avoided. For § 13 (d) provides that where recovery is denied to any person in a suit brought at law or in admiralty to recover damages on the ground that his remedy was under the Longshoremen's and Harbor Workers' Act the limitation of time for making application for an award begins to run "only from the date of termination of such suit."

pensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships." S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. We reviewed the history of the Act in the *Bassett* case and in the *Parker* case, and more recently in *Davis* v. *Department of Labor,* 317 U. S. 249. As we noted in those cases, the Act was adopted to meet the difficulties engendered by the decision in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. And see *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219. That line of cases carved out a domain in which, according to a majority of this Court, state law could not constitutionally afford compensation to maritime employees. It was to fill that gap in the system of workmen's compensation that the present Act was passed. S. Rep. No. 973, *supra,* p. 16. But as we pointed out in the *Bassett* case (309 U. S. pp. 256–257) the effort to bring a master and members of a crew of a vessel under the Act was successfully opposed by the representatives of maritime employees. See *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128, 136; *Warner* v. *Goltra,* 293 U. S. 155, 159–160. And the maritime unions which appeared as *amici curiae* in the present case emphasize the importance of that exception. The liability of an employer under the Act is exclusive. § 5. On the other hand, those who are not covered by it but who are protected by maritime law are entitled to maintenance and cure, a remedy not restricted to accidents. As we said in *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 732, "In this respect it is a broader liability than that imposed by modern workmen's compensation statutes." Moreover, seamen may sue under the Jones Act (41 Stat. 988, 1007, 46 U. S. C. § 688) for injuries in the course of their employment. And in such actions assumption of risk is no defense. *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424. Or suit

may be brought in admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, and cases cited. These are basic rights. The maritime unions appearing in the present case maintain that those remedies are indeed superior to the relief afforded by the Longshoremen's and Harbor Workers' Act. Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise.

If a barge without motive power of its own can have a "crew" within the meaning of the Act and if a "crew" may consist of one man, we do not see why Rusin does not meet the requirements. A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water.[4] See *The General Cass,* Fed. Cas. No. 5,307; *Seabrook* v. *Raft,* 40 F. 596; *In re Eastern Dredging Co.,* 138 F. 942; *Los Angeles* v. *United Dredging Co.,* 14 F. 2d 364; *The Robert W. Parsons,* 191 U. S. 17, 30; *Ellis* v. *United States,* 206 U. S. 246, 259. A crew is generally "equivalent to ship's company" as Mr. Justice Story said in *United States* v. *Winn,* Fed. Cas. No. 16,740, 28 Fed. Cas. 733, 737. But we pointed out in the *Bassett* case that the word does not have "an absolutely unvarying legal significance." 309 U. S. at p. 258. We know of no reason why a person in sole charge of a vessel on a voyage is not as much a "member of the crew" as he would be if there were two or more aboard. We said in the *Bassett* case

[4] "Vessel" is defined in Rev. Stat. § 3, 1 U. S. C. § 3, to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

that the term "crew" embraced those "who are naturally and primarily on board" the vessel "to aid in her navigation." *Id.*, p. 260. But navigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer." Judge Hough pointed out in *The Buena Ventura*, 243 F. 797, 799, that "every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage." And see *The Minna*, 11 F. 759; *Disbrow* v. *Walsh Bros.*, 36 F. 607, 608 (bargeman). We think that "crew" must have at least as broad a meaning under the Act.[5] For it is plain from the amendment exempting a "master or member of a crew" that ship's company was not brought under the Act. And we are told by the Senate Report, as already noted, that the purpose of the legislation was to provide compensation for those who "are mainly employed in loading, unloading, refitting, and repairing ships." S. Rep. No. 973, *supra*.

Rusin, unlike the employee in the *Bassett* case,[6] did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other "crew" only as they were made so by the nature of the vessel and its navigational requirements. The contract under which he was employed stated that the compensation was "based upon all services and time required to safeguard and operate the barge fleet." The services rendered con-

[5] "Seaman" as used in a particular context may of course have a broader meaning than "crew." *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. And see *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. 2d 991.

[6] And see *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. 2d 245; *Henderson* v. *Jones*, 110 F. 2d 952.

formed to that standard and no other. Rusin moreover had that permanent attachment to the vessel which commonly characterizes a crew. See *A. L. Mechling Barge Line* v. *Bassett,* 119 F. 2d 995.

We conclude that only by a distorted definition of the word "crew" as used in the Act could Rusin be restricted to the remedy which it affords and excluded from recovery under the Jones Act or be denied relief in admiralty. See *Maryland Casualty Co.* v. *Lawson,* 94 F. 2d 190; *Loverich* v. *Warner Co.,* 118 F. 2d 690; *Cantey* v. *McLain Line,* 32 F. Supp. 1023, 114 F. 2d 1017, which we reversed in 312 U. S. 667.

Affirmed.

MR. JUSTICE ROBERTS concurs in the result.

FOLLETT *v.* TOWN OF McCORMICK.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 486. Argued February 11, 1944.—Decided March 27, 1944.

A municipal ordinance imposing a flat license tax on book agents, as applied to an evangelist or preacher who distributes religious tracts in his home town and who makes his livelihood from such activity, *held* violative of the freedom of worship guaranteed by the First and Fourteenth Amendments. P. 576.

Reversed.

APPEAL from the affirmance of a conviction for violation of a municipal ordinance prescribing an occupational license tax.

Mr. Hayden C. Covington, with whom *Mr. Grover C. Powell* was on the brief, for appellant.

Messrs. J. Fred Buzhardt and *Jeff D. Griffith* for appellee.

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

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant was convicted of violating an ordinance of the town of McCormick, South Carolina which provided: ". . . the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina: Agents selling books, per day $1.00, per year $15.00." Appellant is a Jehovah's Witness and has been certified by the Watch Tower Bible & Tract Society as "an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus." He is a resident of McCormick, South Carolina, where he went from house to house distributing certain books. He obtained his living from the money received; he had no other source of income. He claimed that he merely offered the books for a "contribution." But there was evidence that he "offered to and did sell the books." Admittedly he had no license from the town and refused to obtain one. He moved for a directed verdict of not guilty at the close of the evidence, claiming that the ordinance restricted freedom of worship in violation of the First Amendment which the Fourteenth Amendment makes applicable to the States. The motion was overruled and appellant was found guilty by the jury in the Mayor's Court. That judgment was affirmed by the Circuit Court of General Sessions for McCormick County and then by the Supreme Court of South Carolina. The case is here on appeal. Judicial Code, § 237 (a), 28 U. S. C. § 344 (a).

The ordinance in this case is in all material respects the same as the ones involved in *Jones* v. *Opelika,* 319

U. S. 103, and *Murdock* v. *Pennsylvania,* 319 U. S. 105. In those cases, the tax imposed was also a license tax—"a flat tax imposed on the exercise of a privilege granted by the Bill of Rights" and therefore an unconstitutional exaction. *Murdock* v. *Pennsylvania, supra,* p. 113. In those cases members of Jehovah's Witnesses had also been found guilty of "peddling" or "selling" literature within the meaning of the local ordinances. But since they were engaged in a "religious" rather than a "commercial" venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock* v. *Pennsylvania, supra,* p. 115. We emphasized that the "inherent vice and evil" of the flat license tax is that "it restrains in advance those constitutional liberties" and "inevitably tends to suppress their exercise." p. 114.

The Supreme Court of South Carolina recognized those principles but distinguished the present case from the *Murdock* and *Opelika* decisions. It pointed out that the appellant was not an itinerant but was a resident of the town where the canvassing took place, and that the principle of the *Murdock* decision was applicable only to itinerant preachers. It stated, moreover, that appellant earned his living "by the sale of books," that his "occupation was that of selling books and not that of colporteur," that "the sales proven were more commercial than religious." It concluded that the "license was required for the selling of books, not for the spreading of religion." [1]

[1] The court also distinguished *State* v. *Meredith,* 197 S. C. 351, 15 S. E. 2d 678, where a license tax statute was construed to be inapplicable to an itinerant minister of Jehovah's Witnesses, the "sale" of literature being "merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion." p. 355.

We pointed out in the *Murdock* case that the distinction between "religious" activity and "purely commercial" activity would at times be "vital" in determining the constitutionality of flat license taxes such as these. 319 U. S. p. 110. But we need not determine here by what tests the existence of a "religion" or the "free exercise" thereof in the constitutional sense may be ascertained or measured. For the Supreme Court of South Carolina conceded that "the book in question [2] is a religious book"; and it concluded "without difficulty" that "its publication and distribution come within the words, 'exercise of religion,' as they are used in the Constitution." We must accordingly accept as *bona fide* appellant's assertion that he was "preaching the gospel" by going "from house to house presenting the gospel of the kingdom in printed form." Thus we have quite a different case from that of a merchant who sells books at a stand or on the road.

The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional. It was not clear from the records in the *Opelika* and *Murdock* cases to what extent, if any, the Jehovah's Witnesses there involved were dependent on "sales" or "contributions" for a livelihood. But we did state that an "itinerant evangelist" did not become "a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." 319 U. S. p. 111. Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living.

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[2] Though appellant distributed more than one tract or book, the only one before the Supreme Court of South Carolina was entitled "Children." As stated by that court, "Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death . . ."

Whether needy or affluent, they avail themselves of the constitutional privilege of a "free exercise" of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early "taxes on knowledge" which the framers of the First Amendment sought to outlaw. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245–248. A preacher has no less a claim to that privilege when he is not an itinerant. We referred to the itinerant nature of the activity in the *Murdock* case merely in emphasis of the prohibitive character of the license tax as so applied. Its unconstitutionality was not dependent on that circumstance. The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean* v. *American Press Co., supra; Murdock* v. *Pennsylvania, supra*) as the imposition of a censorship or a previous restraint. *Near* v. *Minnesota*, 283 U. S. 697. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania, supra*, p. 112.

But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker.

This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does

not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. 319 U. S. p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Reversed.

MR. JUSTICE REED, concurring:

My views on the constitutionality of ordinances of this type are set out at length in *Jones* v. *Opelika,* 316 U. S. 584, and in a dissent on the rehearing of the same case, 319 U. S. 117. These views remain unchanged but they are not in accord with those announced by the Court.

My understanding of this Court's opinions in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Jones* v. *Opelika,* 319 U. S. 103, is that distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and therefore immune from interference by the requirement of a license. These opinions are now the law of the land.

As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case.

MR. JUSTICE MURPHY, concurring:

While I am in complete accord with the opinion of the Court, I desire to add a brief word in light of certain statements made in the dissenting opinion. It is claimed

that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom.

It is suggested that we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities. It is also charged that the decision contains startling implications with respect to freedom of speech and the press. I am neither disturbed nor impressed by these allegations. We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.

It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.

Separate opinion of MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON.

The present decision extends the rule announced in *Jones* v. *Opelika,* 319 U. S. 103, and *Murdock* v. *Pennsylvania,* 319 U. S. 105.

The ordinance in question is not, in the words of the First Amendment, a law "prohibiting the free exercise" of religion. At the outset it should be observed that the ordinance is not discriminatory. It lays a tax on the pursuit of occupations by which persons earn their living in

the Town of McCormick. It does not single out persons pursuing any given occupation and exempt others. If it were attacked as a denial of the equal protection of the laws the contention would be frivolous.[1] There is no suggestion that the purpose is other than to raise revenue necessary for the support of government from all who enjoy the service and protection of government, and to adjust the tax laid on the appellant in the light of the aid he derives from such service and protection.

Secondly, the ordinance lays no onerous burden on the occupation of the appellant or any other citizen. The tax in question is wholly unlike that considered in *Grosjean* v. *American Press Co.*, 297 U. S. 233, which had the unmistakable purpose of hitting at one out of many occupations and hitting so hard as to discourage or suppress the pursuit of that calling. The Court there said (p. 250):

"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."

What then is the law under attack? It is a revenue measure applying generally to those earning their living in the community. It is a monetary exaction reasonably related to the cost of maintaining society by governmental protection, which alone renders civil liberty attainable.

Follett is not made to pay a tax for the exercise of that which the First Amendment has relieved from taxation. He is made to pay for that for which all others similarly situated must pay—an excise for the occupation of street vending. Follett asks exemption because street vending

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[1] *Clark* v. *Titusville*, 184 U. S. 329; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Bradley* v. *Richmond*, 227 U. S. 477.

is, for him, also part of his religion. As a result, Follett will enjoy a subsidy for his religion. He will save the contribution for the cost of government which everyone else will have to pay.

The present decision extends and reaches beyond what was decided in *Murdock* v. *Pennsylvania, supra.* There the community asserted the right to subject transient preachers of religion to taxation; there the court emphasized the "itinerant" aspect of the activities sought to be subjected to the exaction. The emphasis there was upon the casual missionary appearances of Jehovah's Witnesses in the town and the injustice of subjecting them to a general license tax. Here, a citizen of the community, earning his living in the community by a religious activity, claims immunity from contributing to the cost of the government under which he lives. The record shows appellant "testified that he obtained his living from the money received from those with whom he placed books, that he had no other source of income."

Unless the phrase "free exercise," embodied in the First Amendment, means that government must render service free to those who earn their living in a religious calling, no reason is apparent why the appellant, like every other earner in the community, should not contribute his share of the community's common burden of expense. In effect the decision grants not free exercise of religion, in the sense that such exercise shall not be hindered or limited, but, on the other hand, requires that the exercise of religion be subsidized. Trinity Church, owning great property in New York City, devotes the income to religious ends. Must it, therefore, be exempt from paying its fair share of the cost of government's protection of its property?

We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemp-

tion to those who speak and to the press. It will not do to say that the Amendment, in the clause relating to religion, is couched in the imperative and, in the clause relating to freedom of speech and of press, is couched in the comparative. The Amendment's prohibitions are equally sweeping.[2] If exactions on the business or occupation of selling cannot be enforced against Jehovah's Witnesses they can no more be enforced against publishers or vendors of books, whether dealing with religion or other matters of information. The decision now rendered must mean that the guarantee of freedom of the press creates an immunity equal to that here upheld as to teaching or preaching religious doctrine. Thus the decision precludes nonoppressive, nondiscriminatory licensing or occupation taxes on publishers, and on news vendors as well, since, without the latter, the dissemination of views would be impossible. This court disavowed any such doctrine with respect to freedom of the press in *Grosjean* v. *American Press Co., supra,* and it is unthinkable that those who publish and distribute for profit newspapers and periodicals should suggest that they are in a class apart, untouchable by taxation upon their enterprises for the support of the government which makes their activities possible.

Not only must the court, if it is to be consistent, accord to dissemination of all opinion, religious or other, the same immunity, but, even in the field of religion alone, the implications of the present decision are startling. Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. The materials for judicial

[2] "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press . . ."

distinction do not exist. It would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion. Such a belief, however earnestly and honestly held, does not entitle the believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.

We should affirm the judgment.

UNITED STATES v. SEATTLE-FIRST NATIONAL BANK.

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

No. 267. Argued February 7, 8, 1944.—Decided March 27, 1944.

Under authority of § 3 of the National Banking Act, as amended, and pursuant to a consolidation agreement, a state bank was consolidated in 1935 with a national banking association. The transfer to the consolidated association of title to the property of the state bank was not evidenced by deed, conveyance, assignment or other instrument. *Held*:

1. In respect of (a) securities held by the state bank as legal and beneficial owner and (b) securities to which the state bank held legal title in fiduciary capacities, the transfer was "wholly by operation of law" within the meaning of Treasury Regulations 71 (1932 ed.), Arts. 34 (r) and 35 (r), and thereby exempt from the stamp tax imposed by § 800, Schedule A, pars. 3 and 9, of the Revenue Act of 1926, as amended. P. 588.

2. The transfer to the consolidated association of the realty of the state bank was not subject to the stamp tax imposed by § 800, Schedule A–8, of the Revenue Act of 1926, as amended, since the property was not conveyed by any "deed, instrument, or writing," was not "sold," and there was no "purchaser." P. 589.

136 F. 2d 676, affirmed.

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CERTIORARI, 320 U. S. 723, to review the affirmance of a judgment for the plaintiff, 44 F. Supp. 603, in a suit to recover sums paid as taxes.

Mr. Valentine Brookes, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton K. Rothschild* were on the brief, for the United States.

Mr. Arnold L. Graves, with whom *Mr. B. H. Kizer* was on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Respondent initiated this suit to recover the amount of the documentary stamp tax, penalty and interest which had been exacted under the Revenue Act of 1926, as amended, in connection with a statutory consolidation of banks under § 3 of the National Banking Act.[1] The District Court entered judgment for respondent for the amount of the tax and interest, 44 F. Supp. 603.[2] The Circuit Court of Appeals held that the case was governed by one of its former decisions [3] and affirmed the judgment, 136 F. 2d 676. We granted certiorari, 320 U. S. 723, because this judgment was alleged to conflict with decisions in other circuits [4] and because of the desirability of a final settlement of the problems involved.

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[1] Act of November 7, 1918, c. 209, 40 Stat. 1043, § 3, as added by the Act of February 25, 1927, c. 191, 44 Stat. 1224, § 1, and as amended by the Banking Act of 1933, c. 89, 48 Stat. 162, § 24, and the Banking Act of 1935, c. 614, 49 Stat. 684, § 331; 12 U. S. C. § 34a.

[2] Recovery was denied for the $100 penalty, which was paid in compromise of a threatened criminal prosecution, on the ground that the compromise was a final settlement of the penalty. This matter is not now before us.

[3] *United States* v. *Merchants National Bank,* 101 F. 2d 399.

[4] See *City Bank Farmers Trust Co.* v. *Hoey,* 125 F. 2d 577; *State Street Trust Co.* v. *Hassett,* 134 F. 2d 156.

In 1935 the directors of the Spokane and Eastern Trust Company, a state bank, entered into a written agreement of consolidation with the directors of the First National Bank of Seattle. The agreement provided that the banks were to be consolidated under the charter of the First National Bank of Seattle and under the new corporate title of Seattle-First National Bank, the respondent herein. The agreement was ratified and confirmed by the requisite number of stockholders of both banks and the Comptroller of the Currency issued the necessary certificate of approval, reciting that the directors and shareholders of both banks had complied with the provisions of the National Banking Act.

The state bank owned real estate, including its banking premises, as well as corporate stocks and bonds, to all of which it held legal and beneficial title as part of its corporate assets. It also held in trust certain stocks and bonds, the legal title to which was vested in it as trustee, executor, administrator, guardian, or in other fiduciary capacities. Section 5 of the consolidation agreement provided that "All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations."

The transfer to respondent of title to this property held by the state bank was not evidenced by any deed, conveyance, assignment or other instrument. Nor were any documentary stamps purchased or affixed with respect to such transfer. Subsequently, a deputy collector examined the bank records and exacted a tax from respondent on the theory that the consolidation had resulted in a taxable transfer. The necessary stamps were purchased and affixed and this suit for refund followed.

First. We conclude that, as to the securities to which the state bank held both legal and beneficial title, there

was no taxable transfer under the stamp tax provisions in effect at the time the consolidation took place.

Section 800, Schedule A–3, of the Revenue Act of 1926, as amended,[5] imposes a stamp tax on transfers of legal title to any shares of stock or certificates, "whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate . . . or not)." Schedule A–9[6] imposes a stamp tax on similar transfers of legal title to bonds.

Standing alone, these statutory provisions make no exceptions and clearly impose a tax on the transfer of title to the securities legally and beneficially owned by the state bank. But administrative regulations, which until recently have been left undisturbed by subsequently enacted legislation and are to be respected as settled administrative practice,[7] have carved out certain exemptions germane to the transfer here involved. Thus Article 34 (r) of Treasury Regulations 71 (1932 ed.) provides that the transfer of stock owned by a corporation which is merged into another corporation is subject to the stamp tax, "such a transfer being effected by the

[5] C. 27, 44 Stat. 9, as amended by § 723 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

[6] C. 27, 44 Stat. 9, as added by § 724 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as amended by § 212 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.

[7] Substantially similar regulations were promulgated under the Revenue Act of 1926 and were in effect when Congress, in the Revenue Act of 1932, reenacted the stamp tax provisions in issue. Congress did not see fit to amend or change these regulations until the Revenue Act of 1942, §§ 506 (b) (1) and (2), c. 619, 56 Stat. 958. See *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, 115.

act of the parties and not wholly by operation of law." [8] Article 35 (r) specifically exempts from the tax those transfers of shares or certificates of stock "which result wholly by operation of law"; it further states that "transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor." Article 120 makes these same provisions applicable to sales or transfers of bonds. The problem thus resolves itself into a determination of whether the transfer of the state bank's securities to respondent occurred "wholly by operation of law" so as to exempt the transfer from the stamp tax requirements.

It is clear that the consolidation or merger of the national bank and the state bank occurred through the voluntary acts of the respective directors and stockholders pursuant to the provisions of § 3 of the National Banking Act, with the approval of the Comptroller of the Currency. If the words "wholly by operation of law," as used in the administrative regulations, refer here to the entire process of consolidation, of which the transfer of securities is an essential part, the exemption cannot be applied. But in a broad sense, few if any transfers ever take place "wholly by operation of law," for every transfer must necessarily be a part of a chain of human events, rarely if ever other than voluntary in character. Thus to give any real substance to the exemption, we must take a more narrow view and examine the transfer apart from its general background. We must look only to the immediate mechanism by which the transfer is made ef-

[8] While the grammatical construction of the quoted clause gives rise to some doubt as to its meaning, we interpret it in accord with Article 35 (r) so as to impose a tax on transfers arising out of mergers only if the transfer occurs by the act of the parties and not wholly by operation of law.

fective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."

Here the actual transfer to respondent of the legal and beneficial title to the securities owned by the state bank was not effected by or dependent on any of the voluntary acts relating to the consolidation agreement or the ratification or approval thereof. Nor was any voluntary deed, conveyance, assignment or other instrument utilized. Rather the transfer occurred solely and automatically by virtue of § 3 of the National Banking Act. This provides in pertinent part that: (1) upon consolidation, the corporate existence of each of the constituent banks shall be merged and continued in the consolidated national banking association, which shall be deemed to be the same corporation as the constituent banks; (2) all the rights, franchises and interests of each constituent bank in and to every species of property, real, personal and mixed, and choses in action thereto belonging, "shall be deemed to be transferred to and vested in" the consolidated association without any deed or other transfer; (3) the consolidated association, by virtue of such consolidation and without any order or other action by any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests (including fiduciary interests) in the same manner and to the same extent as held and enjoyed by the constituent banks.

Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred "wholly by operation of law." The mere fact that the parties here saw fit to include in their consolidation agreement a provision that all assets of each constituent bank "shall pass to and vest in the consolidated association" does not make the transfer any

less than one "wholly by operation of law." This was merely an agreement that the assets would be transferred in the future and did not purport to be a present, effective conveyance. The transfer of the securities to which the state bank held legal and beneficial title was therefore exempt from the stamp tax under Articles 34 (r) and 35 (r).

Second. We reach the same conclusion as to the transfer of securities to which the state bank held legal title in trust in various fiduciary capacities. The intent to tax such transfers must be clear and unmistakable. No such intent is apparent here. Under § 3 of the National Banking Act, these securities passed to respondent "wholly by operation of law" just as did the securities previously discussed. Articles 34 (r) and 35 (r) make no distinction between transfers of stocks from a fiduciary and transfers from one who is also the beneficial owner. The exemption therein contained is therefore applicable.[9]

Third. The transfer of the real property owned by the state bank is likewise, in our opinion, exempt from the stamp tax.

Section 800, Schedule A–8, of the Revenue Act of 1926, as amended,[10] places a stamp tax on "Conveyances: Deed, instrument, or writing, delivered . . . whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the

[9] Because of the clear applicability of Articles 34 (r) and 35 (r), we have no occasion to determine the applicability here of Article 35 (h), which exempts from the stamp tax "the transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

[10] C. 27, 44 Stat. 9, as added by § 725 of the Revenue Act of 1932, and as amended by § 212 of the National Industrial Recovery Act, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.

purchaser or purchasers . . ." It is clear, however, from § 3 of the National Banking Act that the state bank's realty was not conveyed to or vested in respondent by means of any deed, instrument or writing. There was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid. Nor can the realty be said to have been "sold" or vested in a "purchaser or purchasers" within the ordinary meanings of those terms. Only by straining the realities of the statutory consolidation process can respondent be said to have "bought" or "purchased" the real property. That we are unable to do.

The judgment of the court below is therefore

Affirmed.

TENNESSEE COAL, IRON & RAILROAD CO. ET AL. *v.* MUSCODA LOCAL No. 123 ET AL.

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

No. 409. Argued January 13, 14, 1944.—Decided March 27, 1944.

1. The Fair Labor Standards Act is remedial and humanitarian in nature and must not be interpreted or applied in a narrow, grudging manner. P. 597.
2. Sections 7 (a), 3 (g) and 3 (j) of the Fair Labor Standards Act are necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. P. 597.
3. In the absence of a contrary legislative expression, it must be assumed that Congress in the Fair Labor Standards Act was referring to work or employment as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business. P. 598.
4. Underground travel by iron ore miners to and from the "working face" of the mines, *held,* upon the facts of this case as found by

both courts below, to constitute work. Such underground travel time is includible in the workweek within the meaning of the Fair Labor Standards Act and must be compensated accordingly. P. 598.

5. Although such underground travel of the iron ore miners is in a strict sense non-productive, they are nevertheless engaged during such travel time in a "process or occupation necessary to . . . production," within the meaning of § 3 (j) of the Act. P. 599.
6. The facts relating to underground travel by miners in iron ore mines in this case leave no doubt as to its character as work within the meaning of the Fair Labor Standards Act, and the requirement of the Act that it be compensated accordingly can not be rendered inapplicable by any contrary custom or contract. P. 602.

137 F. 2d 176, affirmed.

CERTIORARI, 320 U. S. 731, to review a judgment which modified and affirmed a judgment, 40 F. Supp. 4, in actions for declaratory judgments construing the Fair Labor Standards Act.

Messrs. Nathan L. Miller and *Borden Burr* for the Tennessee Coal, Iron & Railroad Co., petitioner. *Messrs. E. L. All, S. M. Bronaugh,* and *William B. White* submitted for the Sloss-Sheffield Steel & Iron Co., and *Messrs. T. F. Patton, R. T. Rivers,* and *Borden Burr* for the Republic Steel Corp., petitioners.

Mr. Crampton Harris, with whom *Messrs. J. Q. Smith* and *Lee Pressman* were on the brief (*Mr. James A. Lipscomb* entered an appearance), for respondents.

Solicitor General Fahy, with whom *Messrs. Robert L. Stern, Douglas B. Maggs, Irving J. Levy,* and *Miss Bessie Margolin* were on the brief, for the Administrator of the Wage and Hour Division, U. S. Department of Labor, intervener.

MR. JUSTICE MURPHY delivered the opinion of the Court.

We are confronted here with the problem of determining in part what constitutes work or employment in under-

ground iron ore mines within the meaning of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201. This question, which is one of first impression, arises out of conflicting claims based upon the actual activities pursued and upon prior custom and contract in the iron ore mines. Such an issue can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.

Three iron ore mining companies, petitioners herein, filed declaratory judgment actions [1] to determine whether time spent by iron ore miners in traveling underground in mines to and from the "working face" [2] constitutes work or employment for which compensation must be paid under the Act. The respondent labor unions and their officials, representing petitioners' employees, were named as defendants and the Administrator of the Wage and Hour Division of the Department of Labor was allowed to intervene. The actual controversy relates only to the hours of employment during the period intervening between the effective date of the Act, October 24, 1938, and the dates when the respective actions were initiated in April, 1941.[3] It is

[1] These actions were instituted under the Federal Declaratory Judgments Act, 48 Stat. 955, § 274D, 28 U. S. C. § 400. They were consolidated for trial purposes and the District Court entered a single judgment.

[2] The "working face" is the place in the mine where the miners actually drill and load ore. The "face to face" basis of compensation, advocated by petitioners, includes only the time spent at the working face. The "portal to portal" basis, proposed by respondents, includes time spent in traveling between the portal or entrance to the mine and the working face and back again, as well as the time spent at the working face.

[3] Since May 5, 1941, petitioners have paid their miners for travel time pursuant to contract in compliance with the opinion of the Administrator of the Wage and Hour Division that underground travel in iron ore mines is work within the meaning of the Act.

conceded that if underground travel constitutes employment, the miners worked more than the statutory maximum workweek and are entitled to be paid one and one-half times the regular rate for the excess hours. But if the travel time is excluded from the workweek, thus limiting it to the time spent at the working face, no overtime payments are due.

After extended hearings, the District Court found that the travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining." The court accordingly ruled that the travel time, as well as the time spent at the surface obtaining and returning tools, lamps and carbide and checking in and out, was included within the workweek. 40 F. Supp. 4. The Circuit Court of Appeals affirmed as to the travel time, holding that the District Court's findings on that matter were supported by substantial evidence. The judgment was modified by the Circuit Court, however, by excluding from the workweek the time spent in the activities at the surface. 135 F. 2d 320; rehearing denied, 137 F. 2d 176. The importance of the problem as to the travel time led us to grant certiorari.[4]

Specifically we are called upon to decide whether the District Court and the Circuit Court of Appeals properly found that iron ore miners were at work within the meaning of the Act while engaged in underground travel which they were obliged to perform on the property of and under the direction of petitioners as a necessary concomitant of their employment. The record shows that petitioners own and operate twelve underground iron ore

[4] No review has been sought of the exclusion from the workweek of the activities at the surface. We therefore do not discuss that issue in this case. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487, and cases cited.

mines in Jefferson County, Alabama,[5] and that the general pattern of facts underlying the findings of the courts below is essentially the same in each of these mines.[6]

The miners begin their day by arriving on the company property at a scheduled hour [7] and going to the bath house, where they change into working clothes.[8] They then walk to the tally house near the mine entrance or portal; there they check in and hang up individual brass checks, furnished by petitioners, on a tally or check-in board. This enables the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes. Vacancies are filled and the head miners and crews receive any necessary instructions. In addition, each miner either rents a battery lamp for the day or buys a can of carbide each day or two for underground illumination purposes. And at some of the mines,

[5] The Tennessee Coal, Iron & Railroad Company has eight mines; Sloss-Sheffield Steel & Iron Company, two mines; and Republic Steel Corporation, two mines.

[6] As the District Court pointed out, the conditions set forth by the record are not intended to be used to censure petitioners' manner of maintenance of their mines, "for these conditions may well be normal conditions in iron ore mines and practically inevitable." Moreover, the record indicates that the Spaulding mine of the Republic Company has been operated only intermittently and experimentally during the last 20 years and many of the conditions in the other mines are not present. The ore is close to the surface and miners can walk all the way to the working faces.

[7] One of the Tennessee Company's superintendents stated that "Whenever a man comes to the mine late, dragging along and encourages others to be late, he is setting a bad example. I want this understood thoroughly—men must be on time; we don't care whether they work here or not, but if they want to work here they will have to be on time or else they will be disciplined, even to discharge."

[8] The use of the bath house, or change house, is optional. Some miners change their clothes at home and make no use of the bath houses furnished by petitioners.

many miners stop at a tool box or tool house on the surface to pick up other small supplies and tools necessary for their work. These activities consume but a few minutes.

The miners thereupon are required to report at the loading platform at the mine portal and await their turn to ride down the inclined shafts of the mines. Originally the miners could reach the working faces entirely by foot, but as the shafts increased in length petitioners provided transportation down the main shafts. The miners accordingly ride part of the way to the working faces in ore skips [9] or regular man trips,[10] which operate on narrow gauge tracks by means of cables or hoisting ropes. The operation of the skips and man trips is under the strict control and supervision of the petitioners at all times and they refuse to permit the miners to walk rather than ride. Regular schedules are fixed; loading and unloading are supervised; the speed of the trips is regulated; and the conduct of the miners during the rides is prescribed.

About three to six trips are made, depending on the size of the mine and the number of miners. Ten men sit on each man trip car, while from 30 to 40 are crowded into an ore skip. They are forced to jump several feet into the skip from the loading platform, which not infrequently causes injuries to ankles, feet and hands. The skips are usually overcrowded and the men stand tightly pressed together. The heads of most of them are a foot or more

[9] An ore skip is an ordinary four-wheeled ore box car made of steel. It is normally used for transporting ore and its floor is often covered with muck from such haulings. When men are riding in the car it is known as a "man skip trip." It is used for such purposes in the mines of the Tennessee Company and the Republic Company.

[10] A regular man trip is a specially constructed series of cars. Each car is about eight feet long and resembles a stairway. Five men sit on either side of the car facing outwards, back to back with five men on the other side. The man trip used in the Sloss Company mines consists of six such cars.

above the top of the skips. But since the skips usually clear the low mine ceilings by only a few inches, the miners are compelled to bend over. They thus ride in a close "spoon-fashion," with bodies contorted and heads drawn below the level of the skip top. Broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown.

The length of the rides in the dark, moist, malodorous shafts varies in the different mines from 3,000 feet to 12,000 feet. The miners then climb out of the skips and man trips at the underground man-loading platforms or "hoodlums" and continue their journeys on foot for distances up to two miles. These subterranean walks are filled with discomforts and hidden perils. The surroundings are dark and dank. The air is increasingly warm and humid, the ventilation poor. Odors of human sewage, resulting from a complete absence of sanitary facilities, permeate the atmosphere. Rotting mine timbers add to the befouling of the air. Many of the passages are level, but others take the form of tunnels and steep grades. Water, muck and stray pieces of ore often make the footing uncertain. Low ceilings must be ducked and moving ore skips must be avoided. Overhead, a maze of water and air pipe lines, telephone wires, and exposed high voltage electric cables and wires present ever-dangerous obstacles, especially to those transporting tools. At all times the miners are subject to the hazards of falling rocks.

Moreover, most of the working equipment, except drills and heavy supplies, is kept near the "hoodlums." This equipment is carried each day by foot by the crews through these perilous paths from the "hoodlums" to the working faces. Included are such items as fifty-pound sacks of dynamite, dynamite caps, fuses, gallon cans of oil and servicemen's supplies. Actual drilling and loading of the ore begin on arrival at the working faces, interrupted only by a thirty minute lunch period spent at or near the faces.

The service and maintenance men, of course, work wherever they are needed.

At the end of the day's duties at the working faces, the miners lay down their drills, pick up their other equipment and retrace their steps back to the "hoodlums." They wait there until an ore skip or man trip is available to transport them back to the portal. After arriving on the surface, they return their small tools and lamps, pick up their brass checks at the tally house, and proceed to bathe and change their clothes at the bath house. Finally they leave petitioners' property and return to their homes.

In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7 (a) merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3 (g) defines the word "employ" to include "to suffer or permit to work," while § 3 (j) states that "production" includes "any process or occupation necessary to . . . production."

But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view §§ 7 (a), 3 (g) and 3 (j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employ-

ment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.[11]

Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

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[11] Webster's New International Dictionary (2d ed., unabridged) defines work as follows: "1. To exert oneself physically or mentally for a purpose, esp., in common speech, to exert oneself thus in doing something undertaken chiefly for gain, for improvement in one's material, intellectual, or physical condition, or under compulsion of any kind, as distinguished from something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend, or the packing of a trunk for a pleasure trip) . . ." The word "employ" is defined as follows: "2. To make use of the services of; to give employment to; to entrust with some duty or behest."

Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines.[12] Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3 (j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building,[13] waiting for work,[14] and standing by on call [15] have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron ore miners traveling underground are no less engaged in a "process or occupation" necessary to actual production. They do more than "stand and wait," *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S. 112, 119. Cf. *Bountiful Brick Co.* v. *Giles,* 276 U. S. 154, 158. Theirs is a fossorial activity bearing all the indicia of hard labor.

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[12] Cf. *Dollar* v. *Caddo River Lumber Co.,* 43 F. Supp. 822; *Sirmon* v. *Cron & Gracey Drilling Corp.,* 44 F. Supp. 29; *Bulot* v. *Freeport Sulphur Co.,* 45 F. Supp. 380; *Walling* v. *Peavy-Wilson Lumber Co.,* 49 F. Supp. 846.

[13] *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Kirschbaum Co.* v. *Walling,* 316 U. S. 517.

[14] *Fleming* v. *North Georgia Mfg. Co.,* 33 F. Supp. 1005; *Travis* v. *Ray,* 41 F. Supp. 6.

[15] *Walling* v. *Allied Messenger Service,* 47 F. Supp. 773.

The conclusion that underground travel in iron ore mines is work has also been reached by the Administrator of the Wage and Hour Division. On March 17, 1941, he approved an informal report of his representative based upon an investigation of the "hours worked" in underground metal mines in the United States. The report concluded, in part, that "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar [portal] of the mine and ends when he reaches the collar at the end of the shift." See also *Sunshine Mining Co.* v. *Carver,* 41 F. Supp. 60. In addition, statutes of several important metal mining states provide that the eight-hour per day limitation upon work includes travel underground.[16]

Petitioners, however, rely mainly upon the alleged "immemorial custom and agreements arrived at by the practice of collective bargaining" which are said to establish "the 'face to face' method as the standard and measure

[16] Arizona and Utah statutes specifically include all the travel time within the eight-hour limitation. Ariz. Code Ann. (1939), vol. 4, § 56–115; Utah Code Ann. (1943), § 49–3–2. The Supreme Court of Montana has construed Mont. Const., art. 18, § 4, and Mont. Rev. Code (1935), § 3071, which provide for eight hours of work per day in underground mines, to include all travel time, *Butte Miners' Union No. 1* v. *Anaconda Copper Mining Co.,* 112 Mont. 418, 118 P. 2d 148. Nevada Comp. Laws (1929), § 10237, provides that the limitation shall apply to travel one way. But Wyoming Rev. Stat. (1931), § 63–107, specifically excludes underground travel from the limitation; a like result has been reached by interpretation of California Stats. 1909, ch. 181, p. 279, in *Matter of Application of Martin,* 157 Cal. 59, 106 P. 238. Alabama and Tennessee fix no limitation on hours, while maximum hour statutes of other metal mining states are inconclusive insofar as the inclusion of travel time is concerned. See also § 5 (2) of the English Metalliferous Mines Regulation Act (1872), 35 & 36 Vict., c. 77, which provides that "The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface."

for computing working time in the iron ore industry." They further claim that since the Fair Labor Standards Act contains no specific provision regarding underground travel in mines, Congress must be presumed to have intended to perpetuate existing customs or to leave the matter to be worked out through the process of collective bargaining.

The short answer is that the District Court was unable to find from the evidence that any such "immemorial" custom or collective bargaining agreements existed. That court, in making its findings, properly directed its attention solely to the evidence concerning petitioners' iron ore mines and disregarded the customs and contracts in the coal mining industry. There was ample evidence that prior to the crucial date of the enactment of the statute, the provisions in petitioners' contracts with their employees relating to a forty hour workweek "at the usual working place" bore no relation to the amount of time actually worked or the compensation received. Instead, working time and payment appear to have been related to the amount of iron ore mined each day. Hence such contract provisions defining the workweek are of little if any value in determining the workweek and compensation under a statute which requires that they be directly related to the actual work performed.

Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners recognized no independent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. Contracts with company-dominated unions and discriminatory actions toward the independent unions are poor substitutes for "contracts fairly arrived at through the process of collective bargaining." The wage payments and work on a tonnage basis, as well as the contract provisions as to the workweek, were all dictated by petitioners. The futile efforts by the miners

to secure at least partial compensation for their travel time and their dissatisfaction with existing arrangements, moreover, negative the conclusion that there was any real custom as to the workweek and compensation therefor. A valid custom cannot be based on so turbulent and discordant a history; it requires something more than unilateral and arbitrary imposition of working conditions.[17] We thus cannot say that the District Court's findings as to custom and contract are so clearly erroneous as to compel us to disregard them.

But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.[18] Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory

[17] Blackstone has said that one of the requisites of a valid custom is that "it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." 1 Commentaries 77. See also Pollock, First Book of Jurisprudence, 283 (6th ed.).

[18] Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in § 7 (b) (1) and (2) of the Act. Cf. § 8 (c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts.

rights. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Holden* v. *Hardy,* 169 U. S. 366. See also *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342.

This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment. It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to its character as work. The Act thus requires that appropriate compensation be paid for such work. Any other conclusion would deprive the iron ore miners of the just remuneration guaranteed them by the Act for contributing their time, liberty and strength primarily for the benefit of others.

The judgment of the court below is accordingly

Affirmed.

MR. JUSTICE FRANKFURTER, concurring:

The legal question on the record before us lies within a narrow compass. Section 7 of the Fair Labor Standards Act commands the payment of compensation at a rate of not less than one and one-half times the regular rate for every employee under the statute who is engaged "for a workweek" longer than forty-four or forty-two hours during the first or the second year, respectively, after the effective date of the section and forty hours thereafter. 52 Stat. 1060, 1063, 29 U. S. C. § 207. Congress did not explicitly define "workweek" and there is nothing in the available materials pertinent to construction that warrants a finding that "workweek," as applied to the workers in the iron ore industry, had so settled a

meaning at the time of the enactment of the Fair Labor Standards Act as to be deemed incorporated by reference. As a result, "workweek" in this statute, as applied to workers in this industry and on this record, has no technical meaning, that is, a meaning so well known to those in this particular industry as to be applied by courts in enforcing the statute when invoked by men in the industry. For purposes of this case, in any event, when Congress used the word "workweek," it used it colloquially—the term carries merely the meaning of common understanding.

An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress. And so, the application of this colloquial concept "workweek" to the multifarious situations in American industry was left by Congress for ascertainment by judicial proceedings. These facts are to be found either by a jury or, as in this case, by a judge sitting without a jury. And so here it was the judge's duty to determine what time and energy on the part of the employees involved in this suit constituted a "workweek" of these employees of the petitioners. After a trial which lasted for about three weeks, during which testimony covering 2,643 pages was heard and voluminous exhibits were introduced, the District Court made its findings of fact. A judgment for the employees based on these findings was affirmed by the Circuit Court of Appeals. 40 F. Supp. 4; 135 F. 2d 320.

We have then a judgment of two courts based on findings with ample evidence to warrant such findings. Affirmance by this Court is therefore demanded.

MR. JUSTICE JACKSON, concurring:

This case in my view probably does not present any question of law or, if so, it is one with a very obvious

answer. When Congress in the Fair Labor Standards Act referred to "a workweek longer than forty hours," it considered, I assume, that what was a workweek in fact should be a workweek in law. Therefore, the determination of any particular case does not govern any other, for each establishment and industry stands on its own conditions.

A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275; *District of Columbia* v. *Pace*, 320 U. S. 698; *Baker* v. *Schofield*, 243 U. S. 114, 118; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367.

In these cases ore mining companies sought declaratory judgments that miners' travel time in the shafts getting to and from actual mining operations, and some other time, is not to be counted in the workweek as defined for overtime purposes in the Fair Labor Standards Act. They alleged that the custom of their mines excluded it, but the trial court considered all the evidence and said, "The evidence has disclosed no such custom." The companies also contended that the activity during travel is not in the nature of work. After hearing a mass of conflicting testimony the trial court said of these activities, "They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking." These were found to be the facts by the two courts below and, whatever we might decide if we were a trial court hearing the evidence in the first instance, we cannot with our limited review hold them wrong on this record.

If these facts are accepted, the ruling that such travel time is part of the workweek seems manifest. I would affirm on these controlling facts.

MR. JUSTICE ROBERTS:

The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.

Much of what is said in the opinion, in my view, disregards this fundamental function of the judicial process and relies on considerations which have no place in the solution of the issue presented.

What did Congress mean when it said, in § 7 (a) of the Fair Labor Standards Act, that "No employer shall . . . employ any of his employees . . . *for a workweek* longer than forty hours . . . unless such employee receives compensation" for overtime at a specified rate? No other issue is presented.

The materials for decision are those to which resort always has been had in ascertaining the meaning of a statute. They are the mischief to be remedied, the purpose of Congress in the light of the mischief, and the means adopted to promote that purpose. These are not obscure in this instance.

The committe reports upon the bill which became the Fair Labor Standards Act[1] make it clear that the sole purpose was to increase employment, to require a fair day's pay for a fair day's work by raising the wages of the

[1] H. R. 1452, 75th Cong., 1st Sess., H. R. 2182, 75th Cong., 3d Sess., S. R. 884, 75th Cong., 1st Sess.

most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce. The reports disclose no other purpose. The Congressional findings and declaration of policy embodied in § 2 (a)[2] exhibit no intent to deal with any matter other than substandard conditions in industry stemming from wage and hour practices. The Act will be searched in vain for a mandate respecting any subject other than minimum wages and maximum hours of work. This court has construed it as dealing only with these subjects.[3]

In this setting, therefore, we are to determine what Congress meant by the term "workweek" when it prescribed the maximum number of hours of labor an employer might require to be rendered within any week at the standard wage. The Act does not define "workweek," for the evident reason that Congress believed it had a conventional meaning which all would understand and to which all could conform their practices. The term combines two words in common use. A week is any period of seven days. In accepted usage a man's work means that which he does for his employer as the consideration of the wage he receives. The term is often used in a more general sense as when one is asked what he is doing and replies "I am working for Jones." Of course he does not mean that Jones is paying him for each hour of every week of his life. Men are not commonly paid for the time they sleep, the time they eat, or the time they take to go to, and return from, their employer's premises. Thus, although the phrase "work" may refer to the calling pursued, or the identity of the employer, it is plainly not so used in this statute. Its collocation with the word "week" and with the injunction as to minimum pay, maximum

[2] 52 Stat. 1060.

[3] *United States* v. *Darby*, 312 U. S. 100, 115, 117, 122, 125.

hours, and overtime for extra work, in any week, shows that what Congress meant by work was what I have above described,—the actual service rendered to the employer for which he pays wages in conformity to custom or agreement.

It is common knowledge that what constitutes work for which payment is to be made varies with customs and practices in different industries or businesses. Where the employe is required to report at his employer's place of business and go thence to the place where his employer's activities are pursued, it has been the custom in some cases to pay for the time spent in going from the employer's place of business to the place of work. In many industries some or all of the employes are required to report and to remain at a given place awaiting a call for emergency or other casual service and, according to understanding, they are paid for the hours during which they wait as well as those in which they actually put forth physical or mental effort. There can be little doubt that Congress expected the provisions of the Act to be fitted into the prevailing practices and understandings as to what constituted work in various industries.

The Act does not provide that the Administrator or the courts are to define a workweek in the case of each employer on such basis as they deem right, regardless of the custom of the industry or of existing agreements between employers and employes. Nor does the Act vest authority in Administrator or court to disregard and supersede existing understandings and practices as to what constitutes work or the workweek. There is nothing in the words of the statute or its history to suggest that Congress intended, without mentioning it, to confer on the Administrator or the courts so vast a power over the industry of the nation.

The question in this case then is: What was the workweek of iron miners when the Act was adopted? If the

answer is plain, then, I submit, that existing workweek must control in the administration of the statute unless and until employer and employes, by consensual arrangement, alter the current practice.

The record presents no dispute as to the facts. Some are matters of public notoriety susceptible of judicial notice; others are contained in offers of evidence which the District Court excluded as irrelevant; others are exposed in the proofs.

Conditions of labor in iron mines and in coal mines are similar. In both, as the workings become deeper, the men have farther to go to reach the places at which they labor. The time thus consumed by individual workmen varies in the same mine, and in different mines. The conditions in the channels of approach to the places of work are somewhat better in iron mines than in coal mines. The custom in coal mines is, therefore, persuasive, since some of the petitioners maintain coal and iron mines in close proximity, and since the practice in the two has been the same for many years.

In the public arbitration proceedings at Birmingham, Alabama, in 1903, the testimony showed that a miner's day was reckoned "from the time [he] gets to the face of the coal until he leaves the face of the coal," and that the eight hour day was so measured. That arbitration resulted in a wage agreement on the "face to face" basis; that is, on a wage fixed according to the time the miners worked at the face of the coal.

In 1917 a public board of arbitration, whose award was approved by the United States Fuel Administrator, found:

"An eight hour day means eight hours work at the usual working places of all classes of employees. This shall be exclusive of the time required in reaching such working places in the morning and departing from the same at night."

In 1920 the report and award of the Bituminous Coal Commission, which was made the basis of agreement between operators and union miners, employed the language just quoted.

In 1933 the Code of Fair Competition for the Bituminous Coal Industry, promulgated by the President under the National Industrial Recovery Act, provided:

"Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piecework basis."

In 1933 the Appalachian Agreement, approved by the President, provided:

"Eight hours of labor shall constitute a day's work. The eight-hour day means eight hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period."

Prior to 1938, the petitioner Tennessee Coal, Iron & Railroad Company paid its miners either on a piecework basis or upon a shift basis, as did the petitioners Sloss-Sheffield and Republic Steel. But the common understanding of men and management was that, at first, ten hours and, later, eight hours constituted a working day. This is shown by the proofs and there is no evidence to the contrary.

On numerous occasions the men working in these mines claimed, through their unions, that they ought to be paid for travel time consumed in the mines in going to or from the face where they worked. Their demands for pay for travel time are eloquent proof that they understood the basis on which their pay was reckoned and that it did not include travel time as working time. No agreement to pay for travel time was made and no practice to pay for it was adopted.

In 1934 Tennessee made an agreement with the Union representing its employees, which was renewed in 1935,

and again in 1936. It is undisputed that all of these agreements excluded payment for travel time. On October 6, 1938, before the Fair Labor Standards Act was in effect, a collective bargaining agreement was made between the International Union, affiliated with the CIO, and the Tennessee Company. In this agreement it was provided:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

This agreement remained in effect until May 5, 1941, when the provisions in question were abrogated pursuant to an opinion promulgated by the Wage and Hour Administrator as hereinafter described.

The circumstances are not materially different with respect to Sloss-Sheffield. That company has bargained with a union representing its miners since 1934. Several times the union made a demand for payment of travel time but this was not granted. A formal agreement containing the same definitions of workweek, and hours of work, as in the case of Tennessee, was executed in 1939 and renewed in 1940. The company continued to pay on the face to face basis until 1941.

Republic Steel has had no formal written agreement with its employes, but it has bargained with their union. As early as 1933 the union suggested that an arrangement be made whereby the men enter the mine on their own time and come out on company time, but the matter was not pressed. It came up again in 1934. After a strike, negotiations resulted in a return of the men to

work on the face to face plan of payment. In 1935 the union proposed that the employes should enter on their own time and come out on company time, but in negotiations the matter was dropped. In 1936 the union wrote the company respecting an agreement and, in its proposal, said: "The eight hour day means eight hours in or about the mines, at the usual working places for all classes of work." In 1939 the union proposed an agreement containing a like provision. In that year the union preferred charges before the National Labor Relations Board but these did not involve the face to face basis of wage computation. The complaint was settled by stipulation. The company continued to pay for a day's work on the face to face basis until May 1, 1941.

The Fair Labor Standards Act became effective October 24, 1938. At that time coal and iron miners were being paid on the basis of their time spent at their working places in the mine. The miners fully understood this basis.

On July 9, 1940, the director of the legal department of the United Mine Workers of America, in a letter to the Administrator of the Act, requested that he accept the definition of working time contained in the Appalachian agreement, which the letter said embodied "the custom and traditions of the bituminous mining industry." That definition was the same as that quoted from the Tennessee agreement, *supra*. The letter further said, respecting the face to face method:

"This method of measuring the working time at the places of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense."

and further said:

"As mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for

provision to be made for transportation of the men over long distances to their working places."

and added that adjustment of wage rates to any new measurement

"would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

On the footing of that letter the Administrator issued a release stating that the face to face basis in the bituminous industry would not be unreasonable.

On March 23, 1941, the Administrator announced a modified portal to portal wage hour opinion in which he defined the workday in underground metal mining as starting when the miner reports at the collar of the mine, ends when he returns to the collar, and includes the time spent on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. Realizing that this was a complete change of opinion, the Administrator announced that he would not seek to compel payment of restitution from mine owners operating on a face to face basis but that he could not interfere with the right of employes or their representatives to sue for past overtime and penalties under § 16 (b) of the Act. Thereupon the unions representing miners demanded payment of overtime for all travel time since the effective date of the Act, and invoked the penalties specified therein.

In order to avoid possible penalties, the petitioners complied with the Administrator's ruling and brought the present suit for a declaratory judgment to the effect that working time of underground employes comprised the hours of work in the usual working places in the mine and did not include the time consumed in travel thereto and therefrom.

At the trial much evidence was taken as to the practice existing in iron mines long prior to, and at the date

of the adoption of, the Fair Labor Standards Act. This was given by miners, foremen, and employers, and represented not any single locality but the industry over the country. In fact, some of the testimony consisted of depositions taken by the respondents, but offered by the petitioners. It was all to the effect that the working time of iron miners had always been calculated and paid for according to the time worked in the mine at the place assigned for the work and that travel time had never been included in the time for which payment was made.

The district judge entered twenty-nine findings of fact. The first four are formal. The fifth is to the effect that, in the history of mining in the Birmingham District, plaintiffs' employes have been paid without regard to the number of hours spent at the face of the ore or at any specified place or station in the mines, and adds: "This compensation has never been based upon any precise number of hours spent daily at the face of the seam or at any specified place or station in the mines." The finding would seem difficult to explain in view of the history heretofore outlined. The explanation is found in the fact that, although the men were paid for an eight hour day of work at the face, if blasts were about to be set off at the close of the day the men were sent away from the face some time before the blasting but were, nevertheless, paid as if they had remained at the face for the full eight hours. But this can be no reason for disregarding the practices and agreements of the parties.

Findings 6 to 12, inclusive, refer to various methods of payment practiced in the past and to the character of the work of miners and other underground workers. They evidently are intended to show that, while an eight hour day was in force, the wage was not calculated at an hourly rate. Of course, they do not contradict the fact that forty hours constituted the workweek nor the fact that it was

understood that no wages were paid for time spent in travel in the mines.

Finding 13 is to the effect that the unions which made agreements with various petitioners had never been certified by the National Labor Relations Board as appropriate units for collective bargaining. The bearing of this finding is difficult to understand in view of the fact that the employers dealt with the unions representing their men and two operated under formal collective bargaining agreements with nationally affiliated unions.

Finding 14 briefly mentions that the men had several times demanded pay for travel time.

Findings 15 to 27, inclusive, describe the conditions under which the men arrive at the mine, check in, obtain their tools, and walk, or are carried, to their work underground and how they return. They recite that the men have to obey company regulations while they are on the company property and in going to and returning from work. Many of these regulations are for the men's safety. These findings also show that, after arriving on company property, the men receive certain directions with respect to the work they are to do. The obvious bearing of these findings is that the court thought travel ought to be considered work, within the intendment of the Act, whatever the custom, practice, or agreement of the parties. It would be no less a judicial fiat, though somewhat more extreme, to hold that as the men's living quarters are uncomfortable and unhealthy and they must live in the neighborhood of the mines, the time spent in their homes must be paid for as work.

The two concluding findings are of facts which add nothing. They are to the effect that, if all the travel time is counted in the workweek, the men have worked more than forty hours per week and the petitioners have not paid them for more than forty hours.

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The opinion and concurring opinion in this court rely heavily on these findings, especially as they were accepted by the Circuit Court of Appeals. But it will be observed that the findings are noteworthy for the feature that they deal, except in the instance mentioned, which has already been explained, with facts which are immaterial to the issues in the case. I do not see how aid to decision can be derived by refusing to disturb findings which do not meet the issue made by the pleadings. It is significant that the District Court avoided any finding as to whether the employers had ever paid travel time or as to the understanding of the parties that the employers were not paying for such travel time. And it is even more significant that the court made no finding whatever about the formal collective bargaining agreements entered into by the respondents with the petitioners in which both parties clearly signified their understanding of what was work in iron mines. And the court could not, under the proofs in this case, have found that these collective bargaining agreements were contrary to the accepted practice in iron and coal mines throughout the country prior to 1941. The petitioners objected that the findings omitted any reference to the fact that the companies had never paid for travel time, to the fact that the day's work for which wages were paid did not include travel time to or from the place where they mined the ore, or to the negotiations and agreements as to working time, and sought a new trial. The objections and motions were overruled.

Reliance is placed on the trial court's finding that the evidence discloses no custom to exclude travel time from the workweek. But that very reliance exposes the fallacy of the lower court's and this court's position. Unless the statute gave the courts authority to make contracts for the parties, which the statute did not make, a court could not support such a contract by finding that there was no custom with respect to travel time. It would be necessary for

it to find that there was a custom to pay for such time, which the District Court failed to do, for the obvious reason that there was no evidence of such custom.

To say that we should pitch decision on acceptance of the findings of the trial court, when that court neglected to find facts which were highly relevant and material, is to disregard the real and the only issue in the case.

As I have already pointed out, the Fair Labor Standards Act was not intended by Congress to turn into work that which was not work, or not so understood to be, at the time of its passage. It was not intended to permit courts to designate as work some activity of an employe, which neither employer nor employe had ever regarded as work, merely because the court thought that such activity imposed such hardship on him or involved conditions so deleterious to his health or welfare that he ought to be compensated for them.

It is common knowledge that the issue of portal to portal pay was first nationally raised in connection with the mining industry after the nation was at war and in connection with disastrous coal strikes. And, indeed, the inspiration for the demand for portal to portal pay was furnished by the decision of the court below in this case. That decision was rendered on March 16, 1943. Three days later the National Policy Committee of the United Mine Workers changed its demanded definition of hours of labor so that existing demands, which, until then, had been on the traditional face to face basis of payment, should "conform with the basic legal requirements of the industry and the maximum hours of work time provisions be amended to establish 'portal to portal' for starting and quitting time for all underground workers." In presenting this demand it said: "The Mine Workers desire to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines." Thus it is plain that the decision under review was understood,

as it must be, as a declaration of law by a court as to what is a workweek under the Act and not a finding of fact based on the custom of the industry and the agreement of the parties. In August class actions were filed by the United Mine Workers in various district courts to obtain overtime compensation for portal to portal pay.

One further fact should be noted. The District Court found that not only the travel time from and to the mouth of the mine should be counted as working time, but that the time men spent on the surface in collecting tools, etc. should also be included. The Circuit Court of Appeals, although professing to accept the fact findings of the District Court, reversed its judgment with respect to time spent on the surface, saying no more than that the District Court was wrong in including that time. This is further proof that the decision of the case by both courts below turns on the view of a court as to what ought to be considered work and what not, irrespective of the understanding of the parties. Suppose that the parties had agreed that travel time was working time and to be included and paid for in the workweek? Would the courts be at liberty to find the contrary and deprive respondents of the benefit of the agreement? I think not.

I cannot better characterize the result in this case than by quoting from what Judge Sibley said in his dissenting opinion below: [4]

"If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in futuro, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work

[4] 135 F. 2d 324, 325.

is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

. . . . .

"It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars, to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They are to get three times as much per hour for riding and walking to and from the work they were hired to do, as they get for doing the work itself. The injustice of it to me is shocking."

I would reverse the judgment.

The CHIEF JUSTICE joins in this opinion.

SARTOR ET AL. *v.* ARKANSAS NATURAL GAS CORP.

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

No. 232. Argued February 3, 1944.—Decided March 27, 1944.

Summary judgment under Rule 56 of the Rules of Civil Procedure should not have been granted defendant solely upon opinion affidavits of experts who either were officers of defendant or whose interests with respect to the subject matter of the litigation were similar to that of defendant, and who had given like testimony at a previous trial of the cause wherein a jury had found contrary to their testimony. P. 627.

134 F. 2d 433, reversed.

CERTIORARI, 320 U. S. 727, to review the affirmance of a judgment (46 F. Supp. 111) for the defendant, upon a motion for summary judgment under Rule 56, in a suit to recover sums claimed to be due the plaintiffs under an oil and gas lease.

Mr. G. P. Bullis for petitioners.

Mr. Elias Goldstein, with whom *Messrs. H. C. Walker, Jr., Leon O'Quin,* and *Arthur O'Quin* were on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This litigation, begun a decade ago, has been terminated by a summary judgment, and whether rightly so is the issue. The suit has weathered four adjudications, including two trials, in District Court and four decisions by the Court of Appeals.[1] We will recite only such of its

[1] *Arkansas Natural Gas Corp.* v. *Sartor,* 78 F. 2d 924; *Arkansas Natural Gas Corp.* v. *Sartor,* 98 F. 2d 527; *Sartor* v. *Arkansas Natural Gas Corp.,* 111 F. 2d 772; *Sartor* v. *Arkansas Natural Gas Corp.,* 134 F. 2d 433.

history as bears on the issues as to summary judgment, since we consider no other question.

Sartors are landowners in Richland Parish, Louisiana, who in March of 1927 leased their lands for natural gas development. The lease, so far as here important, provides that ". . . the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of market price and no less than three cents per thousand cubic feet, corrected to two pounds above atmospheric pressure . . ." For many years the lessee made settlement at the 3¢ rate. The suit was based upon the contention that during all of the years from 1927 to 1932 inclusive such market price was considerably above 3¢. At the last trial the court held that the claims for gas produced prior to the 20th of March, 1930 were barred by the statute of limitations or, as it is called in Louisiana, by prescription. The issues as to gas produced between March 20, 1930 and the commencement of the action were submitted to the jury, which returned a verdict: "We, the Jury, find for the Plaintiffs that the average price of gas at the well in Richland Parish, Louisiana, field during the period beginning March 20, 1930, and ending March 20, 1933, to be .0445 per 1,000 cu. ft. at 8 oz. pressure." The Circuit Court of Appeals affirmed "so far as the verdict of the jury fixed the market value of the gas upon which plaintiff is entitled to recover royalties." However, it reversed the ruling that part of petitioner's claims were barred by the statute of limitations and remanded the case for trial of the same issues as to market price of gas produced prior to March 20, 1930. The respondent-defendant then filed a motion for summary judgment under Rule 56. The motion was granted and the Court of Appeals affirmed.[2] The importance of questions raised under the summary judgment rule led us to grant certiorari.[3]

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[2] 134 F. 2d 433.

[3] 320 U. S. 727.

The controversy, both as to whether there is a cause of action and, if so, in what amount, turns on whether the "rate of market price" during this period before March 20, 1930 was above 3¢ per m. c. f., as it is conclusively adjudged in this case to have been thereafter. It is held in Louisiana that the market price under such leases is to be ascertained at the wellhead, if there is an established market price at that point. Unfortunately, this rule requires that the price for royalty purposes be ascertained at a place and time at which few commercial sales of gas occur. The lessees who market this royalty gas along with their own production do not customarily make their deliveries at the wellhead but transmit gas from the several wells some distance in gathering lines, turning it over to larger buyers at points somewhat removed, and under conditions of delivery different from wellhead deliveries. The price producers receive at these delivery stations often is substantially above the 3¢ price to the landowner. The practice of fixing the price of landowner's royalty gas at one time and place and of marketing his gas for a different price at another delivery point raises the dissatisfaction and problems which produce this case.

The Court of Appeals, correctly we think, followed the Louisiana substantive rule that the inquiry in a case of this kind shall determine (1) the market price at the well, or (2) if there is no market price at the well for the gas, what it is actually worth there, and "in determining this actual value . . . every factor properly bearing upon its establishment should be taken into consideration. Included in these are the fixed royalties obtaining in the leases in the field considered in the light of their respective dates, the prices paid under the pipe-line contracts, and what elements, besides the value as such of the gas, were included in those prices, the conditions existing when they were made, and any changes of conditions, the end and aim of the whole inquiry, where there was no market price

at the well, being to ascertain, upon a fair consideration of all relevant factors, the fair value at the well of the gas produced and sold by defendant." [4]

The defendant asked a summary judgment because it averred "there exists no reasonable basis for dispute" that during the period in question there was a market price at the wells and that it did not exceed 3¢ per m. c. f. To sustain this position it filed affidavits, a stipulation of facts, and several exhibits. The plaintiffs resisted on the ground that the motion was inadequately supported on the face of defendant's papers. An affidavit by plaintiffs' counsel analyzed defendant's affidavits in the light of testimony given by the witnesses at prior trials; asserted that all were interested witnesses whose testimony was rejected on previous occasions; recited previous verdicts in the case; and setting forth affiant's experience in ten trials of this character arising out of leases in this field, asserted his knowledge of the market prices there and declared it to be more than 5¢ per m. c. f. at the wellhead.

It should be observed that the entire controversy here turns on questions of valuation. The only issue relates to market price or value of plaintiffs' gas at the time and place of delivery. If there has been no damage in the sense of failure to pay the full market price, then there is no cause of action, and if there has been damage in such sense, there is a cause of action.

The summary judgment rule provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, *except as to the amount of damages,* there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis supplied.) Where the undisputed facts leave the existence of a cause of action depending on

[4] 134 F. 2d 433, 434–35.

questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing. But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.

The defendant undertook to establish the absence of a triable issue by the affidavits of eight persons. It may be assumed for the purposes of the case that the witnesses offered admissible opinion evidence which, if it may be given conclusive effect, would sustain the motion. It will serve no purpose to review it in detail, and we recite only the facts which made it inconclusive. Affiant Harris was the Vice President and General Manager of the defendant, clearly an interested witness. Hunter was a lessee and the producer of gas with interests apparently similar to those of the defendant. Hargrove was Vice President of a gas pipeline company, owning leases and producing gas, which the plaintiffs' attorney by affidavit avers is defending on similar cases brought by these plaintiffs and others. Florsheim is an executive officer of two gas producing companies with similar interests to the defendant, and he avers that the price in the Richland field was never in excess of 3¢, although in this very case it is adjudged at one time to have been more. Stokes is the Chief Clerk of a producing company and recites that the records of his company show that "after deducting from the gross price realized by these various corporations for gas produced from the Richland gas field during the period 1928–1930 inclusive, the actual average unit cost of gathering and delivering the aforesaid gas, the net realization of those corporations from the sale of gas during aforesaid period did not exceed 3¢ per m. c. f." Waiving the question whether the contents of written records can thus be proved, it would hardly seem that a conclusion based on so complicated and indefinite a

calculation, should be accepted from an employee of a corporation with an interest in the market price of gas similar to the defendant's without opportunity to cross-examine. Feazel is another producer of oil and gas from many leases, who avers that the price paid never exceeded 3¢, notwithstanding the jury verdicts. McHenry is a lawyer and executive officer of a company operating gas properties with interests similar to the defendant's. Taylor is an officer of a similar producing company.

Apart from these, and contracts and leases useful only in connection with the testimony of these witnesses, defendant offered a bulletin of the Federal Bureau of Mines, which included a table showing the estimated value at the wells of gas produced in Louisiana to be 3¢ per m. c. f. in 1927 and 3.3¢ in 1928. In so far as state-wide statistics could have any value in proving the local market, this would seem to sustain the plaintiffs' contention that the price was over 3¢. Defendant also relied on a stipulation of facts. This stipulation recited a number of contracts for the sale of gas under various conditions, at various prices, some considerably in excess of 3¢. It also showed the cost of delivery from the wells to the point where these sales were made to be 0.3¢ per m. c. f. Much of the controversy, as will be seen from the prior history of the case,[5] is over the question whether these contract prices may be used in aid of the plaintiffs' case. Defendant uses these contracts only to explain their prices away by showing differences in market conditions. They do not establish the claim that there is a wellhead market price. The

[5] See *Arkansas Natural Gas Corp.* v. *Sartor*, 78 F. 2d 924 (appeal after first trial); *Sartor* v. *Arkansas Natural Gas Corp.*, 134 F. 2d 433 (decision below); cf. *Sartor* v. *United Gas Public Service Co.*, 84 F. 2d 436; *Sartor* v. *United Gas Public Service Co.*, 186 La. 555, 173 So. 103; *Pardue* v. *Union Producing Co.*, 117 F. 2d 225; *Driskell* v. *Union Producing Co.*, 117 F. 2d 229; *Hemler* v. *Hope Producing Co.*, 117 F. 2d 231.

stipulation also recites that about one-third of the leases in this area specify the royalty in substantially the same terms as the lease in suit, the rest providing for a fixed royalty of 3¢ per m. c. f. About 90 per cent of the payments to be based on market price have been made on the basis of 3¢, and the remaining 10 per cent at 4¢ per m. c. f. We certainly cannot rule as matter of law that the 4¢ price paid for 10 per cent of such royalty gas is not a factor to be considered by a fact-finding tribunal in fixing the market value, and is, or may be, some evidence to sustain plaintiffs' contentions.

To summarize the features of the defendant's motion papers:

1. The only evidence in support of defendant's contention as to the wellhead market price is opinion testimony of experts.

2. Each of them either is an officer of the defendant or is a lessee, or is an employee or officer of a lessee corporation, engaged like defendant in gas production, and each certainly is open to inquiry as to the truth of plaintiffs' attorney's sworn statements that each has interest in or bias as to the subject matter of this litigation.

3. Every one of defendant's witnesses had testified to the same general effect on the trial of the claim wherein the jury found against the testimony and the Circuit Court of Appeals affirmed the verdict.

4. Defendant undertook by its motion to show that it was beyond controversy that the 3¢ price prevailed constantly and not as a matter of averages for the entire period ended March 19, 1930, although prior trial had conclusively adjudged that on March 20, 1930 and thereafter the price or value averaged 4.45¢ as recited in the jury verdict. No evidence is presented of any sudden change, and no fact is offered to explain any change in the market and price of such gas. In fact any change is inconsistent with defend-

ants' position in the former trial, which was that at no time in either period had the market exceeded 3¢.

The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *American Insurance Co.* v. *Gentile Brothers Co.*, 109 F. 2d 732; *Whitaker* v. *Coleman*, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

In considering the testimony of expert witnesses as to the value of gas leases, this Court through Mr. Justice Cardozo has said: "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory board." *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299. Cf. *Halliday* v. *United States*, 315 U. S. 94, 97; *Forsyth* v. *Doolittle*, 120 U. S. 73, 77; *McGowan* v. *American Pressed Tan Bark Co.*, 121 U. S. 575, 609; *Quock Ting* v. *United States*, 140 U. S. 417, 420; *Head* v. *Hargrave*, 105 U. S. 45, 50; *Union Insurance Co.* v. *Smith*, 124 U. S. 405, 423. The rule has been stated "that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." *Spring Co.* v. *Edgar*, 99 U. S. 645, 658. ". . . the jury, even if such testimony

be uncontradicted, may exercise their independent judgment." *The Conqueror,* 166 U. S. 110, 131. ". . . the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil* v. *Christian Moerlein Brewing Co.,* 172 U. S. 401, 408.

This Court has said: "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." *Aetna Life Insurance Co.* v. *Ward,* 140 U. S. 76, 88.

We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be deter-

mined, after trial, in the regular manner. The judgment accordingly is

Reversed.

MR. CHIEF JUSTICE STONE, dissenting:

It is not denied that the two courts below have correctly applied the state law governing the right to recover royalties on the particular type of gas lease here in question. By that law, in order to recover further royalty payments in excess of the 3 cents per 1,000 cubic feet of gas, which petitioners have already received, they must sustain the burden of showing that during the relevant period, the market price or value of the gas at the wellhead exceeded 3 cents. By Louisiana law also and upon principles of proof which it is also not denied that the courts below correctly applied, the "pipe line" price of gas, without qualifications and supplementary proof wholly lacking in this case, is not evidence of market price or value at the wellhead. Consequently, on the motion for summary judgment, the single issue was whether petitioners had any evidence by which they could sustain the burden resting on them of showing that during the relevant period, there was a market price or value of gas in excess of 3 cents at the wellhead.

True, Rule 56 (c) of the Rules of Civil Procedure excludes from the summary judgment procedure any issue as to the "amount of damages," where there is an admitted right of recovery but the amount of damages is in dispute. But the Rule does not exclude from that procedure the issue of damage *vel non* when that is decisive of the right to recover. This is made plain by subdivision (d) of Rule 56, which provides for a partial summary judgment and declares that the order shall specify the "facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in

controversy." Obviously, if it appears that there is no evidence of damage, the "amount of damages" is not in controversy and the court is not precluded from giving summary judgment for the defendant.

On the single issue here presented, whether petitioners' right to recover can be established by a showing of market price or value of the gas at the wellhead, in excess of 3 cents, respondent's affidavits and documentary evidence and a stipulation of facts show that all such sales of gas during the relevant period were at 3 cents or less. The affidavits also showed by opinion evidence of qualified experts, the disinterestedness of some of whom is not, on the present record, open to challenge, that the market price and value of the gas at the wellhead did not exceed 3 cents. To meet the prima facie case thus made out by respondent's papers, petitioners tendered only proof of pipe-line prices, each of which the state or federal courts had held in earlier cases to be no evidence of market price or value of the gas at the wellhead. See *Sartor* v. *United Gas Co.*, 186 La. 555, 559–569,[1] and cases cited.

It is irrelevant to any issue now presented that as to a later period, as the field more nearly approached exhaustion, a jury had returned a verdict sustained by the court below, by which it was found that the average market price or value at the wellhead was in excess of 3 cents. Since this was the average for a three year period, it does not indicate any sudden advance in price, and is without probative force to show a market price or value in excess of 3 cents during the earlier period here in issue for which

[1] This suit, brought by the present petitioners, turned on precisely the issue here litigated—the market price of gas at the wellhead in the Richland field. The Louisiana Supreme Court said that the defendant lessee in that case "proved conclusively that the market price in these fields does not exceed 3 cents per thousand cubic feet." 186 La. 555, 569.

petitioners have tendered no probative evidence of a higher price.

Nor is it sufficient to raise a genuine issue here that it appears with respect to 3⅓% of the approximately 900 leases in the gas field, that settlements were made for royalties of 4 cents. Respondent's motion papers show, without contradiction, that these settlements "in almost every case" were compromises of disputes as to whether the lease in question had been properly developed, whether the lessor was entitled to a further royalty on gasoline recovered from the gas, or whether the lessee or lessor should bear the burden of a local severance tax. Such compromises of issues not present here furnish no indication of the market price or value at the wellhead, which alone is the issue decisive of this case.

Further, in the circumstances of this case, it is unduly restrictive of the summary judgment procedure to say that respondent's motion for summary judgment must be denied because it is supported *in part* by affidavits of interested expert witnesses who are not subject to cross-examination by the plaintiffs. Such an interpretation of the rule can hardly be invoked in behalf of petitioners here, who tender no probative evidence to challenge either the proof of actual sales at wellhead at 3 cents or less or the testimony of the experts, and who have not sought to avail themselves of the privilege afforded by Rule 56 (e) and (f) to take the experts' depositions or to offer the cross-examination of these witnesses at the former trials of this action. The summary judgment procedure serves too useful a function in terminating groundless litigation to warrant its limitation in a way which Rule 56 does not admit and on grounds so insubstantial.

On this state of the record both courts below have held that the issue whether petitioners have any proof tending to support the burden which rests on them to show

market price or value at the wellhead in excess of 3 cents, must be resolved against them. I think that the courts' conclusion is correct; that they properly applied the summary judgment procedure, and that the judgment should be affirmed.

MR. JUSTICE REED joins in this dissent.

BOSTON TOW BOAT CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 385. Argued March 1, 2, 1944.—Decided April 3, 1944.

Appellant's interest in the outcome of a proceeding in which the District Court dismissed a petition to set aside an order of the Interstate Commerce Commission, *held* insufficient to entitle it to take a separate appeal from the judgment. Judicial Code, § 210, as amended. P. 633.

Appeal dismissed.

APPEAL from a judgment of a district court of three judges, 53 F. Supp. 349, which dismissed a petition to set aside an order of the Interstate Commerce Commission.

Mr. Charles S. Bolster, with whom *Mr. Albert T. Gould* was on the brief, for appellant.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton,* and *Edward M. Reidy* were on the brief, for the United States et al.; *Mr. Christopher E. Heckman* argued the cause, and *Mr. James A. Martin* was on the brief, for the National Water Carriers Association, Inc.,—appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellant, Boston Tow Boat Company, was an intervenor in the proceedings before the Interstate Commerce

Commission leading to the Commission's decision against the Cornell Steamboat Company which we today have held was properly sustained by the District Court. *Cornell Steamboat Co.* v. *United States, post,* p. 634. When Cornell attacked the Commission's order in the District Court, Boston again intervened. 53 F. Supp. 349. Its petition for intervention, granted by the District Court, alleged that it operated tugboats in and about Boston harbor which rendered services somewhat similar to those rendered by Cornell in New York harbor; that Division 4 of the Commission had held it, Boston, covered by the Act; that it was aggrieved by the Commission's decision against Cornell "insofar as said decision holds that towers for hire are carriers and subject to the terms and provisions of Part III of the Interstate Commerce Act"; and that it desired to participate in the District Court proceedings "solely for the purpose of asserting . . . its said contentions regarding such jurisdictional issue." Boston's petition did not allege, and the record fails to show, that it had any financial interest in Cornell, or was engaged in competition with Cornell, or that its interests would be adversely affected by a decision against Cornell except insofar as that decision might establish a precedent holding tugboats subject to the Commission's jurisdiction under Part III of the Interstate Commerce Act. Boston's brief in this Court asserts that it has pending in the District Court for the District of Massachusetts a suit to enjoin and set aside the Commission's order holding Boston covered by the Act. In its brief Boston expressly seeks to reserve the right to contend in the Massachusetts proceeding "that the facts underlying its own towing operations are such as to bring the question of its status outside the scope of that of a carrier."

We are of opinion that Boston's interest in the outcome of the Cornell litigation is insufficient to entitle it to take a separate appeal. See Judicial Code, §§ 210, 212, as

amended, 28 U. S. C. §§ 47a, 45a. Whether Boston had sufficient interest to intervene as of right before the Commission and in the District Court we need not decide, the issue here being only whether Boston has such an "independent right which is violated" by the decision against Cornell as will support an independent appeal. *Alexander Sprunt & Son* v. *United States,* 281 U. S. 249, 255. Clearly it has not. See *Edward Hines Trustees* v. *United States,* 263 U. S. 143; *The Chicago Junction Case,* 264 U. S. 258, 266–269; *Alexander Sprunt & Son* v. *United States, supra; Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 486–488; *Moffat Tunnel League* v. *United States,* 289 U. S. 113; cf. *Kansas City Southern Ry. Co.* v. *United States,* 282 U. S. 760; *L. Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295.

Appeal dismissed.

CORNELL STEAMBOAT CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 384. Argued March 1, 2, 1944.—Decided April 3, 1944.

Appellant operated tugboats for hire in and about New York harbor and on the Hudson River. The tugboats carried no cargo but towed cargo vessels belonging to others. Operations were between New York and New Jersey, but mostly between points in New York and other points in the same State. *Held:*

1. Appellant was a "water carrier" within the meaning of Part III of the Interstate Commerce Act. P. 636.

2. The finding of the Interstate Commerce Commission that appellant was a "common carrier by water," within the meaning of § 302 (d) of the Act, is supported by substantial evidence and is sustained. P. 637.

3. Under § 302 (i) (1) of the Act, which defines "interstate transportation" as including transportation "wholly by water from a place in a State to a place in another State," appellant's

towage operations between New York and New Jersey were subject to regulation. P. 638.

4. Section 302 (i) (1) is properly construed to apply also to appellant's towage operations between points in New York and other points in the same State, where in the course of such operations the tows regularly crossed into New Jersey waters. P. 638.

53 F. Supp. 349, affirmed.

APPEAL from a judgment of a district court of three judges, which dismissed a suit to set aside an order of the Interstate Commerce Commission.

Mr. Robert S. Erskine for appellant.

Mr. Robert L. Pierce, with whom *Solicitor General Fahy, Assistant Attorney General Berge,* and *Messrs. Walter J. Cummings, Jr., Daniel W. Knowlton,* and *Edward M. Reidy* were on the brief, for the United States et al.; *Mr. Christopher E. Heckman* argued the cause, and *Mr. James A. Martin* was on the brief, for the National Water Carriers Association, Inc.,—appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

Cornell operates tugboats for hire on the Hudson River and in and about New York harbor. Its tugs carry no cargo but move scows, barges, and similar vessels belonging to others which themselves usually carry cargo. This towing service Cornell offers to perform for the public in general. About ninety-five per cent of the vessels which it serves are moved from points in New York to other points in the same State, but these movements generally traverse New Jersey as well as New York waters. Part III of the Interstate Commerce Act[1] provides that contract or common carriers by water in interstate commerce are subject to the Act's regulating provisions. In appropriate proceedings the Interstate Commerce Commission held Cornell's business covered. 250 I. C. C. 301; 250

[1] Transportation Act of 1940, c. 722, 54 Stat. 898, 929.

I. C. C. 577. A three judge District Court sustained the Commission's order. 53 F. Supp. 349. The case is here on direct appeal. 28 U. S. C. §§ 47a, 345.

First. Cornell argues that its towboats are not "water carriers" within the meaning of Part III of the Act. Looking at Part III, we find that, read together, §§ 302 (c), (d) and (e) define a "water carrier" as any person who engages in the "transportation by water . . . of . . . property . . . for compensation." Section 302 (h) defines "transportation" as including "all services in or in connection with transportation," as well as "the use of any transportation facility." Any "vessel," which means any "watercraft," § 302 (f), is such a facility. § 302 (g). Congress has thus carefully and explicitly set out the conditions which in combination describe the kinds of carriers it intended to subject to regulation. Cornell's tugboats fall squarely within the description. If further proof of this be needed, §§ 303 (f) (1) and (2) expressly exempt from regulation under Part III certain types of towage service, but not that such as Cornell provides. Congress hardly would have exempted some towers, as it did in these sections, had it intended to exempt all towers.

Nevertheless, Cornell argues that the Act's language, which appears on its face plainly to include transportation by means of towers, should not be so construed. In support of this contention, it is said that towers do not have that common law or statutory liability to shippers which generally attaches to common carriers, see *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291; cf. *The Murrell*, 200 F. 826; and that a "carrier" has been judicially defined as one who undertakes to transport the goods of another, a definition not inclusive of Cornell, since it does not make contracts to carry goods but only to move vessels which have goods on them. See *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 328; *The Propeller Niagara* v. *Cordes*,

21 How. 7, 22. But the authorities relied upon by Cornell are of little or no assistance here. The case at bar does not require that we determine at large the legal obligations of a tower or define the usual characteristics of a carrier. We are called upon only to interpret a single Act of Congress. With unquestioned power to regulate Cornell's business, Congress in this Act has given its own definition to Cornell's activities in words literally inclusive of those activities, and which operate to subject to the Act interstate activities in the business of towing, which at common law was a common calling. *Sproul* v. *Hemmingway,* 14 Pick. 1, 6. The Act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes,[2] but to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities. Cornell is in active competition with other types of interstate water carriers as well as with trucks and railroads. Therefore, if Cornell's particular method of providing water transportation facilities for others is not subject to regulation under the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of competing transportation activities. We conclude that the language of the Act brings Cornell's business within its coverage, and that to construe the Act otherwise would frustrate the purpose of Congress.

Second. Cornell argues that even if it is covered by Part III of the Act, there was error in holding it to be a "common" rather than a "contract" carrier. Section 302

[2] Compare § 320 (d) of Part III of the Act: "Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part." 49 U. S. C. § 920 (d); 54 Stat. 950.

(d) defines a "common carrier" as one "which holds itself out to the general public to engage in the transportation by water . . . of . . . property . . . for compensation." The Commission found from evidence offered that Cornell did so hold itself out to the general public. Upon review the District Court held the Commission's finding was supported by substantial evidence. The opinions of the Commission and the District Court showed the evidence relied on and it is unnecessary to repeat it here. Sufficient it is to say that we agree with the District Court's conclusion.

Third. The five per cent of Cornell's business which consists of moving vessels between New York and New Jersey ports is unquestionably covered by the Act, because § 302 (i) (1) specifically includes transportation "wholly by water from a place in a State to a place in any other State."[3] But about ninety-five per cent of the vessels towed by Cornell are picked up at New York ports and pulled to other ports in the same State. Cornell contends that none of these movements come within the Commission's jurisdiction. We accept findings of the Commission and the District Court that at least a substantial proportion of these latter movements regularly and ordinarily pass over New Jersey territorial waters. While moving on New Jersey waters, Cornell's vessels are not

[3] This section should be read together with §§ 303 (j) and (k) of Part III which are as follows:

"(j) Nothing in this part shall be construed to interfere with the exclusive exercise by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State.

"(k) Nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose."

The words "intrastate commerce" and "intrastate transportation" as used in these two subsections are not expressly defined in Part III.

at that time at "a place" in New York. Certain of its towing activities therefore actually move vessels from places in New York to places in New Jersey and thence back to places in New York. Such movements, if made on land by rail carriers, would be classified as interstate for regulatory purposes under previous decisions of this Court; [4] and, as the Commission's opinion points out, these decisions have cast grave doubts upon the power of a single state to regulate such movements in whole or in part. Water transportation between two ports of a single state may touch many other states, and pass through hundreds of miles of other states' waters, far removed from the state in which the terminal ports of the voyage are located. Power of the Commission to regulate such movements appears to come well within the broad purposes declared by Congress in passing legislation designed comprehensively to coordinate a national system of all types of transportation. We are unpersuaded that Congress has inadvertently left such a gap in its plan as acceptance of Cornell's argument would create.

The pertinent language Congress used in defining what should be interstate commerce in Part III of the Act reg-

[4] *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. The rule of the *Hanley* case has not been changed by the cases holding that companies engaged in such transportation movements are subject to taxation by the state where the terminal points are located. See *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549; *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *Leavenworth*, 226 U. S. 464, 468–469.

Compare *Wilmington Transportation Co.* v. *Railroad Comm'n*, 236 U. S. 151, 155–156, which held that transportation on the high seas between two points within the state of California, Santa Catalina Island and San Pedro, being "local" and not involving "passage through the territory of another state," was subject to rate regulation by California in the absence of controlling federal legislation.

For a general survey of state and federal legislation pertaining to regulation of water carriers, see Regulation of Transportation Agencies, Senate Document No. 152, 73d Cong., 2d Sess., pp. 5–13, 98–170.

ulating water carriers is to all practical intents and purposes the same as it used in Part I regulating rail carriers.[5] Part III of the Act, including this definition, first was drafted in the House Committee on Interstate Commerce as part of a general revision of an omnibus transportation bill (S. 2009) proposed by the Senate Committee on Interstate Commerce. See H. R. No. 1217, 76th Cong., 1st Sess. In reporting on the provisions of Part III, the House Committee, a body well acquainted with transportation legislation, made the statement that, "Most of the regulatory provisions included in the new part III were modeled on provisions of part I dealing with the same subject." *Id.*, p. 18. At the time of this report, the definition of interstate commerce in Part I upon which that in Part III was modeled had long before been interpreted both by the Commission and the courts as broad enough to cover railroad movements which pass through the territory of two states, even though the freight be carried from a place in one state to another place in the same state. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.[6]

Parts I, II, and IV of the Interstate Commerce Act, relating respectively to regulation of rail carriers, motor carriers, and freight forwarders, explicitly or by judicial interpretation cover all shipments which pass through the territory of two or more states even though both terminal points are in the same state.[7] And so if railroads or truck-

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[5] See Note 7, *infra*.

[6] See also Wells-Higman Co. *v.* St. Louis, I. M. & S. Ry. Co., 18 I. C. C. 175, 176; Willman & Co. *v.* St. Louis, I. M. & S. Ry. Co., 22 I. C. C. 405; Security Cement & Lime Co. *v.* Baltimore & Ohio R. Co., 113 I. C. C. 579; *United States* v. *Delaware, L. & W. R. Co.*, 152 F. 269, 271–272 (C. C. S. D. N. Y.).

[7] Part I, § 1 (1) of the Act confers jurisdiction over "transportation . . . wholly by railroad . . . from one State . . . to any other State." 49 U. S. C. § 1 (1); 24 Stat. 379 as amended. As previously stated this has been construed to include transportation starting in one

ers should use tugs for the same purposes and over the same route as Cornell the movements would be interstate under the Act and subject to regulation by the Commission; and apparently the same is true of freight forwarders. From the language of Part III of the Act, its history, and its general purpose, we conclude that the Commission and District Court correctly decided Cornell's transportation through New York and New Jersey waters also is subject to regulation by the Commission.[8]

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting in part:

When in 1940 Congress provided for the regulation of water carriers in interstate and foreign commerce, it defined "transportation in interstate . . . commerce" for

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state, passing through a second state, and returning to the first state. See Note 6, *supra*.

Part II, § 203 (a) (10) of the Act defines the "interstate commerce" by motor vehicle over which the Commission has jurisdiction as including "commerce . . . between places in the same State through another State. . . ." 49 U. S. C. § 303 (10); 49 Stat. 543, 544, as amended.

And Part IV, § 402 (a) (6) defines that transportation which shall be deemed "interstate commerce" for the purpose of regulation of freight forwarders as including "transportation . . . between points within the same State but through any place outside thereof." 49 U. S. C. § 1002 (a) (6); 56 Stat. 284, 285.

[8] As reported in the Senate, the original omnibus transportation bill (S. 2009) contained a single definition of "interstate commerce" applicable alike to rail, motor, and water carriers. This definition embodied the holding of the *Stroud* case (267 U. S. 404) cited in our opinion by expressly including "transportation . . . between places in the same State by a route . . . passing beyond the borders of said State." § 3 (25), Bill S. 2009, reported to the Senate May 16, 1939. It has been suggested that the failure of the House Committee's revision of Bill S. 2009 to retain this part of the definition contained in the original bill indicates an intention that the rule of the *Stroud* case should not apply to water transportation. In reaching our conclusion in the present case,

the purpose of such regulation to mean "transportation of persons or property—(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." § 302 (i) (1) of the Transportation Act of 1940, 54 Stat. 898, 929, 49 U. S. C. § 902 (i) (1). To the extent that the decision of the Court construes the field of regulation thus defined by Congress to include tugboats moving on the Hudson River from place to place in New York simply because they leave the New York boundary of the river and navigate on what are deemed Jersey waters, I dissent.

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we have considered this suggestion and have rejected it for several reasons.

In the first place, the House Committee's failure to retain in Part III the particular language of the definition of "interstate commerce" in original S. 2009 is sufficiently explained by the fact, noted in the body of our opinion, that the Committee modeled Part III, not upon the provisions of original S. 2009, but upon the existing Part I of the Act. And from the report of the House Committee, a body experienced in matters of transportation legislation, we may fairly infer that, in thus using the language of Part I, it had in mind the same objective as the Senate Committee which drafted the original S. 2009, namely to save "so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections." See S. R. No. 433, 76th Cong., 1st Sess., p. 4; and H. R. No. 1217, 76th Cong., 1st Sess., pp. 18–19. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77–80.

Furthermore, had the experienced House Committee intended to place in Part III a definition of "interstate commerce" different in scope from that in Part I, it hardly would have expressed such an intention by adopting substantially the identical language of Part I. But neither the House nor the Senate Committee appears to have had any such intention. As shown by their reports and the language of the bills which they drafted, the intention of both Committees, and of Congress, was to provide for regulation of the same sort of interstate water shipments as already were being regulated in the case of interstate rail shipments. See H. R. No. 1217, *supra;* S. R. No. 433, *supra.*

The problem is here, as it was before the Commission, for the first time. And the Court's duty of construction is not aided by the light of continuous administrative practice, though of course even the initial conclusion by the Commission on such a question of law should have its weight. But since the matter ultimately turns on general considerations regarding the manner in which legislation should be construed, I deem it appropriate to add a few words to the views expressed by Commissioner Splawn that Part III of the Interstate Commerce Act does not bring within the regulatory powers of the Interstate Commerce Commission transportation on a boundary stream between points in the same State merely because a water carrier crosses a state boundary in a stream.

The terms by which Congress conferred jurisdiction upon the Commission successively over rail carriers, motor carriers and water carriers are different. In a field so well trodden as this, involving as it does the distribution of authority as between States and Nation over transportation facilities of interest to both governments, one would suppose that only the environment of legislation and the history of its enactment could dislodge the natural assumption that different literary roads taken by Congress had different objectives. For we are here concerned with three different definitions having different genealogies in the general field of regulation incorporated in one piece of legislation, namely the Transportation Act of 1940. There is nothing in the legislative history of the extent of the power over transportation by water carriage committed to the Commission to show that Congress meant that the phrasing which it employed was in purpose to be identic with the different phrasings Congress used as to rail and motor carriers. The legislative history indicates the contrary.

The Cullom Act of 1887, as is well known, was in direct response to *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118

U. S. 557. That decision rested fundamentally on the view that rail transportation has a physical unity and to such an extent that, as held very early, regulation of rail rates cannot be "split up" between two States or left only to one State even as to transportation which begins and ends in the same State but passes through the territory of another. See *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. The terms in which Congress granted regulatory power over railroads to the Interstate Commerce Commission reflected this view. The Commission was authorized to regulate rail transportation "from one State . . . to any other State," but the provisions of the Act were not to apply "to the transportation . . . wholly within one State . . ." § 1 of the Act to Regulate Commerce, 24 Stat. 379, 49 U. S. C. §§ 1 (1), (2) (a). When Congress in 1935 brought motor carriers within the regulatory powers of the Commission, it was not content to define the scope of the transportation to be regulated in terms of the scope of the regulated railroad transportation. It defined the motor transportation to be regulated to include "commerce between any place in a State and any place in another State or between places in the same State through another State." § 203 (a) (10) of the Motor Carrier Act of 1935, 49 Stat. 543, 544, 49 U. S. C. § 303 (a) (10). It used this explicit and precise language because the conditions of motor transportation in relation to state control differ from the conditions of interstate railroad transportation, and it wished to leave no doubt whatever that it was regulating rates on motor transportation within the same State through another. The same explicitness was again used by Congress when in 1942 it swept freight forwarders who serve interstate transportation within federal control. § 402 (a) (6), 56 Stat. 284, 285, 49 U. S. C. (Supp. 1942) § 1002 (a) (6).

A totally different situation was presented to Congress by the heavy water traffic on boundry streams through-

out the country. In his report as Federal Coordinator of Transportation, the late Commissioner Eastman pointed out that thirty-two States had laws regulating water transportation "on inland waters and in some instances on bordering streams or lakes and coastal waters." Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 158. This Court, in *Port Richmond Ferry Co.* v. *Hudson County,* 234 U. S. 317, had occasion to call attention to this lively water traffic which, throughout our history, presented "a situation essentially local requiring regulation according to local conditions." 234 U. S. at 332. For that reason it sustained state regulation of ferry rates even for transportation from one State to another.[1] The doctrine of *Hanley* v. *Kansas City Southern Ry. Co., supra,* is thus a doctrine applicable to railroads and has not been applied to water carriers. See *Wilmington Transportation Co.* v. *Railroad Comm'n,* 236 U. S. 151, 155–156.

In 1940 Congress did undertake to regulate water transportation. But in view of the different ways in which rail, motor and water transportation are entangled with state interests and therefore state authority, it becomes vital to heed the exact language in which Congress expressed its purpose of regulation and the manner in which it finally passed the provisions by which it defined the Commission's authority.

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[1] "It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency . . . The practical advantages of having the matter dealt with by the States are obvious and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will of course control." 234 U. S. at 332.

In a word, the bill as enacted was in quite a different form from the bill as originally introduced. As the bill came out of the Senate Committee on Interstate Commerce and as passed by the Senate it had this provision: "the term 'interstate commerce' means transportation . . . from a place in one State . . . to a place in another State . . . or between places in the same State by a route or routes passing beyond the borders of said State . . ." 84 Cong. Rec. 5964. This was not merely a choice of language but a choice of purpose. The Committee and the Senate, that is, asserted a control as extensive as that which Congress asserted in 1935 over motor carriers. The practical result of the purpose thus manifested was to exclude state control over water carriers from port to port in the same State but entering the water of a border State. The House evidently had other views, for that provision was deleted after the Senate bill was committed to the House Committee. That Committee reported and the House passed this restrictive provision: "The term 'interstate or foreign transportation' . . . means transportation of persons or property—(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." 84 Cong. Rec. 9956. The Senate receded from its formulation (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 30), and the restrictive House provision became the law. But we are now told that this change from explicit assumption of jurisdiction is meaningless, and the fact that the provision in the Senate bill was left out as the bill went through the House, the Conference and to passage has precisely the same significance as though the original Senate provision had remained in it. As to this as well as other phases of water transportation, Congress circumscribed the Commission's authority and left state regulation to continue to operate as to matters

which, in the case of rail and motor transportation, federal control has been asserted. Thus for instance, use of the Shreveport doctrine (see *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342)—the control over state rates discriminatory against interstate rates—is explicitly denied (§ 303 (k)), and numerous other exceptions and exemptions show "congressional intent to confer more limited jurisdiction than has been given in the other parts of the act." 250 I. C. C. 577, 586.

No doubt, as the House Committee said, "Most of the regulatory provisions included in the new part III were modeled on provisions of part I dealing with the same subject." H. R. No. 1217, 76th Cong., 1st Sess., p. 18. In its context, the idea behind the phrase "regulatory provisions" bears on how to regulate, not what is regulated. And the fact that "most" provisions were the same, not all, indicates that variations from Part I were made in Part III. When therefore we find differences in definition of the "commerce" to be regulated between Part I and Part III, it will not do to disregard them and find identity through variation. Particularly is this true when there are practical differences to account for the variation. We must first define the field of the regulation—what "commerce" between two points in the same State but going through another becomes federally regulated although theretofore free from state regulation as was rail transportation, and what "commerce" is given over to federal regulation although theretofore it was within the province of state regulation as was water transportation in a situation like that under discussion. We thus have the practical differences between water-borne and land traffic, the practical problems in the distribution between state and federal power raised by water-borne traffic on boundary streams, and the actual differences in the definitions of "commerce" in the same Act of Congress responding to

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these differences of fact between water-borne and land transportation. All enjoin judicial regard for these differences in the construction of the statute.

The definition originally proposed in the Senate bill was intended to cover all three types of carrier—rail, water and motor. Particularization in this proposed definition of transportation within one State but through a second is clear proof that the *Hanley* doctrine applicable to rail carriers did not carry over to water and motor carriage. When Congress finally rejected the all-inclusive definition proposed by the Senate and decided on separate definitions of the commerce to be regulated, it did so precisely because it realized that the legal situation as to the three types was not the same. This careful process of distinctive definition by Congress is now in effect held to have been a futile legislative endeavor. The all-inclusive definition in the original Senate bill which the Congress rejected this Court restores.

A final word. We must not be unmindful that the Committees on Interstate Commerce out of which issued this legislation have a continuity of membership which makes them well versed in the problem before us: namely, how much of the constitutional power possessed by Congress for the control of utility services should in fact be committed to the Interstate Commerce Commission. (The Chairmen of the Senate and House Committees on Interstate Commerce, who had charge of the bills that became the Transportation Act of 1940, have been members of these Committees for twenty and twenty-three years respectively.) Particularly therefore when dealing with legislation coming from these Committees and in matters involving displacement of state by federal authority, we ought not to assume that Congress did not attach significance to what it said and meant to convey that which skilled language withheld. It is more respectful of Congress to attribute to it care instead of casualness. It is

certainly more consonant with judicial tradition and more conducive to legislative responsibility for courts to act on that belief.

I am therefore compelled to conclude that the Commission was not given power to regulate transportation by Cornell from one port in New York to another port in the same State.

MR. JUSTICE ROBERTS joins in this dissent.

SMITH *v.* ALLWRIGHT, ELECTION JUDGE, ET AL.

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

No. 51. Argued November 10, 12, 1943. Reargued January 12, 1944.—Decided April 3, 1944.

1. The right of a citizen of the United States to vote for the nomination of candidates for the United States Senate and House of Representatives in a primary which is an integral part of the elective process is a right secured by the Federal Constitution; and this right of the citizen may not be abridged by the State on account of his race or color. P. 661.
2. Whether the exclusion of citizens from voting on account of their race or color has been effected by action of the State—rather than of individuals or of a political party—is a question upon which the decision of the courts of the State is not binding on the federal courts, but which the latter must determine for themselves. P. 662.
3. Upon examination of the statutes of Texas regulating primaries, *held* that the exclusion of Negroes from voting in a Democratic primary to select nominees for a general election—although by resolution of a state convention of the party its membership was limited to white citizens—was State action in violation of the Fifteenth Amendment. *Grovey* v. *Townsend,* 295 U. S. 45, overruled. Pp. 663, 666.

When, as here, primaries become a part of the machinery for choosing officials, state and federal, the same tests to determine

the character of discrimination or abridgment should be applied to the primary as are applied to the general election. P. 664.

4. While not unmindful of the desirability of its adhering to former decisions of constitutional questions, this Court is not constrained to follow a previous decision which upon reexamination is believed erroneous, particularly one which involves the application of a constitutional principle rather than an interpretation of the Constitution to evolve the principle itself. P. 665.

131 F. 2d 593, reversed.

CERTIORARI, 319 U. S. 738, to review the affirmance of a judgment for the defendants in a suit for damages under 8 U. S. C. § 43.

Messrs. Thurgood Marshall and *William H. Hastie,* with whom *Messrs. Leon A. Ransom, Carter Wesley, W. J. Durham, W. Robert Ming, Jr.,* and *George M. Johnson* were on the brief, for petitioner.

No appearance for respondents.

By special leave of Court, *Mr. George W. Barcus,* Assistant Attorney General of Texas, with whom *Mr. Gerald C. Mann,* Attorney General, was on the brief for the Attorney General of Texas, as *amicus curiae,* urging affirmance. Briefs of *amici curiae* were filed by *Mr. Wright Morrow* on behalf of Mr. George A. Butler, Chairman of the State Democratic Executive Committee of Texas, urging affirmance; and by *Mr. Whitney North Seymour* on behalf of the American Civil Liberties Union, by *Mr. Osmond K. Fraenkel* on behalf of the Committee on Constitutional Liberties, National Lawyers Guild, and by *Mr. John F. Finerty* on behalf of the Workers Defense League,—urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of $5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas,

for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate §§ 31 and 43 of Title 8 [1] of the United States Code in that petitioner was deprived of rights secured by §§ 2 and 4 of Article I [2] and the Fourteenth, Fifteenth and Seventeenth Amend-

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[1] 8 U. S. C. § 31:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

§ 43: "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."

[2] Constitution, Art. I:

"Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

"Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

ments to the United States Constitution.[3] The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code § 24, subsection 14.[4]

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey* v. *Townsend,* 295 U. S. 45.[5] We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States* v. *Classic,* 313 U. S. 299. 319 U. S. 738.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence

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[3] Constitution:

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

Article XV. "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Article XVII. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[4] A declaratory judgment also was sought as to the constitutionality of the denial of the ballot. The judgment entered declared the denial was constitutional. This phase of the case is not considered further as the decision on the merits determines the legality of the action of the respondents.

[5] *Smith* v. *Allwright,* 131 F. 2d 593.

in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, § 2; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic party was required to hold the primary which was the occasion of the alleged wrong to petitioner. A summary of the state statutes regulating primaries appears in the footnote.[6] These nominations are to be made by the qualified voters of the party. Art. 3101.

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[6] The extent to which the State controls the primary election machinery appears from the Texas statutes, as follows: Art. 3118, Vernon's Texas Statutes, provides for the election of a county chairman for each party holding a primary by the "qualified voters of the whole county," and of one member of the party's county executive committee by the "qualified voters of their respective election precincts." These officers have direct charge of the primary. There is in addition statutory provision for a party convention: the voters in each precinct choose delegates to a county convention, and the latter chooses delegates to a state convention. Art. 3134. The state convention has authority to choose the state executive committee and its chairman. Art. 3139, 1939 Supp. Candidates for offices to be filled by election are required to be nominated at a primary election if the nominating party cast over 100,000 votes at the preceding general election. Art. 3101. The date of the primary is fixed at the fourth Saturday in July; a majority is required for nomination, and if no candidate receives a majority, a run-off primary between the two highest standing candidates is held on the fourth Saturday in August. Art. 3102. Polling places may not be within a hundred yards of those used by the opposite party. Art. 3103. Each precinct primary is to be conducted by a presiding judge and the assistants he names. These officials are selected by the county executive committee. Art. 3104. Absentee voting machinery provided by the State for general elections is also used in primaries. Art. 2956. The presiding judges are given legal authority similar to that of judges at general elections. Compare Art. 3105 with Art. 3002. The county executive committee may decide whether county officers are to be nominated by majority or plurality vote. Art. 3106. The state

The Democratic party of Texas is held by the Supreme Court of that State to be a "voluntary association," *Bell* v. *Hill*, 123 Tex. 531, 534, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the State except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their

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executive committee is given power to fix qualifications of party membership, Art. 3107; Art. 2955, 1942 Supp., requires payment of a poll tax by voters in primary elections, and Art. 3093 (3) deals with political qualifications of candidates for nomination for United States Senator. But cf. *Bell* v. *Hill*, 123 Tex. 531, 74 S. W. 2d 113. Art. 3108 empowers the county committee to prepare a budget covering the cost of the primary and to require each candidate to pay a fair share. The form of the ballot is prescribed by Art. 3109. Art. 3101 provides that the nominations be made by the qualified voters of the party. Cf. Art. 3091. Art. 3110 prescribes a test for voters who take part in the primary. It reads as follows:

"No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a . . . (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary;' and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted." This appears, however, to be a morally rather than a legally enforcible pledge. See *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. 2d 515.

Arts. 3092 and 3111 to 3114 deal with the mechanics of procuring a place on the primary ballot for federal, state, district, or county office. The request for a place on the ballot may be made to the state, district or county party chairman, either by the person desiring nomination or by twenty-five qualified voters. The ballot is prepared by a subcommittee of the county executive committee. Art. 3115. A candidate must pay his share of the expenses of the election before his name is placed on the ballot. Art. 3116. Art. 3116, however, limits the sum that may be charged candidates for certain posts, such as the offices of district judge, judge of the Court of Civil Appeals, and senator and representative in the state and federal legislatures, and for some counties fees are fixed by Arts. 3116 a–d, 1939 Supp., and 3116 e–f, 1942 Supp. Supplies for the election are dis-

nominees, the State may regulate such elections by proper laws." p. 545.

That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this State, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise

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tributed by the county committee, Art. 3119, and Art. 3120 authorizes the use of voting booths, ballot boxes and guard rails, prepared for the general election, "for the organized political party nominating by primary election that cast over one hundred thousand votes at the preceding general election." The county tax collector must supply lists of qualified voters by precincts; and these lists must be used at the primary. Art. 3121. The same precautions as to secrecy and the care of the ballots must be observed in primary as in general elections. Art. 3122. Arts. 3123–25 cover the making of returns to the county and state chairmen and canvass of the result by the county committee. By Art. 3127, a statewide canvass is required of the state executive committee for state and district officers and a similar canvass by the state convention, with respect to state officers, is provided by Art. 3138. The nominations for district offices are certified to the county clerks, and for state officers to the Secretary of State. Arts. 3127, 3137, 3138. Ballot boxes and ballots are to be returned to the county clerk, Art. 3128, 1942 Supp., and upon certification by the county committee, the county clerk must publish the result. Art. 3129, 1942 Supp. If no objection is made within five days, the name of the nominee is then to be placed on the official ballot by the county clerk. Art. 3131, 1942 Supp. Cf. Arts. 2978, 2984, 2992, 2996. Arts. 3146–53, 1942 Supp., provide for election contests. The state district courts have exclusive original jurisdiction, and the Court of Civil Appeals has appellate jurisdiction. The state courts are also authorized to issue writs of mandamus to require executive committees, committeemen, and primary officers to discharge the duties imposed by the statute. Art. 3142; cf. Art. 3124.

The official ballot is required to contain parallel columns for the nominees of the respective parties, a column for independent candidates, and a blank column for such names as the voters care to write in. Arts. 2978, 2980. The names of nominees of a party casting more than 100,000 votes at the last preceding general election may not be printed on the ballot unless they were chosen at a primary

guaranteed,—including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights,—that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the state convention of such party, and cannot, under any circumstances, be conferred upon a state or governmental agency." p. 546. Cf. *Waples* v. *Marrast,* 108 Tex. 5, 184 S. W. 180.

The Democratic party on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the

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election. Art. 2978. Candidates who are not party nominees may have their names printed on the ballot by complying with Arts. 3159–62. These sections require applications to be filed with the Secretary of State, county judge, or mayor, for state and district, county, and city offices, respectively. The applications must be signed by qualified voters to the number of from one to five per cent of the ballots cast at the preceding election, depending on the office. Each signer must take an oath to the effect that he did not participate in a primary at which a candidate for the office in question was nominated. While this requirement has been held to preclude one who has voted in the party primary from appearing on the ballot as an independent, *Westerman* v. *Mims,* 111 Tex. 29, 227 S. W. 178; see *Cunningham* v. *McDermett,* 277 S. W. 218 (Civ. App.), one who lost at the primary may still be elected at the general election by a write-in vote. *Cunningham* v. *McDermett, supra.*

The operations of the party are restricted by the State in one other important respect. By Art. 3139, 1939 Supp., the state convention can announce a platform of principles, but its submission at the primary is a prerequisite to party advocacy of specific legislation. Art. 3133.

Democratic party and, as such, entitled to participate in its deliberations."

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government.[7] The Fourteenth Amendment forbids a State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as amici

[7] Cf. *Parker* v. *Brown*, 317 U. S. 341, 359–60.

curiae, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon* v. *Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R. S. §§ 1979 and 2004, the present §§ 43 and 31 of Title 8, U. S. C., respectively. It was urged to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of § 31, Title 8, U. S. C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be state action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon* v. *Condon*, 286 U. S. 73. The question of the inherent power

of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 84–85.

In *Grovey* v. *Townsend,* 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon* v. *Condon, supra,* in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the State. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the State need have no concern," *loc. cit.* at 55, while for a State to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendment.

Since *Grovey* v. *Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States* v. *Classic,* 313 U. S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U. S. at 316, 317,

"where the primary is by law made an integral part of the election machinery." 313 U. S. at 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of federal suffrage secured by the Constitution in primary as in general elections. 313 U. S. at 323. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of federal officials. By this decision the doubt as to whether or not such primaries were a part of "elections" subject to federal control, which had remained unanswered since *Newberry* v. *United States*, 256 U. S. 232, was erased. The *Nixon Cases* were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey* v. *Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey* v. *Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State. When *Grovey* v. *Townsend* was written, the Court looked upon the denial of a vote in a primary as a

mere refusal by a party of party membership. 295 U. S. at 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey* v. *Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey* v. *Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before, this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. *United States* v. *Reese,* 92 U. S. 214, 217; *Neal* v. *Delaware,* 103 U. S. 370, 388; *Guinn* v. *United States,* 238 U. S. 347, 361; *Myers* v. *Anderson,* 238 U. S. 368, 379; *Lane* v. *Wilson,* 307 U. S. 268.

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote

in a general election, is a right secured by the Constitution. *United States* v. *Classic,* 313 U. S. at 314; *Myers* v. *Anderson,* 238 U. S. 368; *Ex parte Yarbrough,* 110 U. S. 651, 663 *et seq.* By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell* v. *Hill, supra,* federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." *Nixon* v. *Condon,* 286 U. S. 73, 88; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483; *Bridges* v. *California,* 314 U. S. 252; *Lisenba* v. *California,* 314 U. S. 219, 238; *Union Pacific R. Co.* v. *United States,* 313 U. S. 450, 467; *Drivers Union* v. *Meadowmoor Co.,* 312 U. S. 287, 294; *Chambers* v. *Florida,* 309 U. S. 227, 228. Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. As appears above in the summary of the statutory provisions set out in note 6, Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct

delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substantially that of Louisiana, with the exception that in

Louisiana the State pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the State or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U. S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson,* 307 U. S. 268, 275.

The privilege of membership in a party may be, as this Court said in *Grovey* v. *Townsend,* 295 U. S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action

of the party the action of the State. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions.[8] However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice,[9] and this practice has continued to this day.[10] This is particularly true when the decision believed erroneous is the application of a constitutional principle rather

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[8] Cf. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652.

[9] See cases collected in the dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 410.

[10] See e. g., *United States* v. *Darby*, 312 U. S. 100, overruling *Hammer* v. *Dagenhart*, 247 U. S. 251; *California* v. *Thompson*, 313 U. S. 109, overruling *DiSanto* v. *Pennsylvania*, 273 U. S. 34; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, overruling *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501 and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, overruling *Swift* v. *Tyson*, 16 Pet. 1; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, overruling *Collector* v. *Day*, 11 Wall. 113, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401; *O'Malley* v. *Woodrough*, 307 U. S. 277, overruling *Miles* v. *Graham*, 268 U. S. 501; *Madden* v. *Kentucky*, 309 U. S. 83, overruling *Colgate* v. *Harvey*, 296 U. S. 404; *Helvering* v. *Hallock*, 309 U. S. 106, overruling *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39 and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48; *Nye* v. *United States*, 313 U. S. 33, overruling *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402; *Alabama* v. *King & Boozer*, 314 U. S. 1, overruling *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 and *Graves* v. *Texas Co.*, 298 U. S. 393; *Williams* v. *North Carolina*, 317 U. S. 287, overruling *Haddock* v. *Haddock*, 201 U. S. 562; *State Tax Commission* v. *Aldrich*, 316 U. S. 174, overruling *First National Bank* v. *Maine*, 284 U. S. 312; *Board of Education* v. *Barnette*, 319 U. S. 624, overruling *Minersville School District* v. *Gobitis*, 310 U. S. 586.

than an interpretation of the Constitution to extract the principle itself.[11] Here we are applying, contrary to the recent decision in *Grovey* v. *Townsend,* the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a State of a citizen's right to vote. *Grovey* v. *Townsend* is overruled.

Judgment reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE ROBERTS:

In *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, 105, I have expressed my views with respect to the present policy of the court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. I shall not repeat what I there said for I consider it fully applicable to the instant decision, which but points the moral anew.

A word should be said with respect to the judicial history forming the background of *Grovey* v. *Townsend,* 295 U. S. 45, which is now overruled.

In 1923 Texas adopted a statute which declared that no negro should be eligible to participate in a Democratic primary election in that State. A negro, a citizen of the United States and of Texas, qualified to vote, except for the provisions of the statute, was denied the opportunity to vote in a primary election at which candidates were to be chosen for the offices of senator and representative in the Congress of the United States. He brought action against the judges of election in a United States court for

[11] Cf. Dissent in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393 at 410.

damages for their refusal to accept his ballot. This court unanimously reversed a judgment dismissing the complaint and held that the judges acted pursuant to state law and that the State of Texas, by its statute, had denied the voter the equal protection secured by the Fourteenth Amendment. *Nixon* v. *Herndon,* 273 U. S. 536 (1927).

In 1927 the legislature of Texas repealed the provision condemned by this court and enacted that every political party in the State might, through its Executive Committee, prescribe the qualifications of its own members and determine in its own way who should be qualified to vote or participate in the party, except that no denial of participation could be decreed by reason of former political or other affiliation. Thereupon the State Executive Committee of the Democratic party in Texas adopted a resolution that white Democrats, and no other, should be allowed to participate in the party's primaries.

A negro, whose primary ballot was rejected pursuant to the resolution, sought to recover damages from the judges who had rejected it. The United States District Court dismissed his action, and the Circuit Court of Appeals affirmed; but this court reversed the judgment and sustained the right of action by a vote of 5 to 4. *Nixon* v. *Condon,* 286 U. S. 73 (1932).

The opinion was written with care. The court refused to decide whether a political party in Texas had inherent power to determine its membership. The court said, however: "Whatever inherent power a state political party has to determine the content of its membership resides in the state convention," and referred to the statutes of Texas to demonstrate that the State had left the Convention free to formulate the party faith. Attention was directed to the fact that the statute under attack did not leave to the party convention the definition of party membership but placed it in the party's State Executive Committee which could not, by any stretch of reasoning, be

held to constitute the party. The court held, therefore, that the State Executive Committee acted solely by virtue of the statutory mandate and as delegate of state power, and again struck down the discrimination against negro voters as deriving force and virtue from state action,—that is, from statute.

In 1932 the Democratic Convention of Texas adopted a resolution that "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."

A negro voter qualified to vote in a primary election, except for the exclusion worked by the resolution, demanded an absentee ballot which he was entitled to mail to the judges at a primary election except for the resolution. The county clerk refused to furnish him a ballot. He brought an action for damages against the clerk in a state court. That court, which was the tribunal having final jurisdicion under the laws of Texas, dismissed his complaint and he brought the case to this court for review. After the fullest consideration by the whole court [1] an opinion was written representing its unanimous views and affirming the judgment. *Grovey* v. *Townsend,* 295 U. S. 45 (1935).

I believe it will not be gainsaid the case received the attention and consideration which the questions involved demanded and the opinion represented the views of all the justices. It appears that those views do not now commend themselves to the court. I shall not restate them. They are exposed in the opinion and must stand or fall on their merits. Their soundness, however, is not a matter which presently concerns me.

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[1] The court was composed of Hughes, C. J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo, JJ.

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the court has overruled three cases.

In the present case, as in *Mahnich* v. *Southern S. S. Co., supra,* the court below relied, as it was bound to, upon our previous decision. As that court points out, the statutes of Texas have not been altered since *Grovey* v. *Townsend* was decided. The same resolution is involved as was drawn in question in *Grovey* v. *Townsend.* Not a fact differentiates that case from this except the names of the parties.

It is suggested that *Grovey* v. *Townsend* was overruled *sub silentio* in *United States* v. *Classic,* 313 U. S. 299. If so, the situation is even worse than that exhibited by the outright repudiation of an earlier decision, for it is the fact that, in the *Classic* case, *Grovey* v. *Townsend* was distinguished in brief and argument by the Government without suggestion that it was wrongly decided, and was relied on by the appellees, not as a controlling decision, but by way of analogy. The case is not mentioned in either of the opinions in the *Classic* case. Again and again it is said in the opinion of the court in that case that the voter who was denied the right to vote was a fully qualified voter. In other words, there was no question of his being a person entitled under state law to vote in the primary. The offense charged was the fraudulent denial of his conceded right by an election officer because of his race. Here the question is altogether different. It is whether, in a Democratic primary, he who tendered his vote was a member of the Democratic party.

I do not stop to call attention to the material differences between the primary election laws of Louisiana under consideration in the *Classic* case and those of Texas which are here drawn in question. These differences were spelled out in detail in the Government's brief in the *Classic* case and emphasized in its oral argument. It is enough to say that the Louisiana statutes required the primary to be conducted by state officials and made it a state election, whereas, under the Texas statute, the primary is a party election conducted at the expense of members of the party and by officials chosen by the party. If this court's opinion in the *Classic* case discloses its method of overruling earlier decisions, I can only protest that, in fairness, it should rather have adopted the open and frank way of saying what it was doing than, after the event, characterize its past action as overruling *Grovey* v. *Townsend* though those less sapient never realized the fact.

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

Syllabus.

WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, *v.* JAMES V. REUTER, INC.

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

No. 436. Argued March 10, 1944.—Decided April 10, 1944.

In a proceeding against a Louisiana corporation by the Administrator pursuant to § 17 of the Fair Labor Standards Act, the District Court permanently enjoined the corporation, "its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest," from further violations of the Act. On appeal by the corporation, the Circuit Court of Appeals reversed. Shortly after this Court had granted certiorari, the corporation was dissolved and its business was transferred to stockholders. Upon a motion to recall the writ of certiorari, *held:*

1. The motion papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporation, since an injunction against the corporation may, in appropriate circumstances, be enforced against those to whom the business may have been transferred. The extent to which the successor to the corporation here is bound is not decided. P. 673.

2. By reason of its dissolution, the corporation, the sole respondent here, no longer has capacity to be sued, thus abating the present appellate proceeding. P. 675.

3. Although this Court may not properly proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. P. 676.

4. The judgment of the District Court determined, subject only to resort to the prescribed appellate review, the right of the Administrator to an injunction. That review contemplates more than a consideration of the case by the Circuit Court of Appeals alone, but also appropriate proceedings in this Court. The full review contemplated by the statute having been frustrated by respondent's dissolution, the judgment of the Circuit Court of Appeals cannot rightly be made the implement for depriving the Administrator of the benefit of a judgment in the District Court. The judgment of the Circuit Court of Appeals is therefore vacated and the cause remanded to the District Court, where the Adminis-

trator may take such proceedings for the enforcement of its judgment as he may deem advisable and as may be proper in the circumstances. P. 677.

137 F. 2d 315, vacated.

CERTIORARI, 320 U. S. 731, to review the reversal of a judgment, 49 F. Supp. 485, enjoining the defendant corporation from violations of the Fair Labor Standards Act.

Mr. Douglas B. Maggs, with whom *Solicitor General Fahy, Mr. Robert L. Stern,* and *Miss Bessie Margolin* were on the brief, for petitioner.

Mr. Frank S. Normann for respondent.

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

Petitioner brought this suit pursuant to § 17 of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.*, to restrain respondent, a Louisiana corporation, from violating the Act. The District Court found violations of §§ 6, 7, 15 (a) (1) (2) and (5) of the Act and gave judgment permanently restraining respondent, "its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest" from further violations. On appeal the Circuit Court of Appeals for the Fifth Circuit reversed, 137 F. 2d 315, and remanded the cause to the District Court for further proceedings. This Court granted certiorari, 320 U. S. 731.

The present proceeding is a motion to recall the writ of certiorari, submitted by the attorney who has appeared for respondent in this Court and in the two courts below. His motion is based upon the affidavit of James V. Reuter, described as the former president of the respondent corporation, from which it appears that on December 15, 1943, shortly after this Court had granted certiorari, Reuter and two others, being all the stockholders of respondent, duly

signed a consent that the corporation be dissolved and that Reuter be designated its liquidator; and that one day later, on December 16, 1943, Reuter, as liquidator, certified that the corporation had been "completely wound up and is dissolved." Upon filing the consent and certificate with the Secretary of State, with proof of publication of the notice of dissolution, the Secretary of State issued his certificate of December 31, 1943, certifying that the corporation "stands dissolved." See § 54 of Act 250 of the Louisiana Legislature of 1928 as amended by § 1 of Act 65 of 1932, and §§ 62 and 64 of Act 250 of the Louisiana Legislature of 1928. The purpose of the dissolution is stated to have been to secure tax advantages.

In support of the motion it is argued that since the corporation is, by Louisiana law, now dissolved without any prolongation of its life for the purpose of continuing pending litigation against it, see *McCoy* v. *State Line Oil & Gas Co.*, 180 La. 579, 583, the case has become moot; and further that, for want of a party respondent, this Court is without power to render any effective judgment in the appellate proceeding now pending before it.[1]

In the present posture of the case we think it plain that the moving papers fail to establish that the case is moot

[1] In the *McCoy* case, it was held at 585–586 that it is the duty of a liquidator of a corporation in dissolution to "terminate in a legal manner . . . by prosecuting, defending, or compromising it, all litigation pending in which the corporation is a party." The court further stated that "the Legislature had no intention of sanctioning the issuance of a certificate of dissolution" where the liquidator had failed to discharge that duty, to the injury of opposing litigants. The Louisiana court deemed it appropriate in that case to annul the certificate of dissolution of the corporation there involved, in view of its liquidator's failure to terminate in a legal manner, prior to dissolution, the suit there under consideration.

We do not consider whether in this case this Court has a like power to annul the certificate of dissolution of respondent corporation, so as to permit the continuation of appellate proceedings here, for, as will appear, other disposition of the case seems more appropriate.

or has abated merely because of the dissolution of the corporate defendant. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 307–310; cf. *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514–516; *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398. The judgment rendered by the District Court determined, subject only to resort to the prescribed appellate review of the judgment, the right of the administrator to an injunction restraining the corporation and those associated or identified with it from violating the statute. Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, *Wilson* v. *United States*, 221 U. S. 361, 376–377; cf. *In re Lennon*, 166 U. S. 548, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100, 106–107. And see, to like effect, *Labor Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 304–305; *Interstate Commerce Comm'n* v. *Western New York & P. R. Co.*, 82 F. 192, 194–195; *Morton* v. *Superior Court*, 65 Cal. 496, 4 P. 489; *Katenkamp* v. *Superior Court*, 16 Cal. 2d 696, 108 P. 2d 1; *Mayor* v. *New York & S. I. Ferry Co.*, 64 N. Y. 622; *Farmers Fertilizer Co.* v. *Ruh*, 7 Ohio App. 430; *Sperry & Hutchinson Co.* v. *McKelvey Hughes Co.*, 64 Pa. Super. 57, 61–62; cf. *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832, 833; *Labor Board* v. *Colten*, 105 F. 2d 179, 183; *Union Drawn Steel Co.* v. *Labor Board*, 109 F. 2d 587, 589, 594–595. And these principles may be applied in fuller measure in furtherance of the public interest, which here the

petitioner represents, than if only private interests were involved. See *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552, and cases cited.

Whether a family business, such as this one appears to be, has successfully avoided all responsibility for compliance with the judgment entered against the family corporation, by the simple expedient of dissolving it and continuing the business under the individual control of members of the family, as appears to have taken place here, is a question which it is unnecessary for us to decide on the basis of the scanty and not entirely enlightening affidavits now submitted to us. It is enough for present purposes, if the appellate procedure, rendered abortive by respondent's dissolution, has not deprived petitioner of the benefits of the judgment rendered in his favor by the District Court, that he is entitled to initiate proceedings to enforce the judgment against individuals who either disobey its command or participate in the evasion of its terms. In such proceedings the question as to how far the successor to the corporation is bound by the decree may be fully investigated by the District Court, with appropriate appellate review. The decisive question for us then is whether petitioner can be rightly deprived of the benefit of the District Court's judgment by respondent's invocation of the appellate procedure provided by the statute, followed by the frustration of that procedure by respondent's dissolution.

It is true that this Court cannot, in the present state of the record,[2] render an effective judgment on the merits, because the sole respondent brought before us by the petition for certiorari, by reason of its dissolution, no longer has capacity to be sued, and no one has sought to procure substitution of any other person as party respondent.

[2] Compare note 1, *supra.*

Such is the effect of dissolution under the Louisiana law. See *McCoy* v. *State Line Oil & Gas Co., supra; Ortego* v. *Nehi Bottling Works,* 182 So. 365, 367 (La. App.); compare *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257. But the judgment of the District Court was entered against respondent before it was dissolved and while it was capable of being sued. Hence it was binding on respondent and, as we have seen, on others who, in appropriate circumstances, may be brought within its reach. The dissolution of respondent, so long as the certificate of dissolution is not annulled, precludes enforcement of the judgment against it, but does not foreclose petitioner from asserting his rights against such other persons as may be bound by the judgment. Hence it does not follow, because the pending appellate proceeding has abated, that the judgment of the District Court has abated because of respondent's dissolution. Nor does it follow, because of this Court's inability to proceed with the appeal on the merits for want of a proper party respondent, that petitioner is to be deprived of the benefit of his judgment in the District Court, which the statute contemplates shall be undisturbed save only by pursuit to completion of the prescribed appellate procedure.

It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings. *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131; *Patterson* v. *Alabama,* 294 U. S. 600, 607, and cases cited; *Villa* v. *Van Schaick,* 299 U. S. 152,

155–156. When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken. *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16; *Oklahoma Gas Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 174; *Phillips* v. *United States*, 312 U. S. 246, 254. If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 477–478; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362–363; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218.

Here, for the reasons we have stated, it appears that petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court, subject only to the review of that judgment on appeal as the statute prescribes, and that that judgment is not shown to be moot or to have abated. But review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone. The losing party in that court may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ. Thus appellate review of the judgment of the District Court had not been completed when respondent was dissolved, and the full review contemplated by the statute was frustrated by that dissolution. By reason of that action, the judgment of the Circuit Court of Appeals, which is not final because the case is pending in this Court, cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court. We conclude, therefore, that in the circumstances the only just and appropriate disposition which can be made of this case is that the judgment of the Court

of Appeals be vacated, and the judgment of the District Court restored, as though respondent had taken no appeal.

The judgment of the Court of Appeals is vacated, and the cause will be remanded to the District Court, where petitioner will be free to take such proceedings for the enforcement of the judgment of the District Court, as he may deem advisable, and as may be proper in the circumstances of the case. Any order of the District Court will, of course, be subject to appropriate appellate review.

So ordered.

MEDO PHOTO SUPPLY CORP. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 265. Argued March 2, 1944.—Decided April 10, 1944.

Petitioner recognized a labor union as the bargaining representative of its employees. At their request and upon their statement that they were dissatisfied with the union and would abandon it if their wages were increased, petitioner negotiated with them without the intervention of the union, granted the requested increase in wages, and thereafter refused to recognize or bargain with the union. *Held* that the Labor Board properly determined that petitioner's negotiations with its employees, its payment of increased wages, and its refusal to bargain with the union constituted unfair labor practices in violation of §§ 8 (1) and (5) of the National Labor Relations Act; and that this determination supported its order directing the cessation of those practices. P. 679.

1. The negotiations by petitioner with any other than the union, the designated representative of the employees, was an unfair labor practice. P. 683.

Bargaining carried on by the employer directly with the employees, whether a minority or a majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained. P. 684.

2. It was likewise an unfair labor practice for petitioner, though in response to the proposal of its employees, to grant wage increases inducing them to leave the union. P. 685.

3. The defection of union members, which petitioner had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority, could not justify petitioner's refusal to bargain with the union. P. 687.

135 F. 2d 279, affirmed.

CERTIORARI, 320 U. S. 723, to review a decree granting enforcement of an order of the National Labor Relations Board, 43 N. L. R. B. 989.

Mr. William E. Friedman, with whom *Mr. Walter N. Seligsberg* was on the brief, for petitioner.

Miss Ruth Weyand, with whom *Solicitor General Fahy* and *Messrs. Alvin J. Rockwell* and *David Findling* were on the brief, for respondent.

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

Petitioner recognized a labor union as the bargaining representative of its employees. At their request and upon their statement that they were dissatisfied with the union and would abandon it if their wages were increased, petitioner negotiated with them without the intervention of the union, granted the requested increases in wages and thereafter refused to recognize or bargain with the union. The only questions raised by the petition for certiorari are whether in the circumstances, petitioner's negotiations with its employees, its payment of increased wages, and its refusal to bargain with the union constituted unfair labor practices in violation of §§ 8 (1) and (5) of the National Labor Relations Act, 29 U. S. C. §§ 158 (1) and (5).

Upon complaint of the National Labor Relations Board charging petitioner with unfair labor practices, issued pur-

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suant to § 10 of the Act, 29 U. S. C. § 160, the Board found that petitioner had violated §§ 8 (1) and (5) of the Act by interfering with its employees in the exercise of their rights to bargain collectively, guaranteed by § 7 of the Act, 29 U. S. C. § 157, and by refusing to bargain with a union representing its employees. The Board entered the usual order directing petitioner to cease the unfair labor practices so found, and requiring it to bargain with the union. 43 N. L. R. B. 989. On the Board's petition to enforce its order, the Court of Appeals for the Second Circuit overruled petitioner's contentions that the union, at the time of the alleged unfair labor practices, no longer represented petitioner's employees for purposes of collective bargaining and directed compliance with the order. 135 F. 2d 279. We granted certiorari, 320 U. S. 723, as the case involves questions of importance in the administration of the National Labor Relations Act.

The Board made findings supported by evidence that after eighteen of the twenty-six employees in petitioner's shipping and receiving department, constituting an appropriate bargaining unit, had designated the union as their bargaining agent, petitioner, on June 4th and 5th, 1941, recognized it as the exclusive bargaining representative of the employees. The union having proposed a contract providing for an increase of wages for the employees, petitioner agreed to meet the union representatives on June 9, 1941 in order to begin collective bargaining.

Two days before that date, twelve of the employees who were members of the union, waited on petitioner's manager and stated that they and the six other members had no desire to belong to the union if through their own efforts they could obtain wage increases, a list of which they submitted. The manager, at that time, declined to discuss the union, but stated that he would consider the request for wage increases with petitioner's president on the latter's return to the office on June 9th, and asked the employees to return on that day.

On June 9th, the manager, after a conference with the president, met with a committee of four of the employees who had conferred with him two days before. He advised them that petitioner would grant substantially the requested wage increases. The committee then withdrew to convey this message to the other employees, who thereupon agreed to accept the wage increases. The committee returned to inform the manager of this and that the employees "felt that they did not need the union, and we would rather stay out." Later in the day, the committee notified the union representative that the employees no longer desired the union to represent them. At a meeting on the same day with the representatives of the union, at which this committee was present, petitioner's attorney stated that he understood that the union no longer represented a majority of the employees and he declined to negotiate with it unless it were established by an election that it did.

From this, and from evidence which it is unnecessary to detail, the Board concluded, and we accept its findings, that the employees had not revoked their designation of the union as their bargaining agent before the wage increases were promised by petitioner's manager on June 9th; that the increases were induced by negotiations begun with petitioner on June 7th and concluded on June 9th before they had repudiated the union; that petitioner's determination to increase wages was "occasioned solely by the employees' offer to withdraw from the union if the raises were granted"; and that the employees' defection from the union was induced by petitioner's conduct in dealing directly with the employees.[1]

[1] It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the

In sustaining the Board's order the Court of Appeals assumed that as there had been no election or certification of the union as their bargaining representative, the employees were free to revoke their designation of it and to negotiate directly with the employer for an increase in wages, without the intervention of the union. But it thought that if such a proposal came from the employer, it would be a forbidden interference with the collective bargaining process and it concluded that, in view of the difficulties of determining whether in fact such an offer, ostensibly coming from the employees, was induced by the employer, the Board could conclude that the mere acceptance by the employer of the employees' offer was an unfair labor practice. A concurring judge thought that the case was stripped of any intimation of employer control but that the Board's order should be sustained on the ground that it was an unfair labor practice for the employer to bargain with the employees when their revocation of the union's authority was made conditional upon the majority's agreement to abandon collective bargaining altogether, even for an unspecified time.

We think it plain that the findings of the Board do not admit of either of these dispositions of the case. While the negotiations of petitioner with the employees resulted in a wage increase and their abandonment of the union, the negotiations were carried on by certain of the employees purporting to act in behalf of and to represent a majority. Nothing appears which would suggest, as the concurring judge thought, that any of the employees during or as

courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight. See *Franks Bros. Co.* v. *Labor Board, post,* p. 702; *Labor Board* v. *Southern Bell Co.,* 319 U. S. 50, 60, and cases cited; *Labor Board* v. *Nevada Copper Co.,* 316 U. S. 105, 106–107, and cases cited; cf. *Dobson* v. *Commissioner,* 320 U. S. 489, 501, and cases cited.

a result of the negotiations had by agreement or otherwise foreclosed themselves from continuing such bargaining through the same or any other representatives whom they might choose. Nor in the circumstances disclosed by the evidence and the Board's findings can we say that it was of any significance whether, as the Court of Appeals thought, the employees' offer to abandon the union originated with them or was inspired by the employer. For in either case, as will presently appear, we think that the negotiations by petitioner for wage increases with any one other than the union, the designated representative of the employees, was an unfair labor practice. We think that the Board's order should have been enforced for the reasons stated by it.

The petition for certiorari does not challenge the Board's findings that the union represented a majority of the employees in petitioner's shipping department, and that they constituted a proper bargaining unit and that petitioner had agreed to bargain with the union. The evidence shows and the Board found that when the employees opened their negotiations with petitioner's manager on June 7th, they had not repudiated the union. On the contrary they made it plain that their proposal for its abandonment was contingent upon petitioner's willingness to give the desired wage increases. The evidence also shows, as the Board found, that the employees did not withdraw their designation of the union as their bargaining representative until after they had voted to accept the wage increases, and that until then, they had held themselves out as union members throughout their negotiations with petitioner and its representatives.

The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9 (a) of the Act, 29 U. S. C. § 159 (a), it

exacts "the negative duty to treat with no other." *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 44; and see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 548–549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332; cf. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342; see also *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 359–361. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8 (1) of the Act.[2] There is no

[2] That the Act "carries the clear implication that employers shall not interfere" with the right of collective bargaining "by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all," was recognized by the reports of the Congressional committees recom-

necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation. Compare *Labor Board* v. *Century Oxford Mfg. Co.*, 140 F. 2d 541, C. C. A. 2d, decided February 15, 1944. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation. And it is the fact here, as found by the Board, that the employees did not revoke their designation of the union as their bargaining agent at any time while they were themselves negotiating with petitioner, and that they left the union, as they had promised petitioner to do, only when petitioner had agreed to give them increased wages.

Quite apart from the Board's finding of an unfair labor practice in petitioner's direct negotiations with its employees when they had not revoked their designation of the union, there can be no question but that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union.[3] *Labor Board* v.

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mending the adoption of the bill which became the National Labor Relations Act. Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

[3] We find no evidence in the record that petitioner's representatives stated to the employees either in terms or in substance, "We will give you the [wage] increases *and you can do as you please about the union.*" From the evidence, which fully supports the findings, it appears that the employees proposed to petitioner's manager on June 7th that they would leave the union if they were given wage raises; that the manager adjourned the meeting with the employees until June 9th in order to consider the suggested wage increases with petitioner's president. On that date, after considering the matter with

Falk Corp., 308 U. S. 453, 460–461. This violation of § 8 (1) was in itself sufficient to support the Board's order to cease and desist. The words and purpose of §§ 7 and 8 (1) of the Act enjoin an employer from interfering with, or coercing, its employees in their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination. *International Association of Machinists* v. *Labor Board*, 311 U. S. 72; *Labor Board* v. *Falk Corp., supra; Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266–268.

Petitioner contends that it would be equally an unfair labor practice to refuse the wage increases as to grant them, for that would influence the employees to stay in the union, instead of abandoning it. But either consequence, as well as any violation of the Act, would in this case have been avoided if the employer, as is its statutory duty, had refused to negotiate with any one other than the duly designated bargaining representative of his employees. We are not now concerned with the question whether, in other circumstances, such action would have been an unfair labor practice. Nor does that possibility relieve peti-

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the president, the manager announced to the employees that wage increases would be given, and this was immediately followed by the employees' desertion of the union. It also appears that it was petitioner's normal practice to grant wage increases only at the close of the year. From these facts the Board could conclude, as it did, that the purpose and the effect of the wage increases was to induce petitioner's employees to leave the union.

tioner of the consequences of its unfair labor practices which the Board has found.

Petitioner was not relieved from its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, *Labor Board* v. *Newport News Co.*, 308 U. S. 241, 251, or the employees suggest the conduct found to be an unfair labor practice, *National Licorice Co.* v. *Labor Board, supra,* 353, at least where the employer is in a position to secure any advantage from these practices, *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 519–521, and cases cited.

Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340; *International Assn. of Machinists* v. *Labor Board, supra,* 82; cf. *National Licorice Co.* v. *Labor Board, supra,* 359. Petitioner's refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of §§ 8 (1) and (5) of the Act.

The Board rightly determined that petitioner had engaged in the unfair labor practices which the Board found, and this determination supports its order directing the cessation of those practices. The petition for certiorari has raised no question as to the propriety of the Board's order directing petitioner to bargain with the union, which was also sustained and ordered enforced by the Court of Ap-

peals. We therefore have no occasion to consider that part of the order here. Compare *Franks Bros. Co.* v. *Labor Board, post,* p. 702.

Affirmed.

MR. JUSTICE ROBERTS dissents.

MR. JUSTICE RUTLEDGE, dissenting:

I dissent. The story told by this record is not of a dominating or intermeddling employer, interfering with employees in their collective bargaining arrangements or activities. It is rather of one which sought to do no more than meet its employees' wishes, freely formed and freely stated; and at the same time to be sure it would do nothing to violate the law governing their relations. The record is barren of any evidence of trouble or real dispute between Medo and its employees, of hostility by Medo to unions or employee organization, or of any refusal to bargain collectively as the statute requires.[1] On the contrary, it shows without contradiction that Medo regarded these things as wholly for the employees to settle among themselves; that it scrupulously sought to keep hands off; and that it was willing to bargain with them by whatever agency they might select. These attitudes were qualified only by the company's desire to be sure that the union was entitled legally to represent the employees and to avoid being caught in a possible jurisdictional dispute between the A. F. of L. and the C. I. O.[2]

The Board has found that Medo was guilty of unfair labor practice in three respects: (1) in dealing directly with the employees, rather than through the union, on June 7 and 9; (2) in refusing to deal with the union; (3) in granting the increased wages sought by the employees.

[1] There was no refusal to bargain with the union until June 9, 1941, after the employer and the employees had reached a full agreement. Cf. note 6 *infra.*

[2] Cf. note 5 *infra.*

On the facts, (1) and (2) come to the same thing, that before June 7 the union had acquired legal status as exclusive bargaining agent, which was effective to require Medo to deal only with it, and that this was not validly revoked then or later. The same things are subsumed by (3), which however poses the further question whether granting the increase in itself was an unlawful interference. The questions thus presented may be pictured more accurately in the light of further facts.

There is no evidence of labor trouble or employee dissatisfaction prior to May, 1941. On the contrary, for all that appears, relations were peaceful and harmonious. During that spring the A. F. of L.[3] put on a campaign to organize all photographic supply stores in New York. In May it got around to Medo. The company had about 70 employees. Of these, about 25 or 26 (including some supervisory employees) were in the shipping and receiving department, doing manual labor in the plant's basement. The others were clerical employees and salesmen, working upstairs. Stoltman, the A. F. of L. organizer, started out in May to organize all of Medo's employees in a single unit. Apparently he was not successful upstairs. But by May 23 he had signed up 18 of the downstairs men. He and they then decided to limit the unit to the basement, and requested the employer to negotiate. At the same time the union applied to the Board for certification. There was some short delay, owing to the absence of Medo's president over the Memorial Day holiday. But on June 4, at the Board's arrangement, the first conference concerning recognition was held.[4]

[3] Acting through the American Federation of Photo Employees Union, Local 21314, of which Stoltman, chief union figure in this case, was president.

[4] The Board's part in bringing about the conference was due solely to the union's having applied to it for certification simultaneously with the making of its first demand upon Medo to negotiate with it, not to any refusal by Medo to negotiate concerning recognition.

Several followed between that time and Saturday, June 7, when the employees intervened for themselves.

At all times Medo showed willingness to negotiate. But it also wished to be sure, as it had both the right and the duty to be, that the unit was appropriate and the union had a majority of the employees.[5] Medo further wanted to know something about the terms the union would demand, if recognized; not wishing, as it said, to "buy a pig in a poke." All of these things were matters of discussion between Stoltman and various company representatives in the conferences held on June 4 and 5. But it was not until the latter date that Stoltman finally submitted his substantive demands to Medo through Seligsberg, its attorney.

The Board's findings, in effect, are that on June 5 Seligsberg, in this conference with Stoltman, conceded finally all questions of representation, that is, of appropriateness of the unit and the union's majority status. Hence it concluded Medo then recognized the union as collective agent and, consequently, the only thing remaining for

[5] It felt, as Stoltman did at first, that there should be one unit in the small plant and was fearful of becoming involved in a jurisdictional dispute if the A. F. of L. should organize the unit downstairs and the C. I. O., which was actively organizing such units, should come in and organize the clerical and sales employees working upstairs.

The union clearly had a majority of the claimed unit from May 23 to June 7, since 18 of the 25 or 26 employees embraced in the unit had signed membership application cards and none had revoked his application or membership in that period.

The company, however, had to take Stoltman's word for this. It asked him for proof that his union represented a majority, but he declined to submit it, saying he would submit the cards only to a Board representative. The record does not show that Medo ever was given proof that the union had lined up its claimed and actual majority. This was one of the things which, in my opinion, the record shows was held for discussion and determination at the conference scheduled for June 9. Cf. text *infra* notes 6–10.

further discussion was the terms of the collective agreement. This finding is the basis for the Board's conclusion that Medo was guilty of unfair labor practices when it later dealt directly with the employees rather than through the union. Medo, however, says that all three questions remained open for final action by it at the conference scheduled for Monday, June 9, but not held because the employees intervened directly in their own behalf on Saturday, June 7.[6]

Seligsberg made particular statements in his conference with Stoltman on June 5 which, if disconnected from the context of the whole conversation and treated as in themselves stating the employer's entire position, could be taken as indicating intention to close the discussion on appropriateness of the unit and the union's majority status. These statements are the Board's only foundation for finding that Medo at any time conceded recognition to the union with finality. In my opinion it would do violence to the facts to regard them as sufficient to sustain these findings. The employer was entitled to a reasonable time for ascertaining the union's status before dealing

[6] It is undisputed that the employees, entirely of their own motion and without any stimulus or suggestion by Medo, on Saturday morning, June 7, sought a conference with Medo's officials, without disclosing their purpose. The request was granted and the conference held Saturday afternoon. As it opened, one of the men mentioned the "union situation." But Medo's general manager, Hoppin, at once and flatly declined to discuss that, saying he would discuss anything else. The men then stated their desire for an increase in wages, and not to have the union. They specified the wages sought and Medo's reply, granting them in part, was given the following Monday morning, June 9. On Monday afternoon there was also a conference with Stoltman, but because of the turn events had taken by the employees' intervention it served only as the occasion for notifying him that Medo and the employees had reached agreement and therefore the company would not deal further with the union.

with it [7] and this had not expired on June 7 or, for that matter, on June 9.[8] Prior to June 5 all questions were open. The conference then was not begun, carried through or concluded with any intention or purpose that understandings which might be reached were or could be taken to be final. Medo's representative was doing a lawyer's job,[9] which was to see how far he and Stoltman could agree on terms to be considered by his client as a basis for final decision. They had been successful previously in bringing other employers and employees together in more difficult disputes and the whole intent of their conference was to find a basis of possible agreement upon all matters, including representation,[10] for consider-

[7] Cf., e. g., *North Electric Mfg. Co.* v. *Labor Board*, 123 F. 2d 887 (C. C. A.); *Texarkana Bus Co.* v. *Labor Board*, 119 F. 2d 480, 484 (C. C. A.). See also *Labor Board* v. *Union Pacific Stages*, 99 F. 2d 153, 158–159 (C. C. A.).

[8] It is to be recalled that the whole period from demand by the union on Medo to negotiate to the time the employees intervened extended only from May 23 to June 7, and that the period of active negotiation began on June 4. Three days, or even a little more than two weeks, is hardly too much under the circumstances here present to allow an employer for determining whether the union meets the statute's requirements.

[9] Seligsberg's testimony was: "That was the purpose of the postponement. They were to bring us proof of representation. We were both to study the question of unit, and we were to study it—and when I say 'we,' I mean the employer, because *except as to language*, I wouldn't know anything about it. They were to study it. Mr. Hoppin and Mr. Goodfield and Mr. Niemeyer, if he were there—which I don't remember—were to study the proposed terms and see how they compared with the possibilities." (Emphasis added.) Seligsberg consistently testified that he and Stoltman considered "all three questions together, proof of majority, proof of unit, and the contract." He was a director and secretary of the company, but not a shareholder.

[10] In the conference Seligsberg renewed a previous request for proof that the union had a majority and conditioned the discussion upon the company's being satisfied in this respect and that the unit was appropriate. Cf. note 9 *supra*. However, Stoltman again refused to exhibit the cards and renewed his offer only to submit them to a Board rep-

ation by Medo for its final decision and with a view to further discussion and possible final settlement in the conference agreed upon for June 9. To tear Seligsberg's statements out of this setting and context and make of such tentative understandings or bases of further negotiation final concessions of recognition is to draw inferences wholly unwarranted by the record. It is therefore not at all clear that on June 7 negotiations had passed beyond the stage of recognition or, consequently, that the union then was legally entitled to act as exclusive bargaining agent.

But even assuming that Medo on June 5, through Seligsberg, conceded recognition, still I cannot agree that it committed any unfair labor practice, under the facts shown here, either in merely hearing what the employees had to say or, after declining to be drawn into discussion of their relations with the union,[11] in granting unconditionally their freely made and wholly uncoerced request for an increase in wages. In my view it is immaterial that this, in effect, short-circuited the union, for two reasons. One is that, under the special circumstances, the employees had the right to revoke the designation and did so by undertaking to deal for themselves; the other, which is perhaps but a different way of stating the first, is that the union itself had no right or interest sufficient to prevent them from doing so.

At most the employer did nothing more than accede to the wishes of a clear majority, both in listening to their request and in granting it. There is no claim or semblance of proof that Medo induced the men to make the

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resentative for comparison with Medo's payroll. The record does not show this was ever done, although in my opinion, contrary to the Board's findings, it does show conclusively that the parties contemplated it would be done and that the result of the comparison would be given to Medo before the negotiations should be concluded with finality of recognition.

[11] Cf. note 6 *supra*.

request. On the contrary, it is not disputed that, when they asked for the conference on June 7, the request came unexpectedly to Medo. And when, at the start of the conference the men mentioned the union situation, Medo's general manager, Hoppin, stated at once and flatly that he would not discuss their union affairs or relations with them, clearly implying that this was their business exclusively, not the company's.[12] Asked whether he would discuss other matters, he answered affirmatively. The men thereupon said they wanted the increase and there is some evidence they also said unconditionally that they did not want the union.[13] The Board, however, has found that they coupled the two statements conditionally, namely, that they did not want the union, if they could have the increase without it.

The Board concluded that Medo's action on June 9 in granting the increases, though less than what were requested, "constituted interference with the self-organizational rights of its employees," on the theory that this influenced them to abandon the union. It also held that the employees' action in approaching the company on June 7 did not "constitute an implied revocation of their designation of the Union so as to relieve the respondent of the obligation to deal solely with it," and therefore dealing directly with them was a violation of Medo's

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[12] Cf. note 6 *supra*. Hoppin's testimony was in response to the question "What happened after they came to your office?" (on Saturday afternoon): "They came up and said that, 'We have decided that we don't want to have anything to do with the union.' I immediately stopped them, and I told them that if there was anything at all pertaining to any union activities, I did not want to listen to them at all, but if it was anything else they had to offer, I would be willing to listen to them."

[13] Hoppin testified he was told: "We have one thing that we are primarily interested in. The working conditions here are excellent. We are very happy with our jobs, but we would like to get more money."

statutory duty to the union and an unfair labor practice. The Board's theory was, apparently, that the men, to revoke their designation, were required to communicate the revocation to the union and that the union had acquired such an interest or status no other act could terminate the agency, however inconsistent with its continued existence and exclusive character.

The statute makes no provision that the agency, once created, shall continue for any specific time. It prescribes no particular method for terminating, as it makes none for creating,[14] the agency. Greater formality hardly would seem to be required in the one case than in the other. The statute purports to be drawn in favor of protecting the interests of employees, not those of unions as such.[15] True, while the agency exists it is exclusive for its appropriate purposes. But it is so only while it does exist and the question here is whether it continued in force after the employees took matters into their own hands and showed to the employer by that act that they wanted to deal for themselves, not through the union.

The Board implies and the Court says the employer should have declined to discuss with them any matter which was appropriate for collective bargaining, since the union was their agent for this purpose. Therefore, it is concluded, the employer violated their rights under the statute to bargain collectively. This, although it is conceded the twelve employees spoke for 18 of the 25 or 26

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[14] Cf. *Lebanon Steel Foundry* v. *Labor Board*, 130 F. 2d 404 (App. D. C.).

[15] Whatever justiciable "interest" the union may have in continuing to act as the employees' representative, its status as such is for the principal's benefit, not its own, and is terminable at the former's will. Cf. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 237; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344; *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 261–262; *Labor Board* v. *Remington Rand*, 94 F. 2d 862, 869–870 (C. C. A.); *Labor Board* v. *Lion Shoe Co.*, 97 F. 2d 448.

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in the unit and it does not appear that what they did was disapproved or repudiated by the other six or seven. Merely to state this proposition should be enough to negate it. For it preserves rights of employees to bargain by representatives of their own choosing by destroying them. In all normal agency relations, except those "coupled with an interest," [16] the principal can revoke them by exercising the agency himself.[17] He need not notify the agent. When he acts on his own behalf, he exhausts the subject matter of the agency and it comes to an end.

Unless a designated union acquires, by its selection, a thraldom over the men who designate it analogous to the power acquired by one who has a "power coupled with an interest," unbreakable and irrevocable by him who gave it, it would seem that any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves. And this should be true, whether or not previous notice is given to the union and whether or not the subject matter of the resumption may include, as one consequence of the dealing, the possible continuance of the agency. For it is the very taking back of the right to deal with their employer, not what he does in response to this, unless that creates some new pressure or influence not contemplated in the employees' freely made proposals, that shows the intent to destroy the agency. Dealing for themselves and dealing exclusively through the agent cannot coexist. The

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[16] See, e. g., *Hunt* v. *Rousmanier's Administrators*, 8 Wheat. 174; *Lane Mortgage Co.* v. *Crenshaw*, 93 Cal. App. 411, 269 P. 672; *Hall* v. *Bliss*, 118 Mass. 554; Note (1930) 39 Yale L. J. 110.

[17] See, e. g., *Ahern* v. *Baker*, 34 Minn. 98, 24 N. W. 341; *Mott* v. *Ferguson*, 92 Minn. 201, 99 N. W. 804; *White & Hoskins* v. *Benton*, 121 Iowa 354, 96 N. W. 876; *Gilbert* v. *Holmes*, 64 Ill. 548.

one wholly excludes the other and the real question becomes, which is to prevail, the agent's interest and right or the principal's, the union's or the employees'?

I do not think Congress intended, by this legislation, to create rights in unions overriding those of the employees they represent.[18] Nor did it require a special form or mode for ending a collective agency any more than for creating it. What Congress did was to give the designated union the exclusive right to bargain collectively as long as, and only as long as, a majority of the employees of the unit consent to its doing so. When that majority vanishes by the employees' voluntary action, whatever form this may take, and the fact is made unmistakably clear to the employer, it not only is no longer under duty to deal with the union; it comes under affirmative obligation not to do so. For otherwise it would be dealing with a representative not of the employees' choice.

There are two possibly applicable limitations. One is that the employer must not interfere to bring about the abandonment. The other is that, in large units, where there are difficult problems of ascertaining whether a majority exists at a particular time, a reasonable degree of stability in employment relations may require, to give the statute workable operation, that a majority designation be deemed to continue for a reasonable period, though changes meanwhile may take away the clearly existing majority, a question not yet finally determined.[19]

The latter limitation, if it is one, can have no reasonable application to a small unit and a small employer under circumstances like those involved here. In such a situation to impose it, where the actual desires of the majority may be easily and readily ascertained at any time, would

[18] Cf. note 15 *supra*.

[19] Cf. *Labor Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (C. C. A.).

be to force men into unions and into dealing with their employers through unions contrary to the employees' own wishes. The statute has no such purpose.

But it is said the other limitation applies here, that the employer shall offer no inducement and exert no influence to secure abandonment. This, too, is a salutary principle when properly applied. And it may be applied as well to a small unit and a small employer as to large ones. But again the limitation is not universally applicable. Whether it is applicable or not depends upon what the employer does. Clearly if he stimulates a proposal from the employees to abandon the union for any substantial advantage he may give, the limitation should be effective. But does he do this when, with no suggestion or intimation on his part, when rather he has shown every willingness to leave the whole matter of their organization to his employees and to deal with them in any way they wish, they come to him, without influence, without coercion, and make a proposal wholly of their own conception and desire?

It is not impossible for men to want wage increases and also to remain or become nonunion men at the same time. Nor is such a combination of desires illegal. When such a proposal is thus made, and the employer does no more than was done here, namely, accede to it, knowing he is dealing with a majority of the unit, saying in effect, "Whether or not you have a union is your own business, not mine. But whether you do or not, you get the increase you want," then in my judgment two things have happened: (1) The employees have revoked the collective agency, as they have a right to do; and (2) the employer has been guilty of no unfair labor practice either in hearing their proposal or in acceding to it. He has done no more than comply with the wishes of the majority, freely formed and freely stated. And this it is the employer's duty to do under the statute. If thereby the union has

been by-passed, it is not through the employer's action, but rather through that of the employees. The employer's response, so limited, is not a violation of the principle, recently stated here,[20] that individual employees cannot deal with the employer to create terms in the contract of employment inconsistent with the collective agreement. Such a situation presents no case of inconsistent individual bargaining. It involves rather one of collective bargaining, not by individuals as such, but by the majority on behalf of the unit.

Finally, if more is needed, the matter should be considered in the light of Medo's predicament when the employees made the proposal, account being taken of the alternative courses open to it. Under the Court's ruling it was between the devil and the deep blue sea. There was no answer Medo could give which would not leave it open to a charge and a finding of unfair labor practice. The employees wanted an increase, according to the findings, with the union if they could not get one without it; without the union, if they could. The main thing in their minds was the increase, not the union.[21] In effect, according to the findings, they said so to their employer. It had to keep silent or reply. It could reply in several ways: (1) The union is your exclusive agent and we cannot deal with you while it is such; (2) we will give you the increase if you discharge the union; do that and then come back; (3) we will give you the increase and you can do as you please about the union; (4) we will not give the raise, union or no union.

The Court says the company's reply should have been (1), whereas its response actually was (3).[22] It finds the

[20] *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342.

[21] Cf. note 13 *supra.*

[22] That this is the fair meaning of Medo's response is clear from its refusal to discuss or interfere in the employees' union activities, cf. note 12 *supra.*

latter bad because in effect it offered "inducement" to the employees to abandon the union. The trouble is that the same thing would have been true of (1) or of any of the other possible replies. Answers (2) and (4) clearly would constitute unfair labor practices, under the Court's view, the former as offering inducement to abandon, the latter as a flat refusal to bargain through the union or otherwise. Answer (1), while purporting to say only that the employer could not deal with anyone as long as the union retained its exclusive agency, in fact would be infected with two faults. One would be the assumption that the employees could not revoke the agency and take matters back into their own hands, without giving prior notice to the union, a question involved in the issues here. But, even more plainly, by making this response the employer would open itself to the charge and to the finding that it had said, in effect: "We cannot deal with you directly while the union's agency stands unrevoked," and thereby had offered, by clear implication, the inducement of dealing with the employees directly, conditioned upon their discharging the union.

The only other answers open to the employer were (3), the one Medo actually made, and to remain silent. Merely ignoring the employees might have been taken to mean anything, but more probably answer (4) than any other. Silence therefore afforded no escape from the trap. Nor does the Act require silence in such a situation. Consequently answer (3), which Medo gave, was the only one it could give consistently with the view that the employer should hold out no inducement to the employees to abandon the union. In effect it said simply, "We are perfectly willing you should have the increase. But whether you have it through the union or without it is entirely your own business and we will not have anything to do with this." Any other reply would have

been a counter-proposal offering inducement to abandon or a rejection of all bargaining. The answer Medo gave was neither. It was merely accession to the employees' wishes, not "inducement" or offer held out; and it was coupled with the clear indication, under the circumstances, that what the employees might do about the union was wholly their own affair and none of Medo's.

Accordingly, I think Medo gave the only possible answer consistent with the statute's requirements and purposes and the only one which afforded no substantial basis for finding either that it was refusing to bargain collectively or that it was interfering with the employees' rights of organization by offering inducement to get rid of the union. In my opinion the Wagner Act was not designed or intended to put an employer, whose sole purpose and conduct are to give his employees completely free rein in matters of organization and collective bargaining, on such a spot that anything he may do will be, or will form the basis for a finding that it is, an unfair labor practice. So to construe the Act not only would make it a trap for employers, but also would defeat the very purposes the statute was intended to accomplish, by fastening upon employers and employees alike union domination the latter do not want. This would be to destroy, not to safeguard, the employees' basic right of collective bargaining by representatives of their own choosing. I would reverse the judgment with instructions to dismiss the petition for enforcement.

FRANKS BROS. CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 521. Argued March 2, 27, 1944.—Decided April 10, 1944.

1. The National Labor Relations Board acted within its statutory authority in ordering petitioner to bargain collectively with a union which had lost its majority after petitioner had wrongfully refused to bargain with it. 29 U. S. C. § 160 (a), (c). P. 703.
2. It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged. P. 704.

137 F. 2d 989, affirmed.

CERTIORARI, 320 U. S. 734, to review a decree directing compliance with an order of the National Labor Relations Board, 44 N. L. R. B. 898, 917.

Mr. Benjamin E. Gordon, with whom *Mr. Arthur V. Getchell* was on the brief, for petitioner.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Mr. David Findling,* and *Miss Ruth Weyand* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The single question presented is whether the National Labor Relations Board acted within its statutory authority in ordering petitioner to bargain collectively with a union which had lost its majority after petitioner wrongfully had refused to bargain with it.

In June 1941 forty-five of the eighty production and maintenance employees in petitioner's clothing factory designated the Amalgamated Clothing Workers of America as their bargaining representative. Attempts of the Union to negotiate with petitioner proved unsuccessful because of the latter's refusal to bargain, and the Union

filed with the Board a petition for an investigation and certification of representatives. A consent election was scheduled for July 25, and notices posted. Before the election was held, petitioner conducted an aggressive campaign against the Union, even to the extent of threatening to close its factory if the Union won the election. Thereupon the Union withdrew its petition for an election, and filed charges with the Board alleging that petitioner had engaged in unfair labor practices.

In the following months various conferences were held and correspondence exchanged between petitioner and the Board in an unsuccessful effort to persuade the petitioner to cease opposition to the Union. Finally on March 2, 1942, the Board issued a complaint against petitioner. Hearings on the complaint were conducted at length, and in October 1942 a final order was entered. The finding of the Board, not here challenged, was that the foregoing conduct of petitioner, together with related conduct unnecessary to be detailed, constituted unfair labor practices within the meaning of § 8 (1) and (5) of the National Labor Relations Act; 49 Stat. 449, 452, 453; 29 U. S. C. § 158 (1) and (5).

In reaching its conclusion as to the appropriate remedy for these unfair practices, the Board considered petitioner's contention that during the seven-month interval between the filing of the charges and the issuance of the complaint, thirteen of the Union's original members had been replaced by new employees in the normal course of business. This left the Union with only thirty-two of the eighty-five employees then in the unit which it represented, or less than a majority. But the Board found that the Union's lack of a majority was "not determinative of the remedy to be ordered." Citing many of its previous decisions involving similar situations, the Board concluded that "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer

to bargain with the Union which represented a majority at the time the unfair labor practice was committed." 44 N. L. R. B. 898, 917. Accordingly, because it deemed such a provision "necessary to effectuate the policies of the Act," the Board included in its order a requirement that petitioner bargain collectively with the Union. The Circuit Court of Appeals upheld the Board, and directed enforcement of the order. 137 F. 2d 989. To consider an alleged inconsistency between the Circuit Court's decision and our decision in *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 261–262, we brought the case here for review. 320 U. S. 734.

We think the decision of the Circuit Court correct under the Act and consistent with past decisions of this Court. Little need be added to what has been said on this subject in other cases. Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain. See, *e. g.*, Matter of Inland Steel Co., 9 N. L. R. B. 783, 815–816; Matter of P. Lorillard Co., 16 N. L. R. B. 684, 699–701. One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U. S. C. § 160 (a) and (c). And, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." *International Association of Machinists* v. *Labor Board*, 311 U. S. 72, 82.

That determination the Board has made in this case and in similar cases by adopting a form of remedy which

requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 U. S. C. § 160 (a) and (c).

Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co.* v. *Labor Board,* 139 F. 2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *Labor Board* v. *Appalachian Power Co.,* 140 F. 2d 217, 220–222; *Labor Board* v. *Botany Worsted Mills,* 133 F. 2d 876, 881–882. After such a rea-

sonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. *Id.;* see 29 U. S. C. § 159 (c).

That issuance of the order challenged by petitioner lay within the Board's discretion is settled by our holding in *Labor Board* v. *P. Lorillard Co.*, 314 U. S. 512, 513. The *Lorillard* case, argues petitioner, is distinguishable because in that case the Court pointed to the fact that, "The Board had considered the effect of a possible shift in membership. . . ." *Id.*, 513. But in this case also the Board considered the change in membership, and in addition relied in part upon the *Lorillard* decision to support its order. We find no possible valid distinction between this and the *Lorillard* case.

Nor is the *Lorillard* decision inconsistent with the earlier holding in *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. In the latter case the Board's order to bargain with the union rested in part on its finding that the company should reinstate ninety-three discharged union members. The Board had not determined in that proceeding, nor did it argue in this Court, that the company should be compelled to bargain with the union if these ninety-three employees were denied reinstatement. After this Court, contrary to the Board's conclusion, held that these employees properly were denied reinstatement, the situation was the same as if the Board had not considered the effect of the change in union membership. Cf. *Labor Board* v. *P. Lorillard Co., supra.*

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

UNITED STATES *v.* BAUSCH & LOMB OPTICAL CO. ET AL.

NO. 62. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued December 8, 1943.—Decided April 10, 1944.

1. The provision of the judgment dismissing, as to certain of the defendants, the complaint in a suit to restrain alleged violations of the Sherman Act is here affirmed by an equally divided Court. P. 719.
2. A distributor of a trade-marked article in interstate commerce may not limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as authorized by the Miller-Tydings Act. P. 721.
3. The evidence in this case supports the District Court's finding of a combination and conspiracy between the Soft-Lite company (a distributor of trade-marked pink-tinted ophthalmic lenses) and wholesalers to maintain resale prices through a distribution system in violation of the Sherman Act. On review of its decree, *held:*

   (a) The order of the District Court directing cancellation of Soft-Lite's arrangements with wholesalers and cessation of systematic price suggestions was justified by the findings. P. 723.

   Whether the conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers, coupled with assistance in effectuating its purpose, is immaterial.

   (b) Clauses of the decree which hold null and void certain resale price maintenance contracts entered into by Soft-Lite and wholesalers subsequent to the Miller-Tydings Act, and which forbid enforcement of such contracts and the execution of any others for six months after notice of cancellation, are justified in view of the illegality of the distribution system previously existing and because the contracts in respect of a portion of the resales are not immunized by the Act. P. 724.

   Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole.

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*Together with No. 64, *Soft-Lite Lens Co., Inc., et al.* v. *United States,* also on appeal from the District Court of the United States for the Southern District of New York.

(c) Provisions of the decree giving representatives of the Department of Justice certain broad visitatorial powers, as construed by this Court, were within the power and discretion of the District Court. P. 726.

(d) A provision of the decree directing the defendants to submit, on the written request of the Department of Justice, such reports in writing "with respect to any of the matters contained in this judgment" as may be necessary to enforce it, is too indefinite for judicial enforcement and therefore inappropriate. Pp. 725, 728.

(e) The Government's requests that the decree require Soft-Lite to sell its product to any person offering to pay cash therefor, and that the prohibition against Soft-Lite's systematically suggesting resale prices and its execution of resale price maintenance contracts under the Miller-Tydings Act be made permanent, are denied. P. 728.

45 F. Supp. 387, modified and affirmed.

CROSS-APPEALS from a decree which, in a suit to restrain alleged violations of the Sherman Act, dismissed the complaint as to certain of the defendants and gave injunctive relief against others.

Assistant Attorney General Berge, with whom *Solicitor General Fahy* and *Mr. Charles H. Weston* were on the brief, for the United States.

Mr. Whitney North Seymour, with whom *Mr. Richard B. Persinger* was on the brief, for the Bausch & Lomb Optical Co. et al., appellees in No. 62; and *Mr. Bethuel M. Webster* for the Soft-Lite Lens Co. et al., appellees in No. 62 and appellants in No. 64.

MR. JUSTICE REED delivered the opinion of the Court.

The United States of America brought suit in the District Court for the Southern District of New York against the Bausch & Lomb Optical Company, a corporation, and the Soft-Lite Lens Company, Inc., and several of the chief officers of each, to restrain violations of the Sherman Act. Jurisdiction was conferred on the trial court by § 4 of the Act (15 U. S. C. § 4) and upon this Court by § 2 of the

Act of February 11, 1903 (15 U. S. C. § 29 and Judicial Code § 238).

The complaint alleged that Bausch & Lomb and Soft-Lite and their officers contracted, combined and conspired to restrain trade in pink tinted lenses for eyeglasses, contrary to §§ 1 and 3 of the Sherman Act.[1] The allegations of the complaint were upheld by the trial court as to Soft-Lite and certain of its officers and dismissed as to Bausch & Lomb and its officers. *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387.

The findings and opinion upon which the decree is molded show that Soft-Lite is the sole distributor of pink

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[1] 26 Stat. 209, as amended, 50 Stat. 693:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . ."

Section 3 governs similar conduct in territories of the United States and the District of Columbia.

tinted lenses sold under the trade name "Soft-Lite." Their plan of dealing follows. As no patents or secret processes are relied upon and as Soft-Lite limits itself to distribution only, the trade name, salesmanship and business experience of Soft-Lite are the qualities upon which it must primarily depend for its profits as a distributor. Soft-Lite buys its lenses from Bausch & Lomb. It sells to wholesalers, who in turn sell to retailers, who in turn sell to the public. Laying aside the variations in operating costs of wholesalers as compared with other wholesalers and of retailers as compared with other retailers, the opportunity for profits which can be divided between Soft-Lite, the wholesalers and the retailers, depends upon the difference between the price per lens that Soft-Lite pays Bausch & Lomb and the price the ultimate consumer pays the retailer. A wider spread between original purchase and final prices, which is maintained by artificial fixing of the prices demanded from the ultimate consumer, furnishes the links of the distribution chain more profit for division among themselves. This is true regardless of volume or price although these factors, of course, affect the aggregate profits available for division among the dealers who have a part in distribution. In its self-restricted field, Soft-Lite is successful. Roughly speaking, for the years 1938, 1939 and 1940 in the United States it has sold one-third of the pink tinted lenses for one-half of the gross receipts. Other manufacturers than Bausch & Lomb and other distributors than Soft-Lite do the remainder of the business.

Soft-Lite has arrangements with Bausch & Lomb for the purchase from them of lenses and blanks, with wholesalers of optical glass for the supply of this material to retail opticians, and in turn with these retailers for sales promotion. This is an integrated plan for the distribution of Soft-Lite's optical specialty, the pink tinted glass for easing eye strain. The plan of distribution for this

commodity has developed over more than a quarter of a century of experience.

The arrangement with Bausch & Lomb had its origin in 1924. At that time this manufacturer of optical glass undertook to grind pink tinted lenses for Soft-Lite out of foreign glass imported by the latter, but very soon the two parties arranged for Bausch & Lomb to manufacture the glass as well. At the very beginning Bausch & Lomb agreed that any orders for pink tinted lenses which it might receive would be transmitted to Soft-Lite. A list of Soft-Lite customers, wholesale and retail, was furnished Bausch & Lomb. It appeared better to both seller and buyer to extend their arrangement by a contract in which Bausch & Lomb undertook to manufacture and sell pink tinted glass and lenses to Soft-Lite. To avoid the danger to Soft-Lite's business of indiscriminate selling by Bausch & Lomb of this pink glass specialty, Bausch & Lomb agreed that it would not sell pink tinted glass to lens manufacturers or pink tinted lenses to the optical trade. Soft-Lite buys exclusively from Bausch & Lomb.

The legal position of Bausch & Lomb and Soft-Lite is that of buyer and seller. Their relations through the years have been close, friendly and mutually satisfactory. Bausch & Lomb knows generally of the Soft-Lite distribution system, both as manufacturer for an active customer and as an owner of stock in wholesale optical goods companies, which subsidiary companies handled a large part of Soft-Lite's goods as jobbers. The officials of the two corporations carried on discussions and correspondence with respect to wholesale customers, retail outlets, prices, advertising policies, the standing of dealers, and general trade information. As to trade adjuncts for optical glass distribution such as cleaning cloths, lens cabinets, etc., Soft-Lite and Bausch & Lomb cooperated even to the ex-

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tent of agreeing to charge identical prices for such marketing aids.

In 1926, the arrangement between Bausch & Lomb and Soft-Lite was given a somewhat more formal character by a letter of the manufacturer advising its customer as follows:

"Since the very beginning of our relations with you, in connection with this transaction, it has been understood that we would safeguard your interests in every way and it has never been our intention to make competition for you by either marketing a tinted lens of our own or producing similar tinted glass for other manufacturers and it is our intention to abide by this understanding.

"On the other hand, however, it is difficult to foresee the progress of science in producing glass possessing better properties than is obtainable at the present time and in that event we feel certain that you would not in any way desire to impede our progress in that direction.

"We hope that this may be sufficient guarantee to you that we do not wish to do anything that would look like competition in connection with the Soft-Lite and we naturally expect that your efforts in the sale of same will be continued as at present for an indefinite period unless by consent of both parties concerned a different arrangement is agreed upon.

Yours very truly,

BAUSCH & LOMB OPTICAL COMPANY.

"P. S. Tinted lenses such as Crookes, Fieuzal, Smoke, Amber, etc. which we are now manufacturing, it is understood will not come under the above arrangement."

Minor variations in the plan have occurred since that letter. Bausch & Lomb patented a lens called "Nokrome." Soft-Lite was advised that when Soft-Lite glass was used in the Nokrome lens, Soft-Lite should have exclusive distribution. There were other patented lenses manufac-

tured by Bausch & Lomb. Sometimes these lenses were ground from pink tinted glass and sometimes from other colors. Since these patented lenses were distributed by Bausch & Lomb under a licensee system, interference arose. Soft-Lite and Bausch & Lomb made mutually satisfactory adjustments so that their respective retailers might have some of the advantages of dealing in the Bausch & Lomb patented lenses ground out of Soft-Lite glass.

Again, Soft-Lite was released from its obligation to take second quality lenses and Bausch & Lomb agreed to sell them only in foreign countries where Soft-Lite had no offices and at prices acceptable to both Soft-Lite and Bausch & Lomb.

Reference has been made to the fact that Bausch & Lomb owned stock in optical wholesale companies which distributed Soft-Lite lenses and blanks. A stipulation stated that

"Bausch & Lomb, through its ownership of a majority of the outstanding voting stock of each of said wholesale companies, has power to coordinate and control the sales and pricing policies of said wholesale companies."

These subsidiaries were acquired by Bausch & Lomb "at intervals subsequent to the original arrangement with Soft-Lite." They now are the largest outlet for Soft-Lite lenses, taking sixty per cent of Soft-Lite sales. They were substantial customers of Soft-Lite before they became affiliates of Bausch & Lomb. Soft-Lite is treated by its wholesale customers alike whether or not the customers are Bausch & Lomb affiliates. It is equally true that all wholesalers have cooperated with Soft-Lite in the development of its system.

Bausch & Lomb thus profited from the Soft-Lite business in two ways: first, by profit made in manufacturing and selling to Soft-Lite; second, by sharing, through stock

ownership of wholesale distributors of Soft-Lite's goods, in the profits which lay between the Soft-Lite selling price and the consumer purchase price. Bausch & Lomb, the evidence shows, understood well as early as 1925 the advantages to itself through these subsidiaries of the Soft-Lite plan, which secured an increased profit for division among distributing agencies. As a consequence, Bausch & Lomb concerned itself with prices charged to wholesalers by Soft-Lite, discussed each step of the price mark-up from Soft-Lite up to the consumer, insisted that reductions in its prices to Soft-Lite should be passed along the distribution line, and through its affiliated corporations cooperated in the price arrangements and the elimination of undesirable retailers.

Soft-Lite's control of distribution did not cease with this sale of its goods to optical wholesalers. It sought as wholesale outlets distributors who were free from business alliances with Soft-Lite's competitors. It sold only to wholesalers who were willing to cooperate with its policy. These wholesalers it designated as dealers and sold its goods only through them. Soft-Lite's wholesalers were allowed to resell only to retailers who held licenses from Soft-Lite. When retailers were licensed, the wholesalers were notified that they were at liberty to sell to the specified retailer. On the cancellation of the license, the wholesalers were notified in writing that the retailer was no longer entitled to receive Soft-Lite lenses. If a wholesaler did business with unapproved retailers, it was excluded from Soft-Lite's list of designated wholesalers. The wholesalers were required to distribute with each pair of Soft-Lite lenses a numbered certificate called a "Protection Certificate." By this certificate the wholesale outlet for Soft-Lite lenses found in the hands of unlicensed retailers could be traced by Soft-Lite. The wholesalers were told that the certificates were intended for

this purpose. Soft-Lite indicated to the wholesalers the prices to be received by them from retailers by means of published price lists. Through these price lists, made available to wholesalers and retailers alike, the retailers could determine the prices wholesalers were to charge.

It was determined by the District Court (and this finding is without challenge) that Soft-Lite and the wholesalers understood that material deviation would result in the discontinuance of the offending wholesaler as an outlet.

Soft-Lite's plan of distribution was rounded out by its arrangements with the retail optical concerns. As we have just pointed out, the retailers knew from the published lists the prices the wholesalers were expected to charge them. The retailers were selected by Soft-Lite with care equal to that used in selecting wholesalers. Soft-Lite, in the words of its brief, was "manufactured and advertised as a quality product, Soft-Lite must be sold as such." "Ethical" retailer opticians and optometrists were sought. Those who quoted prices in their advertisements or operated as adjuncts to department or jewelry stores were frowned upon. Retail prices to consumers were not fixed by Soft-Lite. It seems to be admitted, however, that the retailer was required to maintain prevailing local price schedules. An application form dated February 1, 1939, for retail stock licensees calls for representations to that effect from the Soft-Lite representative recommending the application and the approval of a Soft-Lite wholesaler. This practice apparently applied to all retailers. The District Court found that retailers agreed to sell the lenses at prices prevailing in the locality and that Soft-Lite required retailers to sell the pink tinted lenses "at a premium over comparable untinted lenses."

Under its present system, Soft-Lite grants a revocable, exclusive and nontransferable "license" to the retailer to

buy Soft-Lite lenses and lens blanks from "licensed" Soft-Lite distributors or wholesale "licensees" and to resell the lenses at prevailing prices in the locality where the retailer is located. In turn, the licensee agrees to promote the sale of Soft-Lite lenses and to do nothing to injure their prestige. The licensee was required to state that he understood that the substitution of other lenses for Soft-Lite would adversely affect that prestige. The licensee further agreed to sell only under the trade names and mark of Soft-Lite and only to the consumer or patient.[2]

The retailer's agreement to conform to the license requirements was enforced by surveillance through Soft-Lite's salesmen and by cancellation of the retailer's license if he failed to abide by its terms. Wholesalers were notified of such cancellation.

The Miller-Tydings Act of August 17, 1937, 50 Stat. 693, amended the Sherman Act so as to permit minimum prices for the resale of a commodity which bears the trade mark of the distributor in states where contracts of that description are legal by statute so far as intrastate transactions are concerned, and beginning in 1940 Soft-Lite has entered into resale price maintenance contracts with a number of wholesalers, presumably in conformity with the Miller-Tydings Act. The District Court was of the view that these contracts "came into existence as a patch upon an illegal system of distribution of which they have become an integral part."

It is accepted by all parties that the transactions of Bausch & Lomb and Soft-Lite are in interstate commerce as the term "commerce" is used in the Sherman Act.

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[2] In 1939 a change was made from the license agreement not to deal in any lens similar in tint, color or shade to Soft-Lite lenses. The change followed an agreed order of the Federal Trade Commission of June 23, 1938, Docket No. 2717, In the Matter of Soft-Lite Lens Co., Inc.

The judgment of the District Court determined that Soft-Lite and certain of its officers had contracted and conspired with optical wholesalers and retailers to violate the Sherman Anti-trust Act in the following particulars:

"(a) by entering into so-called 'license' agreements with optical retailers which fix the prices at which said retailers shall sell Soft-Lite lenses; (b) by entering into so-called 'license' agreements with optical retailers which provide that said retailers will sell such lenses only to the public; (c) by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated as 'licensees' by the defendant Soft-Lite Lens Company, Inc.; (d) by entering into agreements with wholesale customers which fix the prices at which said wholesalers shall sell Soft-Lite lenses and blanks; (e) by entering into 'Fair Trade' resale price maintenance contracts with said wholesalers as an integral part of the illegal distribution system of Soft-Lite blanks and lenses; and (f) by enforcing the agreements set forth in subdivisions (a) through (e) of this paragraph."

The judgment directs Soft-Lite to cancel its license agreements with retailers and its Fair Trade resale price maintenance contracts and agreements with wholesalers fixing prices and restricting their resales to Soft-Lite's retail licensees. Soft-Lite and its agents are enjoined from enforcing these contracts or using identification devices, such as the "Protection Certificates," for tracing resales of lenses or blanks purchased from Soft-Lite. They are likewise forbidden to enter into any other agreement similar in effect or purpose to those adjudged unlawful, except the Fair Trade contracts. These latter may be renegotiated after six months from the notices of cancellation which the judgment directs to issue. There is also a prohibition against Soft-Lite's and its officers' system-

atically suggesting resale prices on lens or blanks for said six months. Bausch & Lomb and various individuals are adjudged to be free of the violations which are charged in the complaint. The right to inspect records and to interview officers and employees is reserved to the Department of Justice in the manner set out below.[3] Finally, jurisdiction of the case is retained for further orders, or directions, including modification or termination of any of the provisions as well as their enforcement. Cf. *Sugar Institute* v. *United States,* 297 U. S. 553, 605.

Two appeals are before us. The Government seeks to establish that the agreement of Bausch & Lomb not to sell pink tinted glass or lenses to any competitor of Soft-Lite and not to compete with Soft-Lite in the marketing of any

[3] "9. That for the purpose of securing compliance with this Judgment, authorized representatives of the Department of Justice, upon the written request of the Attorney General or an Assistant Attorney General, shall be permitted access, within the office hours of the said defendants, and upon reasonable notice, to books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or the control of the said defendants, or any of them, relating to any of the matters contained in this judgment, such access to be subject to any legally recognized privilege. Any authorized representative of the Department of Justice, subject to the reasonable convenience of the said defendants, shall be permitted to interview officers or employees of said defendants without interference, restraint or limitation by said defendants; provided, however, that any such officer or employee may have counsel present at such interview. Said defendants, upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this Judgment as from time to time may be necessary for the purpose of enforcement of this Judgment; provided, however, that the information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law."

pink tinted lens unreasonably restrains commerce in violation of the Sherman Act. By its appeal, the Government urges also a broadening of the decree by the substitution of a permanent instead of a six months' injunction against new Fair Trade agreements and against systematic suggestion of resale prices by Soft-Lite. It also asks an addition to the decree requiring Soft-Lite to sell its product without discrimination to any person offering to pay cash therefor.

The other appeal is by Soft-Lite and those of its officers who are enjoined. This appeal attacks the provisions of the judgment cancelling agreements of Soft-Lite with wholesalers to charge uniform prices to retailers, enjoining systematic suggestions of resale prices and execution of Fair Trade resale price maintenance contracts even for six months, and allowing future discovery by the Department of Justice in order to police the decree.

Since the alleged illegality of the Soft-Lite distribution system is the heart of the scheme which the Government attacks, we shall examine first the judgment from the standpoint of Soft-Lite's objections to it and then from that of the Government's desired additions as to Soft-Lite.

As the Court is equally divided upon the issue raised in the Government's appeal in No. 62 by its request for a reversal of the provision of the judgment which dismisses Bausch & Lomb and its officers from the proceeding, that provision stands affirmed.

I.

Our task of examining Soft-Lite's objections is simplified by the frank recognition of those appellants that "the retail license provisions binding dealers to sell at locally prevailing prices and only to the public constitute illegal restraints." Our former decisions compel this conclu-

sion. Price fixing, reasonable or unreasonable, is "unlawful *per se*." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218; *United States* v. *Trenton Potteries*, 273 U. S. 392, 397; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 465. The retailer's price to his customer is the single source of stable profits for all handlers.

These illegal contracts cannot be considered, however, as happenings, completely insulated from other incidents of the Soft-Lite distribution system. When we turn to the provisions of the decree which are attacked here by Soft-Lite, requiring it to cancel its resale price agreements with wholesalers as well as retailers and to avoid such requirements for six months either by contract or suggestion, and thereafter to act only in accordance with the Miller-Tydings Act, we must first note that it is plain that the arrangements for price maintenance in the wholesalers' sales to retailers are an integral part of the whole distribution system. Not only are Soft-Lite wholesalers carefully selected and cooperative but they may sell only to Soft-Lite's retail licensees. Undesirable wholesalers are excluded from the system and the District Court found that by means of published wholesale price lists, put in the hands of wholesalers and retailers alike, resale prices of wholesalers are designated by Soft-Lite. The requirement of the wholesalers' recommendation as to the business character of the applicant for a retail license, the evidence of espionage, the limitation of resales to Soft-Lite retail licensees, the existence of the "Protection Certificate" to mark the wholesaler who might violate the arrangement, the uniformity of the prices, as prescribed in Soft-Lite's published lists, which are charged retailers by wholesalers—all amply support, indeed require, the inference of the trial court that a conspiracy to maintain prices down the distribution system existed between the wholesalers and Soft-Lite through the years prior to this suit.

Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 404. Even the additional protection of a copyright, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Interstate Circuit* v. *United States*, 306 U. S. 208, 221, and cases cited, or of a patent, *United States* v. *Masonite Corp.*, 316 U. S. 265, 276; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 664–665, and cases cited, adds nothing to a distributor's power to control prices of resale by a purchaser. The same thing is true as to restriction of customers. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 465; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 47–49; *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45.

Not only do the appellants urge that conspiracy between Soft-Lite and the wholesalers should not be found from the foregoing evidence but they also say that they come within the scope of certain of our cases which are said to indicate that a simple refusal to sell to customers who will not resell at prices fixed by the seller is permissible under the Sherman Act. They cite *United States* v. *Colgate & Co.*, 250 U. S. 300; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452–3; *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475–6; and *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582. None of these cases involve, as the present case does, an agreement between the seller and purchaser to maintain resale prices.

The *Colgate* case turned upon the sufficiency on demurrer of an indictment under the Sherman Act against a manufacturer for requiring its dealers to maintain prices. As the indictment was construed to allege only specification of resale prices by the manufacturer and refusal to deal with customers who did not maintain them, this Court held the indictment insufficient as no reference was made in it to a purpose to monopolize and in such a posture the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U. S. at 302, 306, 307. Cf. *United States* v. *Schrader's Son,* 252 U. S. 85, 99.

The *Beech-Nut* case recognizes that a simple refusal to sell to others who do not maintain the first seller's fixed resale prices [4] is lawful but adds as to the Sherman Act, "He [the seller] may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." 257 U. S. at 453. The Beech-Nut Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters. *Idem,* pp. 451, 454, 455. As the decision as to the Curtis Company involved only selling agencies, 260 U. S. at 581, and that as to Sinclair the restricted use of a distributor's gasoline tanks, 261 U. S. at 474, they are inapplicable to a consideration of a refusal by a distributor to sell except to chosen dealers.

[4] Cf. Robinson-Patman Act, § 1, 49 Stat. 1526.

As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers in Soft-Lite's published resale price list. The wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. *Interstate Circuit* v. *United States,* 306 U. S. 208, 226, 227; *United States* v. *Masonite Corp.,* 316 U. S. 265, 274–75; *Sugar Institute* v. *United States,* 297 U. S. 553, 601.

So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and by limiting the customers of the wholesalers to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act. This finding justifies the order directing cancellation of the wholesale arrangements and cessation by Soft-Lite of systematic price suggestions. Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.

Soft-Lite makes objection also to the clause of the decree which holds null and void certain resale price maintenance contracts entered into by Soft-Lite and many of its wholesalers after the passage of the Miller-Tydings Amendment to the Sherman Act on August 17, 1937, 50 Stat. 693. See note 1, *supra.* Objections on the same grounds apply to other clauses of the decree forbidding enforcement of these existing "Fair Trade" contracts with wholesalers and Soft-Lite's entering into any others until six months after certain notices of cancellation which are required by the decree but which have not yet been given owing to this appeal. Soft-Lite contends that the "Fair Trade" agreements are strictly within the terms of the Miller-Tydings

Act and we assume the correctness of that position.[5] The disadvantage at which these clauses place Soft-Lite towards its customers and competitors is pointed out.

The District Court said that these contracts "came into existence as a patch upon an illegal system of distribution" and as an integral part of that system. As some wholesalers do certain cutting and edging work on the blanks for sale to retailers who do not do this grinding for themselves, the "Fair Trade" contracts for fixing resale prices apply only to those sales, known as "stock" sales, where the lenses and blanks are resold in the same form in which they come from Soft-Lite. See *United States* v. *Univis Lens Co.*, 316 U. S. 241, 253–54. We think that where a distribution system exists, prior to the making of such price maintenance contracts, which is illegal because of unallowable price fixing contracts and where that illegality necessarily persists in part because a portion of the resales are not covered by the "Fair Trade" contracts, as just explained, subsequent price maintenance contracts, otherwise valid, should be cancelled, along with the invalid arrangements, in order that the ground may be cleansed effectually from the vice of the former illegality. Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461. Cf. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 96, 470, 476–77; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205–6.

The last objection brought forward by Soft-Lite to the decree is that paragraph 9, which is set out in full in note

[5] See the decision below, 45 F. Supp. 387, 399. We do not understand the opinion of the District Court to impugn the validity of bilateral contracts, identical in form, between a producer or distributor, on the one hand, and their customers on the other, entered into under the Miller-Tydings Act.

3, is an unconstitutional exercise of judicial power by virtue of the provisions of the Fourth and Fifth Amendments or, at any rate, an improper use of the trial court's discretion.

The first sentence requires Soft-Lite to permit authorized representatives of the Department of Justice to have access to all records and documents of Soft-Lite which are in Soft-Lite's control, "relating to any of the matters contained in this judgment . . . subject to any legally recognized privilege." [6] The second sentence we construe to forbid Soft-Lite or its officers from directing its personnel to refuse to discuss with investigators of the Department the affairs of Soft-Lite relating to any of the matters contained in the judgment and from barring from their property investigators who may appear unprovided with search warrants. This second sentence purports to give no other right of investigation of the affairs of the appellants. The third and last sentence directs the defendants to submit on the written request of the Department such reports in writing "with respect to any of the matters contained in this judgment" as may be necessary to enforce it.

There is nothing in the United States Code relating to monopolies and combinations in restraint of trade which makes provision for such broad visitatorial powers. Without this statutory authority, United States officials could not require the corporation to submit to this examination without a search warrant. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 356–58; *United States* v. *Louisville & N. R. Co.,* 236 U. S. 318, 329–38. Cf. *Guthrie* v. *Harkness,* 199 U. S. 148, 158. The provision was evi-

[6] The wording of the sentence includes the papers of the individual defendants who are officers of Soft-Lite. The United States disclaims in its brief, page 55, so broad a meaning. We accept the suggested interpretation that the paragraph relates only to the papers belonging to the corporation. Cf. *Wilson* v. *United States,* 221 U. S. 361, 376–85.

dently sought and allowed to enable the Government to obtain information as to the operations of Soft-Lite subsequent to the judgment declaring Soft-Lite's distribution operations unlawful, to guide the responsible officials of the Department of Justice in their duty of protecting the public against a continuance of the illegal combination and conspiracy without the necessity of the expense and difficulty of extended investigation or renewed hearings under the jurisdiction retained for modification or enforcement. If reasonably necessary to wipe out the illegal distribution system, we see no constitutional objection to the employment by equity of this method. In the immediately preceding paragraphs of this opinion which discuss the power of the trial court to compel the cancellation of "Fair Trade" agreements, executed during and as a part of the unlawful distribution system, we cited important precedents of this Court which uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. These precedents are applicable here. The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to "be resolved in favor of the Government and against the conspirators." *Local 167* v. *United States,* 291 U. S. 293, 299; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532.

The Fifth Amendment does not protect a corporation against self-incrimination through compulsory production of its papers, *Wilson* v. *United States,* 221 U. S. 361, 375; *Hale* v. *Henkel,* 201 U. S. 43, 74–75; *Wheeler* v. *United States,* 226 U. S. 478, although it does protect an individual, *Boyd* v. *United States,* 116 U. S. 616. A corporation is chartered with special powers only. Its creator, the State, may examine into its records to see whether or not the privileges have been abused. Our dual form of government necessarily authorizes the United States to

exercise these powers in the vindication of its own laws. *Hale* v. *Henkel, supra.* The *Boyd* case pointed out that, as to individuals, the extortion of his private papers by subpoena was not only compelling self-incrimination but was also an unreasonable search and seizure within the Fourth Amendment. 116 U. S. at 634. Upon further examination of the problem of the inter-relation of the two Amendments in *Hale* v. *Henkel,* 201 U. S. at 72–73, this Court reached the conclusion that the Fourth Amendment was not intended to interfere with "the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence," so long as the scope of the subpoena was reasonable. The power of Congress to require disclosure of corporate documents, a question adverted to in *Hale* v. *Henkel,* p. 77, but not decided, was upheld in *United States* v. *Louisville & N. R. Co., supra.* The scope of equity's power, Sherman Act, § 4, 26 Stat. 209, to obviate continued restraint on trade in accordance with the Congressional direction as to the use of the injunction against violators of the Sherman Act is no more restricted in its field than that of Congress.

The appropriateness of the visitatorial remedy raises a different question. Of course, a mere prohibition of the precise scheme would be ineffectual to prevent restraints. *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 308. The circumstances of each case control the breadth of the order. *Labor Board* v. *Express Publishing Co.,* 312 U. S. 426, 436. The other provisions of the decree are important. If in the present case, Soft-Lite was required for the indefinite future to sell its goods to any buyer with cash to pay the purchase price, there would not be the same need for visitatorial powers. The first sentence of the provision of the decree under discussion compels the disclosure only of papers relating to the matters contained in the judgment. This we think is limited

sufficiently to satisfy the rule as to necessary certainty. *Wilson* v. *United States, supra.* We cannot say that the first two sentences of the 9th paragraph of the decree, as herein construed, were beyond the discretion of the trial judge. We are of the view that the third sentence, relating to reports, is too indefinite for judicial enforcement and therefore improper. Cf. *Swift & Co.* v. *United States,* 196 U. S. 375, 400, 402.

II.

The United States seeks extensions of the decree as entered against Soft-Lite. In the Government's view the existing prohibitions, although coupled with the retention of jurisdiction for further orders or directions, including modification and enforcement, are insufficient to prevent continuance of the purposes and effects of the unlawful Soft-Lite distribution system. Specifically, we are asked to direct the inclusion of requirements that Soft-Lite file "with the district court a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor."

The Sherman Act is intended to prevent unreasonable restraints of commerce. The Clayton amendment, 38 Stat. 731, outlawed agreements with customers which restricted the customer from dealing with the products of a competitor of the seller. Persons injured by unlawful restraints may recover threefold damages. The federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of

service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Federal Trade Comm'n* v. *Raymond Co.*, 263 U. S. 565, 573. We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

What we have just said as to the Government's request for a requirement of sales by Soft-Lite to all applicants for its commodities is relevant to the Government's other request for modification of the decree to make permanent the six months' prohibition against Soft-Lite's systematically suggesting resale prices on its lenses and the execution of resale price maintenance contracts under the Miller-Tydings Act. The path is narrow between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices under this decree, but we think Soft-Lite is entitled to traverse it, after a reasonable interim to dissipate unlawful advantages, with such aid as Congress has given by the Miller-Tydings Act. The suggestion for a permanent injunction is unacceptable.

These conclusions lead us to modify the judgment by striking out the last sentence of paragraph 9, quoted in note 3. As so modified the judgment is affirmed.

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

UNITED STATES *v.* BLAIR, INDIVIDUALLY AND TO THE USE OF ROANOKE MARBLE & GRANITE CO., INC.

CERTIORARI TO THE COURT OF CLAIMS.

No. 75. Argued February 1, 1944.—Decided April 10, 1944.

1. The Government construction contract here involved imposed no duty on the Government to take affirmative steps to prevent a contractor from unreasonably delaying or interfering with the attempt of another contractor to complete construction in advance of the time specified; and the Government was not liable for damages for such delay. P. 733.

   The fact that after the execution of the contract the contractor gave notice to all other parties of his intention to finish ahead of schedule does not alter the obligation of the Government.
2. An award of damages by the Court of Claims against the Government on items which were the subject of "disputes concerning questions arising under this contract"—though the actions of the Government agents upon which the claims were based be assumed to have been unauthorized, unreasonable and arbitrary—*held* erroneous in view of the failure of the contractor to appeal to the departmental head as required by Article 15 of the contract, it not appearing that the appeal procedure provided was in fact inadequate. P. 735.
3. The Court of Claims properly allowed a claim of the contractor, to the use of a subcontractor, for extra labor costs incurred by the subcontractor under conditions erroneously imposed by the Government superintendent. P. 737.

99 Ct. Cls. 71, reversed in part.

CERTIORARI, 320 U. S. 720, to review a judgment for the plaintiff in a suit against the Government upon a contract.

Assistant Attorney General Shea, with whom *Solicitor General Fahy* and *Messrs. Valentine Brookes* and *Melvin Richter* were on the brief, for the United States.

Messrs. H. Cecil Kilpatrick and *Richard S. Doyle,* with whom *Mr. Fred S. Ball, Jr.* was on the brief, for respondent.

Messrs. Prentice E. Edrington, Bernard J. Gallagher, John W. Gaskins, William E. Hayes, and *Frederick Schwertner* filed a brief on behalf of the Associated General Contractors of America, Inc., as *amicus curiae,* in support of the respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Respondent, a general contractor of long experience in constructing federal buildings, was awarded a contract by the United States to construct certain buildings at the Veterans' Administration Facility at Roanoke, Virginia. After completing the contract, respondent filed a claim with the Veterans' Administration for certain expenses which he claimed were caused by the delay of a mechanical contractor and for other expenses alleged to have been imposed on him by the arbitrary, capricious and unfair conduct of Government agents at the work site. The claim was rejected and this suit in the Court of Claims followed. Judgment in the sum of $130,911.08 was awarded by that court to respondent, 99 Ct. Cls. 71. We granted certiorari because of important questions of interpretation of the Government construction contract used in this case.[1]

I.

Respondent's contract provided that the construction work was to be completed within 420 days from the receipt of notice to proceed. Concurrently, one R. J. Redmon was awarded a mechanical contract [2] by the United

[1] The form of Government contract here involved was "U. S. Government Form P. W. A. 51," the critical provisions of which are substantially the same as those in the standard form of Government construction contract.

[2] The terms and conditions of both respondent's and Redmon's contracts were identical, differing only in the description of the work to be performed.

States to perform the plumbing, heating and electrical work in the buildings to be constructed by respondent. Redmon's work was to be commenced promptly after receipt of notice to proceed and was to be completed at a date not later than that provided in respondent's contract.

Respondent proceeded promptly with the construction work. He planned to complete the work within 314 days instead of the 420 days allowed him by the contract. However, no representative of Redmon reported at the work site until nearly three months after he received notice to proceed. The contracting officer had previously made many urgent demands that Redmon proceed with his work and had advised him that the progress of respondent's construction work was being delayed by his failure to start work; Redmon had also been threatened with termination of his contract. He finally started work, but made slow progress. At no time did Redmon have adequate equipment or a sufficient number of men on the job properly to carry on the work called for by his contract, nor was he financially able at this time to complete his work. The Court of Claims found that reasonable inquiry by the Government would have disclosed these facts but that no such inquiry was made because of false statements and reports made to the contracting officer by the Government agents in charge of the work at the site.

Several months later, Redmon advised the contracting officer that he was unable to proceed with his contract. Redmon's surety secured a substitute and every effort was made to overcome the delay. As a result, respondent was able to finish his construction work within the required 420 days but not within the 314 days as he had planned. The court below found that respondent was unreasonably delayed for a period of three and one-half months due to the failure of the United States promptly to terminate

Redmon's right to proceed, that the cost of the delay to respondent was $51,249.52, and that the United States was liable therefor.

We are of the opinion, however, that nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date and that it was error for the Court of Claims to award damages to respondent based upon a breach of this non-existent obligation.

If the parties did intend to impose such an obligation or duty on the Government, they failed to embody that intention expressly in the contract. Article 13 of the contract merely obligates the contractor to cooperate with other Government contractors and to refrain from committing or permitting any act which would delay such other contractors. Article 9 imposes liquidated damages upon the contractor for delay in completing his work unless due to such unforeseeable causes as "acts of the Government." Nowhere is there spelled out any duty on the Government to take affirmative steps to prevent a contractor from unreasonably delaying or interfering with the attempt of another contractor to finish ahead of his schedule.

Nor is there anything in the context of the contract to lead us to believe that the parties meant more than they said, or that the contract implies something that was not expressed. The Government and respondent covenanted that the construction work would be completed within 420 days; Redmon's contract was grounded on this same time estimate. They cannot be said to have executed these contracts in contemplation of the then unrevealed intention of respondent to complete his work three and one-half months early. The fact that respondent subsequently gave notice of this intention to all the other parties con-

cerned could not give rise to a new obligation on the Government to compel accelerated performance from Redmon.

Respondent had the undoubted right to finish his construction work in less time than the stipulated 420 days, but he could not be forced to do so under the terms of the contract. To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract. Compare *Crook Co.* v. *United States,* 270 U. S. 4; *United States* v. *Rice,* 317 U. S. 61.

II.

The Court of Claims, in addition to awarding damages for the Government's delay in terminating Redmon's contract, awarded respondent $79,661.56 damages for extra labor and materials, excess wages and miscellaneous costs found to be the result of unauthorized acts, rulings and instructions of the Government superintendent and his assistant. The court also found that these acts, rulings and instructions were unreasonable and in many instances arbitrary, capricious and so grossly erroneous as to imply bad faith.

Assuming without deciding that the actions complained of were unauthorized, unreasonable and arbitrary, we cannot conclude that recovery of the resulting damages was proper in this case. Article 15 of the contract in suit provides that all disputes "concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." All

of the items on which the recovery of $79,661.56 was based were the subject of "disputes concerning questions arising under this contract." Respondent appealed some of the decisions or instructions of the Government superintendent to the contracting officer, which resulted in at least one ruling favorable to respondent.[3] As to the adverse rulings, however, respondent made no further appeal to the head of the appropriate department or his authorized representative. Moreover, the remaining items which were the subject of sharp dispute between respondent and the superintendent were not even appealed by respondent to the contracting officer. And where the contracting officer could be said to have acquiesced in the superintendent's rulings, no attempt was made to appeal further to the departmental head.

Respondent has thus chosen not to follow "the only avenue for relief," *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

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[3] See Part III, *infra*.

The Court of Claims sought to justify respondent's failure to pursue the procedure outlined in Article 15. It found that the superintendent and his assistant acted so unreasonably as to make it impossible for respondent to invoke the appeal procedure without subjecting himself to punishment and reprisals. It also found that respondent reasonably concluded that "the best and most practical way of handling the matter of protests" was informally through conferences with the contracting officer in Washington; the latter, however, was often unable or unwilling to help him. Thus the court ruled that respondent was excused from following the procedure set forth in the contract. We cannot agree. Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts. There was no finding or evidence that appeal to the head of the appropriate department or to his authorized representative would have been futile or prejudicial. Compare *United States* v. *Smith,* 256 U. S. 11, 16; *Ripley* v. *United States,* 223 U. S. 695, 702. We cannot on this record attribute to the departmental head the alleged unreasonable attitude of his subordinates. Nor can we assume that the departmental head would have adopted an arbitrary attitude or refused to grant respondent the relief to which he may have been entitled. Moreover, nothing in the record suggests that he could not effectively supervise his subordinates or provide full and prompt relief. Thus, absent a valid excuse for not appealing the disputed items to the departmental head pursuant to Article 15, respondent cannot assert a claim for damages in the Court of Claims. If it were shown that the appeal procedure provided in the contract was in fact inadequate for the correction of the alleged unreasonable attitude of the subordinate Government officials, we would have quite a

different case. But here we must insist, not that respondent turn square corners, but that he exhaust the ample remedies agreed upon.

III.

Included in the $79,661.56 award of miscellaneous damages was one item of $9,730.27 on a claim to the use of the Roanoke Marble & Granite Company, Inc., a subcontractor of respondent who furnished the materials and performed the labor necessary to install the tile, terrazzo, marble and soapstone work called for in respondent's contract with the Government. This award was based upon extra labor costs incurred under conditions erroneously exacted by the Government superintendent. Respondent appealed this matter to the contracting officer, who finally rendered a decision in favor of respondent and the subcontractor. The Government has not reimbursed either respondent or the subcontractor for these excess labor costs; nor has respondent paid the subcontractor for such costs. The court below made no finding, and the subcontract as introduced in the record does not expressly indicate, that respondent was liable to the subcontractor for the acts of the Government upon which the claim was based.

Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government. *Merritt* v. *United States,* 267 U. S. 338. But it does not follow that respondent is barred from suing for this amount. Respondent was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price for the tile, terrazzo, marble and soapstone work whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such

costs were incurred or such services were performed personally or through a subcontractor. Respondent's contract with the Government is thus sufficient to sustain an action for extra costs wrongfully demanded under that contract. *Hunt* v. *United States,* 257 U. S. 125.

The decision of the Court of Claims is reversed as to all items except the claim of $9,730.27. We affirm the judgment as to the latter claim.

MR. JUSTICE FRANKFURTER, dissenting in part:

Those dealing with the Government must no doubt turn square corners. While agents for private principals may waive or modify provisions in contracts which circumstances have rendered harsh, provisions in government contracts cannot be so alleviated. But in order to enforce the terms of a government contract courts must first construe them. And there is neither law nor policy that requires that courts in construing the terms of a government contract should turn squarer corners than if the same terms were contained in a contract between private parties. "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument." *Hollerbach* v. *United States,* 233 U. S. 165, 171–172. Like all other writings that do not have the precision of mathematical terms, government contracts have interstices that secrete relevant implications. Neither a statute which provides that contracts shall be reduced to writing, nor the parol evidence rule "precludes reliance upon a warranty implied by law." *United States* v. *Spearin,* 248 U. S. 132, 138. Unless the terms of a contract are so explicit as to preclude it, the presupposition of fair dealing surely must underlie a government as well as a private contract. *Ripley* v. *United*

States, 223 U. S. 695, 701–702; *United States* v. *Smith,* 256 U. S. 11, 16.

Accordingly, provisions in a government contract defining methods for settling controversies by appeal to the contracting branch of the Government presuppose effective resort to such methods of settling questions that arise in carrying out a contract—they presuppose that administrative remedies as a condition to judicial relief are not rendered futile and nugatory. This does not of course question the good faith of the head of the Veterans' Administration. But where the man on the spot, in his daily relations with the contractor, shows the kind of arbitrary attitude found by the Court of Claims, he cannot be effectively supervised by the head of a department. In any event, the burden of incurring the subordinate's future hostility by appeals to the head of a department should not be cast on the contractor. The findings of the Court of Claims in this case can only mean that it would have been wholly futile, and worse than futile, to invoke the explicit provisions of the contract for resort to administrative relief. Therefore, as a reciprocal duty of the Government, the contract brings into operation the implied warranty that those who have in effective keeping the administrative machinery for settling controversies will not prevent its utilization for all practical purposes.

The Court of Claims awarded respondent $79,661.56 to compensate for losses and increased costs resulting from the unreasonable and improper requirements imposed upon the contractor by the Government's superintendent of construction and his assistant. The circumstances surrounding the various items which go to make up this sum differ in details, but the basis on which the Court of Claims found for the contractor is the same.

The findings of fact of the court below tell a story of arbitrary impositions. From the outset, the superintend-

ing government officers required the contractor "to do things admittedly not required of him under the contract on threat of reprisals for refusal." These were not empty threats. The evidence shows that an unauthorized and unreasonable order to erect outside scaffolding for laying bricks was enforced by rejecting brickwork which was not precisely uniform to a maximum of one-sixteenth of an inch by measurement, and exacting of plaintiff mortar joints that did not vary more than one-eighth of an inch by measurement. That these rejections and exactions were wilful and oppressive became clear when all objections ceased as soon as the contractor decided to comply and erect the outside scaffolds. This is but one illustration of what was apparently a systematic practice of unjustified demands and vexations.

The Court of Claims found that the superintendent and his assistant "resented plaintiff's making protest to the contracting officer, thereby rendering it impossible for plaintiff effectively to protest in writing in each instance to the contracting officer through the defendant's officer at the site of the work. . . . The contracting officer in those cases involving unreasonable and arbitrary acts and instructions of the officers at the site of the work stated to plaintiff that he understood and appreciated the troubles and difficulties under which plaintiff was having to perform the work, but there was practically nothing he could do about it and that plaintiff should keep him informed but that plaintiff 'would just have to do the best he could to get along' with the officers and inspectors at the site of the work, to the end that the work be completed as soon as possible." If there is substantial evidence supporting these findings, this Court's power of review is confined to questions of law. 53 Stat. 752, 28 U. S. C. § 288.

For all but one item, there can be no doubt that the evidence is adequate and the award in accordance with

law. The contractor was awarded $107.50 for the extra cost of temperature steel used by order of the superintendent of construction in slabs reinforced with two-way rods. The record makes clear that the contract specifications supported this order of the superintendent, in that no distinction was made as to whether the slabs were reinforced by one-way or two-way rods, and the fact that the contracting officer subsequently relieved the contractor of this requirement as to two-way rods does not justify the award. In view of what I deem to be legal principles governing the construction of contracts, I should therefore affirm the judgment of the Court of Claims for damages resulting from the acts of the superintending officers after deducting $107.50.

MR. JUSTICE ROBERTS joins in this opinion.

DECISIONS PER CURIAM, ETC., FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.*

No. 209. UNITED STATES *v.* WATERHOUSE ET AL. Certiorari, 320 U. S. 723, to the Circuit Court of Appeals for the Ninth Circuit. Argued January 5, 6, 1944. Decided January 17, 1944. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE JACKSON states that, the proceeding having been commenced, as the record shows, "under the instructions of the Attorney General" and the valuation for which the Government now contends appearing to have been fixed at the time when he held that office, he thinks it inappropriate that he should now participate in the determination of the case, notwithstanding he has no recollection of personal participation in the Departmental action. *Assistant Attorney General Littell,* with whom *Solicitor General Fahy* and *Messrs. Vernon L. Wilkinson* and *Roger P. Marquis* were on the brief, for the United States. *Mr. Herman Phleger,* with whom *Mr. A. G. M. Robertson* was on the brief, for respondents. Reported below: 132 F. 2d 699.

No. —. EX PARTE LOUIS RED CLOUD. January 17, 1944. Application denied.

No. —. EX PARTE FRANK HARRIS. January 17, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

*Decisions on applications for certiorari, *post,* pp. 756, 762; rehearing, *post,* p. 800; cases disposed of without consideration by the Court, *post,* p. 800.

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No. —. BENJAMIN OLWEISS ET AL. *v.* UNITED STATES. January 17, 1944. The motion for leave to file a petition for writ of certiorari nunc pro tunc is denied.

No. 457. VIATOR ET AL. *v.* EDWINS, SHERIFF, ET AL. Appeal from and on petition for writ of certiorari to the Supreme Court of Mississippi. January 31, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. The petition for writ of certiorari is denied. *Messrs. Albert Sidney Johnston, Jr.* and *William L. Guice* for appellants-petitioners. *Mr. J. H. Sumrall* for appellees-respondents. Reported below: 195 Miss. 220, 14 So. 2d 212.

No. 560. NATHANSON *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 31, 1944. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court of the United States for the Western District of Missouri with directions to proceed in conformity with the Act of December 23, 1943, c. 377, 57 Stat. 608. *Messrs. J. Francis O'Sullivan* and *Maurice J. O'Sullivan* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. See *post*, p. 746.

No. —. ILLINOIS EX REL. WILLIAMS *v.* RAGEN, WARDEN; and

No. —. EX PARTE GARFIELD J. KELLY. January 31, 1944. Applications denied.

No. —. Ex parte Taylor Seals. January 31, 1944. The motion for leave to file petition for writ of prohibition is denied.

No. —. Ex parte James Thomas. January 31, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. Ex parte Joseph E. Jones. January 31, 1944. The motion for leave to file petition for writ of certiorari is denied.

No. —. Ex parte Merritt R. Longbrake. January 31, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. 109. City of Yonkers et al. *v.* United States et al. January 31, 1944. The motion to stay the mandate until March 1, next, is granted. Mr. Justice Black states: "I dissent. As this record stands, railroad service to Yonkers has been abandoned without any valid order authorizing such action. I therefore would permit the Court's mandate to go down. But if the mandate is to be stayed, I think that, at the very least, since the stay is equivalent to an injunction, a bond should be required of the railroad in an amount sufficient to protect the people of Yonkers against such loss as the city or its citizens may sustain in case it is ultimately decided that the railroad had no legal right to abandon its service. Cf. *Inland Steel Co.* v. *United States,* 306 U. S. 153, 156–157." Mr. Justice Douglas and Mr. Justice Murphy agree with this dissent.

See 320 U. S. 685.

No. 603. BEILFUSS *v.* CALIFORNIA. Appeal from the District Court of Appeal, 2d Appellate District, of California. February 7, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Morris Lavine* for appellant. *Messrs. Robert W. Kenny,* Attorney General of California, and *Frank Richards,* Deputy Attorney General, for appellee. Reported below: 59 Cal. App. 2d 83, 138 P. 2d 332.

No. —. EX PARTE NORMAN BAKER;

No. —. EX PARTE CHARLES JANULIS; and

No. —. EX PARTE CHARLES E. RAGGIO. February 7, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. EX PARTE GARFIELD J. KELLY. February 7, 1944. Application denied.

No. 11, original. ILLINOIS *v.* INDIANA ET AL. February 7, 1944. The motion of the State of Indiana to dismiss is denied without prejudice to any question presented, *Wisconsin* v. *Illinois,* 270 U. S. 634. The replies of the complainant to the answers are received and ordered filed.

No. 560. NATHANSON *v.* UNITED STATES. February 7, 1944. The order entered January 31st, *ante,* p. 744, is amended to read as follows:

"*Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Circuit Court of Appeals

is vacated and the cause is remanded to the District Court of the United States for the Western District of Missouri with directions to proceed in conformity with the Act of December 23, 1943, c. 377, 57 Stat. 608, but without prejudice to the consideration of any questions which petitioner may wish to raise as to the validity or application of that Act."

No. 154. ANDERSON NATIONAL BANK ET AL. *v.* REEVES, COMMISSIONER OF REVENUE, ET AL. February 7, 1944. Luckett substituted for Reeves. See *ante,* p. 233.

No. 541. FITZJERRELL *v.* BECKER, WARDEN. See *post,* p. 772.

No. 577. TRIMBLE ET AL. *v.* JUSTICE ET AL., EXECUTORS, ET AL. Appeal from and on petition for writ of certiorari to the Court of Appeals of Kentucky. February 14, 1944. *Per Curiam:* The motion for leave to file the statement as to jurisdiction is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). The petition for writ of certiorari is denied. *Mr. J. Smith Hays* for appellants-petitioners. *Messrs. LeWright Browning* and *J. J. Moore* for appellees-respondents. Reported below: 295 Ky. 178, 173 S. W. 2d 985.

No. 619. CASH *v.* METROPOLITAN TRUST CO. ET AL. Appeal from the Supreme Court of Illinois. February 14, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Simon* v. *Craft,* 182 U. S. 427, 428, 434–5; *Chaloner* v. *Sherman,* 242 U. S. 455, 459–60; (2) *Milk Wagon Drivers' Union* v.

Meadowmoor Co., 312 U. S. 287, 294; (3) *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100, 106. *Mr. Henry W. Dieringer* for appellant. *Mr. George Bayard Jones* for appellees. Reported below: 383 Ill. 409, 50 N. E. 2d 487.

No. — . Ex parte Harry C. Kelly. February 14, 1944. Application denied.

No. —. Ex parte William Clark. February 14, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. Ex parte Selvie W. Wells. February 14, 1944. The motion for leave to file petition for writ of habeas corpus is denied and the rule to show cause is discharged.

No. 195. Northwestern Electric Co. et al. *v.* Federal Power Commission. February 14, 1944. It is ordered that the opinion of the Court in this case be amended by striking out the sentence beginning "In a brief", at line 10, page 4, and by altering the first sentence of the succeeding paragraph, beginning with the word "although", to read as follows: "Although, as sugested in a brief filed by the American Institute of Accountants, the Commission's prescribed method of eliminating the write-up may not accord with the best accounting practice, it is sustained by expert evidence."

Opinion reported as amended, *ante*, p. 119.

No. 70. Thomson, Trustee of the property of the Chicago & North Western Railway Co., *v.* United

STATES ET AL. February 14, 1944. Roth substituted for Thomson. See *post*, p. 803, No. 70.

No. 4. HILL, ADMINISTRATOR, *v.* HAWES ET AL., TRUSTEES. February 14, 1944. MR. JUSTICE DOUGLAS is of the view that a rehearing of this case should be ordered. [320 U. S. 520; *post*, p. 801.]

No. —. EX PARTE JOHN FOSTER. February 28, 1944. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. ET AL.;

No. —. PATTEN *v.* DENNIS, U. S. ATTORNEY, ET AL.; and

No. —. EXUM *v.* ILLINOIS. February 28, 1944. Applications denied.

No. —. DIOGUARDI *v.* CITY OF NEW YORK PARKS ET AL. February 28, 1944. Petition for appeal denied.

No. —. L. P. STEUART & BRO., INC. *v.* BOWLES, PRICE ADMINISTRATOR. February 28, 1944. The motion of petitioner to stay the mandate and to continue the temporary restraining order is granted and the mandate is stayed and the temporary restraining order continued until March 15 next, and if on or before that date a petition for a writ of certiorari is filed in this Court in this case, it is ordered that the mandate be stayed and the temporary restraining order be continued until the final disposition of the case by this Court.

No. 142. UNITED STATES *v.* MYERS;
No. 143. UNITED STATES *v.* ARBLE;
No. 144. UNITED STATES *v.* MARTIN;
No. 145. UNITED STATES *v.* PLITZ; and
No. 146. UNITED STATES *v.* SPITZ. February 28, 1944.
On respondents' petition for clarification of the opinion of the Court, it is ordered that the two paragraphs beginning on page 10 of the slip opinion be amended to read as follows:

"As to Sundays and holidays, we construe the statute to require extra compensation for inspectors without regard to the hours of the day or whether such services are additional to a regular weekly tour of duty. Before § 5 there was no authority to pay extra compensation for Sunday and holiday work. Revised Statutes, § 2871, allowed extra pay for nighttime work only. Somewhat indirectly the Act of February 13, 1911, gave Sunday and holiday pay and the 1920 amendment made the right to that extra compensation clear by saying extra compensation shall be paid inspectors 'who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays'. This language and the Customs Regulations, note 18, *supra,* give an employee who works regular hours weekdays in daytime extra pay for Sunday and holiday work. The statute covers also those who work outside the statutory normal hours. Logically, if Sundays and holidays were not to receive extra compensation, without regard to whether services on those days were overtime, there would have been no occasion to add Sundays and holidays to the overtime. Overtime would cover every situation.

"The proviso of § 5 does not give the Collector of Customs authority to make assignments which deprive inspectors of the Sunday and holiday pay. It authorizes adjustments of hours but specifically forbids alteration of overtime pay. It is silent as to Sundays and holidays

which leaves the earlier grant of extra compensation for those days in effect. Overtime pay is also applicable to Sundays and holidays when inspectors work longer than nine hours with one hour for food and rest. The rate of overtime extra compensation on Sundays and holidays is the same as the rate for week days. The administrative practice is uncertain. It does not support a contrary conclusion. The Government cites excerpts from testimony on amendatory bills, not here directly involved, which indicate the extra compensation is paid for Sundays and holidays.[22] Findings 5 and 6 of the Court of Claims, note 17, *supra,* show that extra compensation was paid at times for Sunday and holiday services.[23]"

Opinion reported as amended, 320 U. S. 561, 574–575.

No. 497. MARIO MERCADO E HIJOS *v.* COMMINS ET AL. See *post,* p. 758.

No. 698. VAUGHN, DOING BUSINESS AS VAUGHN'S USED CARS, *v.* BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES ET AL. Appeal from the District Court of Appeal, 2d Appellate District, of California. March 6, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 552–4; *Lehmann* v. *Board of Accountancy,* 263 U. S. 394, 398; cf. *Nash* v. *United States,* 229 U. S. 373, 376–7; (2) *Caldwell* v. *Texas,* 137 U. S. 692, 698; *Bergemann* v. *Backer,* 157 U. S. 655, 656; cf. *Dohany* v. *Rogers,* 281 U. S. 362, 369; (3) *Cincinnati, N. O. & T. P. Ry. Co.* v. *Slade,* 216 U. S. 78, 83; *Mobile, J. & K. C. R. Co.* v. *Mississippi,* 210 U. S. 187, 204. *Messrs. Albert G. Bergman* and *Bates Booth* for appellant. *Messrs. Ray L. Chesebro, Frederick von Schrader,* and *Edwin F. Shinn* for appellees. Reported below: 59 Cal. App. 2d 771, 140 P. 2d 130.

No. 704. JOHN J. CASALE, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Delaware. March 6, 1944. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 89; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384–5; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130. *Mr. Charles E. Cotterill* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 52 F. Supp. 1005.

No. 119. MILLER *v.* UNITED STATES. Certiorari, 320 U. S. 732, to the Circuit Court of Appeals for the Fifth Circuit. March 6, 1944. *Per Curiam:* On consideration of the stipulation between counsel for the petitioner and the Solicitor General, the judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court of the United States for the Northern District of Texas with directions that petitioner, after reasonable notice, be accorded a hearing on the issues involved before a judge other than the sentencing judge, and that at such hearing petitioner be allowed to be present and represented by counsel, with opportunity to adduce testimony and cross-examine witnesses. It is ordered that the mandate issue forthwith. *Mr. Gerhard A. Gesell* for petitioner. *Solicitor General Fahy* for the United States. Reported below: 136 F. 2d 287.

No. —. EX PARTE FRANK ROBERSON. March 6, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. 11, original. ILLINOIS *v.* INDIANA ET AL. March 7, 1944. Luther Ely Smith, Esquire, of Saint Louis, Missouri, appointed Special Master.

No. 388. CITY OF CORAL GABLES *v.* WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & CO., ET AL. Certiorari, 320 U. S. 729, to the Circuit Court of Appeals for the Fifth Circuit. Argued February 10, 11, 1944. Decided March 13, 1944. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Messrs. Morton B. Adams* and *Ira C. Haycock,* with whom *Mr. D. H. Redfearn* was on the brief, for petitioner. *Mr. Miller Walton* for Ed. C. Wright and *Mr. F. A. Berry* for the American National Bank of Nashville,—respondents. *Mr. W. Terry Gibson* filed a brief, as *amicus curiae,* in support of respondents. Reported below: 137 F. 2d 192.

No. 710. KOHLMEYER, NEWBERGER & CO. ET AL. *v.* COOPER, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Louisiana. March 13, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Ware & Leland* v. *Alabama,* 209 U. S. 405; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 604; cf. *Minnesota* v. *Blasius,* 290 U. S. 1, 8; *Parker* v. *Brown,* 317 U. S. 341, 360–63. *Mr. Arthur A. Moreno* for appellants. Reported below: 16 So. 2d 247.

No. —. ILLINOIS EX REL. TRUITT *v.* NIERSTHEIMER, WARDEN. March 13, 1944. Application denied.

No. —. WILSON *v.* HINMAN ET AL. March 13, 1944. The motion for leave to file petition for writ of mandamus is denied.

No. —. EX PARTE STEPHEN MITCHELL; and

No. —. EX PARTE ERHARDT ELOWSON. March 13, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Ex parte Jesse T. Sylence; and

No. —. Ex parte Dennis W. Rosier. March 27, 1944. Applications denied.

No. —. Ex parte James Goode;

No. —. Ex parte Richard O'Neill;

No. —. Ex parte Louis Berman;

No. —. Johnson *v.* Nierstheimer, Warden; and

No. —. United States ex rel. Hill *v.* Ragen, Warden. March 27, 1944. The motions for leave to file petitions for writs of habeas corpus denied.

No. 935, October Term, 1942. Kelley et al. *v.* Everglades Drainage District. March 27, 1944. The motion to correct or amend the mandate is denied without prejudice to any other appropriate remedy. 319 U. S. 415.

No. 252. Flournoy, Sheriff and Ex-Officio Tax Collector, *v.* Wiener et al. March 27, 1944. It is ordered that the opinion in this case be amended by adding, at the end of the opinion, the following paragraph:

"Appellant having assigned as error the decision of the Louisiana Supreme Court holding the federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547. Or he could have filed a petition for writ of certiorari in addition to his appeal. *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U. S. 96, 98. But since he failed to raise or brief in this Court any question as to the validity of the Louisiana statute under the Fourteenth Amendment, we have no jurisdiction of the case either on certiorari or on appeal, and there is no oc-

casion for the application of Judicial Code, § 237 (c), 28 U. S. C. § 344 (c). See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 40, and cases cited."

The petition for rehearing is denied.

Opinion reported as amended *ante*, p. 253.

No. 766. HUDSON & MANHATTAN RAILROAD CO. *v.* JERSEY CITY ET AL. Appeal from the District Court of the United States for the District of New Jersey. April 3, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588–9; *Sterling* v. *Constantin*, 287 U. S. 378, 386. *Mr. John F. Finerty* for appellant. *Solicitor General Fahy and Messrs. Richard H. Field* and *Harry R. Booth* for Fred M. Vinson, Stabilization Director, and *Messrs. Charles A. Rooney* and *Charles Hershenstein* for Jersey City,—appellees. Reported below: 54 F. Supp. 315.

No. 794. RATNER *v.* CALIFORNIA. Appeal from the Appellate Department of the Superior Court of California, County of Los Angeles. April 3, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *Nash* v. *United States*, 229 U. S. 373, 376–7; *United States* v. *Ragen*, 314 U. S. 513, 523–4; (2) *Casey* v. *United States*, 276 U. S. 413, 418; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 18–19. *Mr. Morris Lavine* for appellant. *Messrs. Ray L. Chesebro* and *John L. Bland* for appellee.

No. —. EX PARTE WALTER D. STEWART; and

No. —. EX PARTE EDWARD E. P. BOYENS. April 3, 1944. Applications denied.

No. —. BETZ *v.* UNITED STATES. April 3, 1944. Petition denied.

No. —. MINNTOLE *v.* JOHNSTON, WARDEN. April 3, 1944. Motion for leave to file petition for writ of habeas corpus denied.

No. —. SMITH *v.* BIDDLE, ATTORNEY GENERAL. April 3, 1944. Motion for leave to file petition for writ of certiorari denied.

No. —. UNITED STATES EX REL. TIGNEY *v.* RAGEN, WARDEN; and

No. —. NEW YORK EX REL. VIALVA *v.* WEBSTER, SUPERINTENDENT. April 10, 1944. Applications denied.

No. —. ILLINOIS EX REL. SULLIVAN *v.* RAGEN, WARDEN; and

No. —. EX PARTE ALLAN LAMBUS. April 10, 1944. The motions for leave to file petitions for writs of habeas corpus are denied.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.

No. 493. BAUMGARTNER *v.* UNITED STATES. January 17, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Carl Wilhelm Baumgartner, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 29.

Nos. 514 and 515. UNITED STATES *v.* MITCHELL. January 17, 1944. Petition for writs of certiorari to the

United States Court of Appeals for the District of Columbia granted. *Solicitor General Fahy* for the United States. *Mr. James J. Laughlin* for respondent. Reported below: 138 F. 2d 426.

No. 560. NATHANSON *v.* UNITED STATES. See *ante*, p. 746.

No. 559. MORTENSEN ET AL. *v.* UNITED STATES. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Eugene D. O'Sullivan* and *Thomas W. Lanigan* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 139 F. 2d 967.

No. 565. WISCONSIN GAS & ELECTRIC CO. *v.* UNITED STATES. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Van B. Wake* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key* and *Chester T. Lane* for the United States. Reported below: 138 F. 2d 597.

No. 349. DECASTRO *v.* BOARD OF COMMISSIONERS OF SAN JUAN. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Hugh R. Francis* and *Gabriel de la Haba* for petitioner. Reported below: 136 F. 2d 419.

No. 613. AMERICAN SEATING CO. *v.* ZELL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs.*

William D. Whitney and *Albert R. Connelly* for petitioner. *Messrs. J. Edward Lumbard, Jr.* and *Theodore S. Hope, Jr.* for respondent. Reported below: 138 F. 2d 641.

No. 649. THE ANACONDA ET AL. *v.* AMERICAN SUGAR REFINING CO. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Cody Fowler* for petitioners. *Mr. Henry N. Longley* for respondent. Reported below: 138 F. 2d 765.

No. 497. MARIO MERCADO E HIJOS *v.* COMMINS ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. The motion for leave to file petition for writ of mandamus is denied. *Messrs. William Cattron Rigby, Pedro M. Porrata,* and *Fred W. Llewellyn* for petitioner.

No. 648. UNITED STATES *v.* HELLARD. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Fahy* for the United States. *Mr. George H. Jennings* for respondent. Reported below: 138 F. 2d 985.

No. 578. SOUTHERN RAILWAY CO. *v.* UNITED STATES. March 6, 1944. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Sidney S. Alderman, Siddon G. Boxley,* and *S. R. Prince* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Walter J. Cummings, Jr.* for the United States. Reported below: 100 Ct. Cls. 175.

No. 628. HUDDLESTON ET AL. *v.* DWYER ET AL. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Joseph R. Brown* and *Frank H. Moore* for petitioners. *Mr. William L. Curtis* for respondents. Reported below: 137 F. 2d 383.

Nos. 701 and 702. CLARIDGE APARTMENTS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 27, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John E. Hughes, Cornelius E. Lombardi,* and *Jesse Andrews* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch,* and *Mrs. Muriel Paul* for respondent. Reported below: 138 F. 2d 962.

No. 681. HERB *v.* PITCAIRN ET AL., RECEIVERS; and

No. 682. BELCHER *v.* LOUISVILLE & NASHVILLE RAILROAD CO. March 27, 1944. Petitions for writs of certiorari to the Supreme Court of Illinois granted. *Messrs. Roberts P. Elam* and *Mark D. Eagleton* for petitioners. *Messrs. Carleton S. Hadley, Geo. D. Burroughs,* and *Thos. Williamson* for respondents in No. 681; and *Mr. James A. Farmer* for respondent in No. 682. Reported below: 384 Ill. 237, 281, 51 N. E. 2d 277, 282.

No. 699. WALLING, ADMINISTRATOR, *v.* HELMERICH & PAYNE, INC. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted limited to the first question presented by the petition. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* for petitioner. Reported below: 138 F. 2d 705.

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No. 679. KOREMATSU *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Jackson H. Ralston* for petitioner. *Solicitor General Fahy* and *Mr. Edward J. Ennis* for the United States. *Messrs. Edwin Borchard, Osmond K. Fraenkel, Arthur Garfield Hays, Harold Evans,* and *Thomas Raeburn White* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 140 F. 2d 289.

No. 711. MUSCHANY ET AL. *v.* UNITED STATES; and No. 726. ANDREWS ET AL. *v.* UNITED STATES. April 3, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William R. Gentry* for petitioners in No. 711; and *Messrs. Samuel M. Watson* and *Redick O'Bryan* for petitioners in No. 726. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Valentine Brookes* and *Norman MacDonald* for the United States. Reported below: 139 F. 2d 661.

No. 741. COMMISSIONER OF INTERNAL REVENUE *v.* HARMON. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Fahy* for petitioner. Reported below: 139 F. 2d 211.

No. 674. CAROLENE PRODUCTS CO. ET AL. *v.* UNITED STATES. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted limited to the first four questions presented by the petition. *Mr. Samuel H. Kaufman* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Edward G. Jennings* and *Irvin*

Goldstein for the United States. Reported below: 140 F. 2d 61.

No. 680. SMITH ET AL., PARTNERS, *v.* DAVIS ET AL., AS BOARD OF COUNTY TAX ASSESSORS, ET AL. April 3, 1944. Petition for writ of certiorari to the Supreme Court of Georgia granted. *Messrs. Blair Foster, Philip H. Alston,* and *Wm. Hart Sibley* for petitioners. Reported below: 28 S. E. 2d 148.

No. 684. POPE *v.* UNITED STATES. April 3, 1944. Petition for writ of certiorari to the Court of Claims granted. *Messrs. George Robert Shields, Herman J. Galloway, John W. Gaskins,* and *Fred W. Shields* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Robert L. Stern* and *Melvin Richter* for the United States. Reported below: 100 Ct. Cls. 375, 53 F. Supp. 570.

No. 793. L. P. STEUART & BRO., INC. *v.* BOWLES, PRICE ADMINISTRATOR, ET AL. April 3, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Renah F. Camalier* and *Francis C. Brooke* for petitioner. *Solicitor General Fahy* and *Mr. Thomas I. Emerson* for respondents. Reported below: 140 F. 2d 703.

No. 759. KANN *v.* UNITED STATES. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Simon E. Sobeloff* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Edward G. Jennings,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 140 F. 2d 380.

No. 781. HOOVEN & ALLISON CO. *v.* EVATT, TAX COMMISSIONER. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Messrs. Luther Day* and *Thomas C. Lavery* for petitioner. *Mr. Thomas J. Herbert,* Attorney General of Ohio, for respondent. Reported below: 142 Ohio St. 235, 51 N. E. 2d 723.

No. 745. SAGE STORES CO. ET AL. *v.* KANSAS EX REL. MITCHELL, ATTORNEY GENERAL. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Kansas granted limited to the first question presented by the petition. *Messrs. Samuel H. Kaufman, George Trosk, Milton Adler,* and *Thomas M. Lillard* for petitioners. *Messrs. A. B. Mitchell,* Attorney General of Kansas, and *C. Glenn Morris* for respondent. Reported below: 157 Kan. 622, 143 P. 2d 652.

No. 768. MCDONALD *v.* COMMISSIONER OF INTERNAL REVENUE. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederick E. S. Morrison* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Newton K. Fox,* and *Miss Helen R. Carloss* for respondent. Reported below: 139 F. 2d 400.

DECISIONS DENYING CERTIORARI, FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.

No. 538. WILLIAMS *v.* ILLINOIS. January 12, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. The application for a stay is also denied. MR. JUSTICE MURPHY took no part in the consideration or

decision of these applications. *Mr. Melvin L. Griffith* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 383 Ill. 348, 50 N. E. 2d 450.

No. 518. PATRICK CUDAHY FAMILY COMPANY *v.* BOWLES, PRICE ADMINISTRATOR. January 17, 1944. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Richard H. Tyrrell* for petitioner. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 138 F. 2d 274.

No. 530. BEAMER, ADMINISTRATRIX, *v.* VIRGINIAN RAILWAY CO. January 17, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Carlton C. Sanders* for petitioner. *Mr. Lewis A. Nuckols* for respondent. Reported below: 181 Va. 650, 26 S. E. 2d 43.

No. 543. CONSUMERS BREWING CO. *v.* E. F. PRICHARD CO. ET AL. January 17, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sanford A. Headley* for petitioner. *Mr. Rodman W. Keenon* for respondents. Reported below: 136 F. 2d 512.

No. 545. SCHROEPFER ET AL. *v.* A. S. ABELL CO., INC. January 17, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. I. Duke Avnet* and *Wm. Taft Feldman* for petitioners. *Mr. Edwin F. A. Morgan* for respondent. Reported below: 138 F. 2d 111.

No. 539. BERNARDS ET AL. *v.* JOHNSON ET AL. January 17, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

No. 457. VIATOR ET AL. *v.* EDWINS, SHERIFF, ET AL. See *ante*, p. 744.

No. 542. HERMOSA AMUSEMENT CORPORATION, LTD. ET AL. *v.* CARR, TRUSTEE IN BANKRUPTCY, ET AL. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alfred T. Cluff* for petitioners. *Mr. Ira S. Lillick* for respondents. Reported below: 137 F. 2d 983.

No. 546. UNION TRUST CO., ADMINISTRATOR, *v.* DRISCOLL, FORMER COLLECTOR OF INTERNAL REVENUE. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. A. Seifert* and *William Wallace Booth* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key, J. Louis Monarch*, and *Bernard Chertcoff* for respondent. Reported below: 138 F. 2d 152.

No. 547. COMMONWEALTH TRUST CO. ET AL., EXECUTORS, *v.* DRISCOLL, FORMER COLLECTOR OF INTERNAL REVENUE. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. A. Seifert* and *William Wallace Booth* for petitioners. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.*, and *Messrs. Sewall Key* and *Bernard Chertcoff* for respondent. Reported below: 137 F. 2d 653.

No. 548. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* KEYES; and

No. 549. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* MARGUERITE KEYES, INCORPORATED. January 31, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John T. Harding, David A. Murphy,* and *R. C. Tucker* for petitioner. *Messrs. Arthur Miller* and *Alton Gumbiner* for respondents. Reported below: 138 F. 2d 382.

No. 550. WOOD ET AL. *v.* FIRST NATIONAL BANK ET AL. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Edward R. Adams* for petitioners. *Messrs. George G. Gilbert, Jr., Jewell I. Dilsaver,* and *Russell B. James* for respondents. Reported below: 383 Ill. 515, 50 N. E. 2d 830.

No. 551. CURACAO TRADING CO., INC. *v.* FEDERAL INSURANCE CO. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Theodore E. Wolcott* for petitioner. *Mr. George S. Brengle* for respondent. Reported below: 137 F. 2d 911.

No. 580. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* GOLDBERG. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frederic H. Nash* and *Clarence J. Hoyt* for petitioner. *Mr. David C. Haynes* for respondent. Reported below: 138 F. 2d 192.

No. 554. ARONOFF *v.* UNITED STATES. January 31, 1944. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Charles V. Halley* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 138 F. 2d 911.

No. 555. UNITED STATES EX REL. SILVER *v.* O'BRIEN, SHERIFF. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mrs. Esther Melnick* and *Mr. Abraham Teitelbaum* for petitioner. Reported below: 138 F. 2d 217.

No. 557. EPP *v.* BICKNELL. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. A. Sorensen* for petitioner. Reported below: 138 F. 2d 735.

No. 563. EMPIRE TRUST CO., TRUSTEE, *v.* DRISCOLL ET AL., TRUSTEES. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Glass* for petitioner. *Mr. Allen E. Throop* for respondents. Reported below: 137 F. 2d 603.

No. 564. FIDELITY & DEPOSIT CO. *v.* PINKERTON'S NATIONAL DETECTIVE AGENCY, INC. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis L. Dent* for petitioner. *Mr. Guy A. Gladson* for respondent. Reported below: 138 F. 2d 469.

No. 570. BLACK DIAMOND LINES, INC. *v.* PIONEER IMPORT CORP. ET AL. January 31, 1944. Petition for writ

of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Mr. George C. Sprague* for the Pioneer Import Corp., and *Mr. Arthur M. Boal* for the Tampa Inter-Ocean Steamship Co., respondents. Reported below: 138 F. 2d 907.

No. 499. O'BRIEN *v.* O'BRIEN ET AL. January 31, 1944. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Messrs. Rodman W. Keenon* and *Allen Prewitt* for petitioner. *Messrs. Louis Seelbach* and *William W. Crawford* for respondents. Reported below: 294 Ky. 793, 172 S. W. 2d 595.

No. 600. KELLY *v.* VIRGINIA; and

No. 601. KELLY *v.* SMYTH, SUPERINTENDENT. January 31, 1944. Petition for writs of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Thomas H. Stone* for petitioner. Reported below: 181 Va. 576, 26 S. E. 2d 63.

No. 505. LINN *v.* ILLINOIS. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 507. ILLINOIS EX REL. BACHALDER *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 508. MEYERS *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 524. ILLINOIS EX REL. DI CHIARA *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 527. HAINES *v.* ILLINOIS ET AL. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 528. DAVIDSON *v.* BENNETT, WARDEN, ET AL. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 532. PROVOST *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 533. AVONTS *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 536. ILLINOIS EX REL. DOYLE *v.* RAGEN, WARDEN, ET AL. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 540. SCHEIB *v.* RAGEN, WARDEN. January 31, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 529. NEW YORK EX REL. RICHARDS *v.* KIRBY, WARDEN. January 31, 1944. Petition for writ of certiorari to the Court of Appeals of New York denied. Reported below: 291 N. Y. 705, 52 N. E. 2d 594.

No. 544. WHITTINGTON *v.* UNITED STATES. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hall Etter* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 138 F. 2d 573.

No. 562. EDWARDS *v.* UNITED STATES. January 31, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Hugh H. Obear* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 139 F. 2d 365.

No. 571. RUCKER ET AL. *v.* FIRST NATIONAL BANK. January 31, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Harold E. Rorschach* and *Jack L. Rorschach* for petitioners. Reported below: 138 F. 2d 699.

No. 603. BEILFUSS *v.* CALIFORNIA. See *ante,* p. 746.

No. 552. CROWN CAN CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. R. Mayne* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 138 F. 2d 263.

No. 566. SCYPHERS *v.* ST. PAUL NATIONAL BANK. February 7, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. S. H. Sutherland* for petitioner. *Mr. Ralph T. Catterall* for respondent. Reported below: 181 Va. lx.

No. 567. WHOLESALE DRY GOODS INSTITUTE, INC. ET AL. *v.* FEDERAL TRADE COMMISSION. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Karl Michelet* and *Charles H. Tuttle* for petitioners. *Solicitor General Fahy, Assistant Attorney General Berge,* and *Mr. Charles H. Weston* for respondent. Reported below: 139 F. 2d 230.

No. 572. LEVY ET AL. *v.* UNITED STATES. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Eben Lesh* and *Walter Bachrach* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Edward G. Jennings* and *W. Marvin Smith* for the United States. Reported below: 138 F. 2d 429.

No. 574. COOMBS, TRUSTEE, *v.* UNITED STATES. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Max L. Rosenstein* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 137 F. 2d 736.

No. 575. ABRAMS ET AL. *v.* SCANDRETT ET AL., TRUSTEES. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit de-

nied. *Mr. Meyer Abrams* for petitioners. *Mr. A. N. Whitlock* for respondents. Reported below: 138 F. 2d 433.

No. 583. GRAND RAPIDS FURNITURE CO. *v.* GRAND RAPIDS FURNITURE CO ET AL. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Pearl M. Hart* for petitioner. *Mr. John J. Yowell* for respondents. Reported below: 138 F. 2d 212.

No. 584. WERNECKE *v.* UNITED STATES. February 7, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Leo L. Donahoe* and *Laurence B. Jacobs* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 138 F. 2d 561.

No. 616. MURRAY ET AL. *v.* LAGUARDIA, MAYOR, ET AL. February 7, 1944. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Menahem Stim* for petitioners. *Mr. Jeremiah M. Evarts* for the Board of Estimate of New York City et al., and *Messrs. Churchill Rodgers* and *Samuel Seabury* for the Metropolitan Life Insurance Co., respondents. Reported below: 266 App. Div. 912, 42 N. Y. S. 2d 612; 291 N. Y. 320, 43 N. Y. S. 2d 408.

No. 593. TOFFENETTI RESTAURANT CO., INC. *v.* NEW YORK STATE LABOR RELATIONS BOARD. February 7, 1944. The application for a stay is denied. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Abraham Teitelbaum* for petitioner. Reported below: 291 N. Y. 750, 52 N. E. 2d 961.

No. 622. BERNATOWICZ *v.* RAGEN, WARDEN. February 7, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 506. HEATH *v.* RAGEN, WARDEN. February 7, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 556. MACKRETH *v.* ALABAMA. February 7, 1944. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Walter S. Smith* for petitioner. *Messrs. William N. McQueen,* Attorney General of Alabama, and *John O. Harris,* Assistant Attorney General, for respondent. Reported below: 244 Ala. 649, 15 So. 2d 114.

No. 541. FITZJERRELL *v.* BECKER, WARDEN. February 7, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. The motion for leave to file petition for writ of habeas corpus is also denied.

No. 577. TRIMBLE ET AL. *v.* JUSTICE ET AL., EXECUTORS, ET AL. See *ante,* p. 747.

No. 568. HARPER *v.* UNITED STATES. February 14, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. F. Rawls* for petitioner. *Solicitor General Fahy* for the United States. Reported below: 138 F. 2d 538.

No. 573. SCHUCHARDT *v.* MICHIGAN. February 14, 1944. Petition for writ of certiorari to the Circuit Court

of Midland County, Michigan, denied. *Mr. A. W. Richter* for petitioner. *Messrs. Herbert J. Rushton,* Attorney General of Michigan, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 576. MEEKS *v.* TAYLOR, TRUSTEE, ET AL. February 14, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. L. E. Heath* and *Benjamin E. Pierce* for petitioner. Reported below: 138 F. 2d 458.

No. 582. UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY *v.* POWELSON, ASSIGNEE, ET AL. February 14, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Fahy* and *Mr. William C. Fitts, Jr.* for petitioner. *Messrs. George Lyle Jones* and *George H. Wright* for respondents. Reported below: 138 F. 2d 343.

No. 585. NOEL ET AL. *v.* OLDS ET AL. February 14, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Frank J. Hogan* and *James C. Rogers* for petitioners. *Messrs. John E. Larson, Homer Cummings, O. Max Gardner, William Stanley, J. Edward Burroughs, Jr., Cushman Radebaugh,* and *Harry McMullan* for respondents. Reported below: 138 F. 2d 581.

No. 591. COOPERATIVE TRANSIT CO. ET AL. *v.* STATE ROAD COMMISSION. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. Jay T. McCamic* and *Gordon D. Kinder* for petitioners.

No. 581. WOOD *v.* DOWD, WARDEN. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 51 N. E. 2d 356.

No. 596. REAVES *v.* MISSOURI. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 599. LUMLEY *v.* MISSOURI. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 645. LOCKE *v.* RAGEN, WARDEN. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 653. SHELLENBERG *v.* BECKER, WARDEN. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 586. SPRAGUE *v.* ILLINOIS. February 14, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 612. EVENOW *v.* ILLINOIS. February 14, 1944. The petition for writ of certiorari to the Supreme Court of Illinois 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.

No. 558. SEA GULL LUBRICANTS, INC. *v.* UNITED STATES. February 28, 1944. Petition for writ of certiorari to the Court of Claims denied. *Mr. Ashley M. Van Duzer* for

petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key, Miss Helen R. Carloss,* and *Mrs. Elizabeth B. Davis* for the United States. Reported below: 100 Ct. Cls. 576, 50 F. Supp. 230.

No. 579. UNITED STATES LINES OPERATIONS, INC. *v.* UNITED STATES. February 28, 1944. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. I. Denning, John W. Cross,* and *Earl C. Walck* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Walter J. Cummings, Jr.* for the United States. Reported below: 99 Ct. Cls. 744.

No. 590. DAVIS *v.* UNITED STATES ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. D. H. Redfearn* and *R. H. Ferrell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for respondents. Reported below: 138 F. 2d 406.

No. 594. PEARSON ET AL., DOING BUSINESS AS BEN PEARSON CO., *v.* WALLING, ADMINISTRATOR. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. W. Dickey* and *A. F. House* for petitioners. *Solicitor General Fahy, Messrs. Douglas B. Maggs* and *Archibald Cox,* and *Miss Bessie Margolin* for respondent. Reported below: 138 F. 2d 655.

No. 595. COOPERATIVE TRANSIT CO. *v.* HYPHA DAYOUB. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Mr. Gordon D. Kinder for petitioner. Reported below: 138 F. 2d 534.

No. 604. INTERNATIONAL LADIES' GARMENT WORKERS UNION ET AL. *v.* SUPERIOR COURT OF CALIFORNIA ET AL. February 28, 1944. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California denied. *Messrs. Emil Schlesinger, S. Hasket Derby, Joseph C. Sharp,* and *Mathew O. Tobriner* for petitioners. *Mr. Milton Marks* for respondents.

No. 608. VAN DUSEN *v.* COMMISSIONER OF INTERNAL REVENUE. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph E. Davies* and *Raymond N. Beebe* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 138 F. 2d 510.

No. 609. VAN DUSEN *v.* COMMISSIONER OF INTERNAL REVENUE. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph E. Davies* and *Raymond N. Beebe* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 138 F. 2d 510.

No. 610. INTERNATIONAL TYPOGRAPHICAL UNION *v.* COUNTY OF MACOMB ET AL. February 28, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Irvin Long* for petitioner. *Mr. Alex. J. Groesbeck* for respondents. Reported below: 306 Mich. 562, 11 N. W. 2d 242.

No. 614. COLUMBIA CHEESE CO. ET AL. *v.* MCNUTT, FEDERAL SECURITY ADMINISTRATOR. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin A. Fromer* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for respondent. Reported below: 137 F. 2d 576.

No. 615. JASPER CHAIR CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Isidor Kahn* and *Douglas L. Hatch* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr.* and *Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 138 F. 2d 756.

No. 618. NEW SOUTHERN OHIO GAS CO. ET AL. *v.* ROUSH ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Chalmers M. Parker* for petitioners. *Mr. Arthur L. Rowe* for respondents. Reported below: 138 F. 2d 411.

No. 626. DERRICK ET AL. *v.* CITY COUNCIL OF AUGUSTA ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lansing B. Lee* for petitioners. Reported below: 138 F. 2d 507.

No. 627. CHARLESTON TRANSIT CO. ET AL. *v.* STERLING NATIONAL BANK & TRUST CO., TRUSTEE. February 28, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Robert S. Spilman* for petitioners. Reported below: 27 S. E. 2d 256.

No. 605. FLYNN *v.* BOWLES, PRICE ADMINISTRATOR. February 28, 1944. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Evelyn Flynn, pro se. Solicitor General Fahy* and *Mr. Richard H. Field* for respondent.

No. 623. BODELL, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Ira Lloyd Letts* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *Joseph M. Jones,* and *Miss Helen R. Carloss* for respondent. Reported below: 138 F. 2d 553.

No. 629. BRYAN ET AL. *v.* CREAVES. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leon M. Despras* for petitioners. *Mr. Jacob Levy* for respondent. Reported below: 138 F. 2d 377.

No. 630. EDWARD G. BUDD MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry S. Drinker* for petitioner. *Solicitor General Fahy, Messrs. Walter J. Cummings, Jr.* and *Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 138 F. 2d 86.

No. 631. COHEN ET AL. *v.* YOUNG ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Meyer*

Abrams for petitioners. *Mr. Thomas G. Long* for respondents. Reported below: 135 F. 2d 625.

No. 651. DUKE, DOING BUSINESS AS ROOSEVELT CHAIR & SUPPLY CO., *v.* EVEREST ET AL. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles B. Cannon* and *Geo. H. Wallace* for petitioner. *Mr. Fred H. Miller* for respondents. Reported below: 139 F. 2d 22.

No. 607. WALEY *v.* JOHNSTON, WARDEN. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Harmon Metz Waley, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 139 F. 2d 117.

No. 611. DUNCAN *v.* IOWA. February 28, 1944. Petition for writ of certiorari to the Supreme Court of Iowa denied. Reported below: 11 N. W. 2d 484.

No. 672. TAYLOR *v.* RAGEN, WARDEN. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 677. FRAME *v.* AMRINE, WARDEN. February 28, 1944. Petition for writ of certiorari to the Supreme Court of Kansas denied.

No. 509. LANG *v.* SWOPE, WARDEN. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 666. JOHNSON ET AL. *v.* MASONIC BUILDING CO. February 28, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lucien H. Boggs* for petitioners. *Mr. W. Inman Curry* for respondent. Reported below: 138 F. 2d 817.

No. 760. BUCHALTER *v.* WARDEN OF SING SING PRISON. March 4, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Mr. J. Bertram Wegman* for petitioner. Reported below: 141 F. 2d 259.

No. 636. BUTLER ET AL. *v.* MCKEY. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Theodore J. Roche, James Farraher,* and *Theodore H. Roche* for petitioners. *Mr. John W. Dinkelspiel* for respondent. Reported below: 138 F. 2d 373.

No. 637. STEADMAN *v.* ATLANTIC COAST LINE RAILROAD CO. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Julian S. Wolfe* for petitioner. *Messrs. Douglas McKay* and *Thos. W. Davis* for respondent. Reported below: 138 F. 2d 691.

Nos. 638, 639 and 640. WEST LAUREL HILL CEMETERY CO. *v.* ROTHENSIES, COLLECTOR OF INTERNAL REVENUE. March 6, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul Reilly* for petitioner. *Solicitor General Fahy, As-*

sistant Attorney General Samuel O. Clark, Jr., and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 139 F. 2d 50.

No. 641. AETNA LIFE INSURANCE CO. *v.* BARNETT ET AL.;

No. 642. AETNA LIFE INSURANCE CO. *v.* SAVINGS INVESTMENT & TRUST CO.; and

No. 643. EQUITABLE LIFE ASSURANCE SOCIETY *v.* BARNETT. March 6, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward A. Markley* for petitioners. *Mr. Josiah Stryker* for respondents in Nos. 641 and 643. *Mr. Arthur T. Vanderbilt* for respondent in No. 642. Reported below: 139 F. 2d 483.

No. 646. BIRMINGHAM CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Russell D. Morrill* and *Francis L. Casey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Newton K. Fox,* and *Robert L. Stern,* and *Miss Helen R. Carloss* for respondent. Reported below: 138 F. 2d 455.

No. 650. CONVEY *v.* OMAHA NATIONAL BANK. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Richard C. Meissner* for petitioner. Reported below: 140 F. 2d 640.

No. 652. CLEO SYRUP CORP. *v.* COCA-COLA COMPANY. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr.*

Ralph Kalish for petitioner. *Messrs. Samuel W. Fordyce, John A. Sibley,* and *Edwin W. Canada* for respondent. Reported below: 139 F. 2d 416.

Nos. 655 and 656. RADCLIFF GRAVEL CO., INC. ET AL. *v.* HENDERSON, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL. March 6, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Palmer Pillans* for petitioners. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Robert L. Stern* and *Melvin Richter* for Henderson. Reported below: 138 F. 2d 549.

No. 659. DE FREMERY & CO. *v.* UNITED STATES. March 6, 1944. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Mr. George R. Tuttle* for petitioner. *Solicitor General Fahy, Assistant Attorney General Rao,* and *Messrs. John R. Benney* and *Walter J. Cummings, Jr.* for the United States. Reported below: 138 F. 2d 161.

No. 665. MATTSON *v.* AMUSEMENT CORPORATION OF AMERICA. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Burton G. Henson* for petitioner. *Mr. Albert G. McCaleb* for respondent. Reported below: 138 F. 2d 693.

No. 668. ESENWEIN *v.* COMMONWEALTH EX REL. ESENWEIN. March 6, 1944. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Sidney J. Watts* for petitioner. *Mr. J. Thomas Hoffman*

for respondent. Reported below: 348 Pa. 455, 35 A. 2d 335.

No. 633. NORTH *v.* UNITED STATES. March 6, 1944. 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. *Mr. Howard A. Newman* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 139 F. 2d 598.

No. 597. MCMURTRY *v.* UNITED STATES. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Dewey Wallace McMurtry, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 139 F. 2d 482.

No. 647. BOOTH *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Morton L. Wallerstein* and *Philip Rosenfeld* for petitioner. Reported below: 138 F. 2d 844.

No. 667. KELLY *v.* DOWD, WARDEN. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 140 F. 2d 81.

No. 676. KELLY *v.* DOWD, WARDEN. March 6, 1944. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Seventh Circuit denied. Reported below: 140 F. 2d 81.

No. 625. LYNCH *v.* UNITED STATES. March 6, 1944. The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth 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. 665–6. *William Lynch, pro se. Solicitor General Fahy* for the United States. Reported below: 139 F. 2d 699.

No. 714. FERGUSON *v.* MASSACHUSETTS. March 6, 1944. The petition for writ of certiorari to the Superior Court of Massachusetts 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.

No. 669. FRATERNAL ORDER OF POLICE ET AL. *v.* HARRIS ET AL. March 13, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Edward N. Barnard* for petitioners. *Mr. Paul G. Eger* for respondents. *Messrs. Paul E. Krause* and *John H. Witherspoon* filed a brief on behalf of the City of Detroit, as *amicus curiae,* opposing the petition. Reported below: 306 Mich. 68, 10 N. W. 2d 310.

No. 670. MILLER ET AL., PARTNERS, ET AL. *v.* WALLING, ADMINISTRATOR. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George P. Lamb* and *Pierce Butler* for petitioners. *Solicitor General Fahy* and *Messrs. Robert L. Stern, Douglas B. Maggs, Archibald*

Cox, and *Joseph I. Nachman* for respondent. Reported below: 138 F. 2d 629.

No. 675. DEMPSEY, ADMINISTRATOR, *v.* GUARANTY TRUST CO. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis E. Pennish* for petitioner. *Messrs. James P. Dillie* and *Otis T. Bradley* for respondent. Reported below: 138 F. 2d 663.

No. 686. MILES NATIONAL FARM LOAN ASSOCIATION *v.* FEDERAL LAND BANK OF HOUSTON. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Scott Snodgrass* for petitioner. *Mr. Dan Moody* for respondent. Reported below: 139 F. 2d 422.

No. 689. TAYLOR INSTRUMENT COMPANIES *v.* FAWLEY-BROST COMPANY. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edward S. Rogers, William T. Woodson, Karl D. Loos,* and *Preston B. Kavanagh* for petitioner. *Mr. Albert I. Kegan* and *Mrs. Esther O. Kegan* for respondent. *Messrs. Will Freeman* and *C. B. Spangenberg* on behalf of the Brown Instrument Co., and *Messrs. Casper W. Ooms* and *E. S. Booth* on behalf of the Republic Flow Meters Co., filed briefs, as *amici curiae,* in support of the petition. Reported below: 139 F. 2d 98.

No. 693. WALLING, ADMINISTRATOR, *v.* L. WIEMANN CO. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Fahy* and *Mr. Douglas B. Maggs*

for petitioner. *Mr. Morris Karon* for respondent. Reported below: 138 F. 2d 602.

No. 657. WESTERN CARTRIDGE CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Allan Seserman* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 138 F. 2d 551.

No. 660. VANCOUVER BOOK & STATIONERY CO., INC. *v.* L. C. SMITH & CORONA TYPEWRITERS, INC. ET AL. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank C. Hanley* for petitioner. Reported below: 138 F. 2d 635.

No. 683. CHARLES HUGHES & CO., INC. *v.* SECURITIES & EXCHANGE COMMISSION. March 13, 1944. 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. *Mr. David V. Cahill* for petitioner. *Solicitor General Fahy* and *Messrs. Chester T. Lane* and *Milton V. Freeman* for respondent. Reported below: 139 F. 2d 434.

No. 588. SPALEK ET AL. *v.* UNITED STATES. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Mr. John J. Sloan* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States.

No. 606. NIVENS *v.* UNITED STATES. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Claud Nivens, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 139 F. 2d 226.

No. 703. NICHOLS *v.* UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. March 13, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 739. RANSIN *v.* NIERSTHEIMER, WARDEN. March 13, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 713. MOORE *v.* MICHIGAN. March 13, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied for the reason that it does not appear from the record that application therefor was made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C., § 350. Reported below: 306 Mich. 29, 10 N. W. 2d 296.

No. 310. WELLS FARGO BANK & UNION TRUST CO., EXECUTOR, ET AL. *v.* IMPERIAL IRRIGATION DISTRICT ET AL. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Sidney M. Ehrman, Robert B. Murphey,* and *W. Coburn Cook* for petitioners. *Messrs. Harry W. Horton* and *George Herrington* for respondents. Reported below: 136 F. 2d 539.

No. 525. GODBERSEN *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Gilbert Lorenz Godbersen, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 139 F. 2d 491.

No. 661. PERLEY *v.* ROBERTS ET AL. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. Reported below: 138 F. 2d 518.

No. 685. WALLING, ADMINISTRATOR, *v.* BLOCK. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Fahy* and *Mr. Douglas B. Maggs* for petitioner. *Messrs. Cassius E. Gates* and *Edward G. Dobrin* for respondent. Reported below: 139 F. 2d 268.

No. 690. KAPLAN ET AL., CO-PARTNERS, *v.* NATIONAL LABOR RELATIONS BOARD. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert L. Wasserman* for petitioners. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 138 F. 2d 884.

Nos. 691 and 692. PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, TRUSTEE, *v.* UNITED STATES. March 27, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter Biddle Saul* for petitioner. *Solicitor General Fahy, Assistant Attorney General Sam-*

uel O. Clark, Jr., *Messrs. Sewall Key, Carlton Fox,* and *Valentine Brookes,* and *Miss Helen R. Carloss* for the United States. Reported below: 138 F. 2d 869.

No. 696. Doss *v.* Illinois. March 27, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. A. M. Fitzgerald* for petitioner. Reported below: 384 Ill. 400, 51 N. E. 2d 517.

No. 697. Roth, Trustee, *v.* Carlson, Administrator. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. W. T. Faricy* and *Nelson J. Wilcox* for petitioner. *Mr. Roy F. Hall* for respondent. Reported below: 138 F. 2d 753.

No. 700. Baker *v.* Hunter, Warden. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. A. G. Bush* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for respondent.

No. 705. Piedmont Fire Insurance Co. *v.* Aaron et al. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander H. Sands* for petitioner. *Messrs. Allan D. Jones* and *Tazewell Taylor* for respondents. Reported below: 138 F. 2d 732.

No. 707. Gaines, Guardian, *v.* Sun Life Assurance Co. March 27, 1944. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Lucas S. Miel*

for petitioner. *Messrs. Henry C. Walters* and *Cashan P. Head* for respondent. Reported below: 306 Mich. 192, 10 N. E. 2d 823.

No. 718. NATIONAL SURETY CORP. *v.* PROVIDENT TRUST CO. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George E. Beechwood* for petitioner. *Mr. Harvey A. Miller* for respondent. Reported below: 138 F. 2d 252.

No. 720. HARTMAN *v.* ROSS. March 27, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Frank J. Hogan, Edmund L. Jones,* and *Howard Boyd* for petitioner. *Mr. Charles H. Houston* for respondent. Reported below: 139 F. 2d 14.

No. 738. ISELIN ET AL. *v.* LACOSTE. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. L. Bryan Dabney* for petitioners. Reported below: 139 F. 2d 887.

No. 624. CAPE ANN GRANITE CO., INC. *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Court of Claims denied. *Mr. Horace M. Gray* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 100 Ct. Cls. 53.

No. 671. MCMULLEN *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Leo R. Friedman, William E. Leahy,* and

Nicholas J. Chase for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. Reported below: 100 Ct. Cls. 323.

No. 708. SINGER ET AL. *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Cragun* and *William Stanley* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for the United States. Reported below: 141 F. 2d 262.

No. 712. KELLEY *v.* AMERICAN SUGAR REFINING CO. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Patrick Henry Kelley* and *Daniel J. Lyne* for petitioner. *Messrs. John L. Hall* and *Richard Wait* for respondent. Reported below: 139 F. 2d 76.

No. 715. DIXIE MARGARINE CO. *v.* SHAEFER, FORMERLY DEPUTY COLLECTOR OF INTERNAL REVENUE. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George N. Murdock* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr.,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Robert L. Stern* for respondent. Reported below: 139 F. 2d 221.

No. 719. JAFFE *v.* FEDERAL TRADE COMMISSION. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin F. Morrison* for petitioner. *Solicitor General*

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Fahy, Assistant Attorney General Berge, and *Messrs. Charles H. Weston, Matthias N. Orfield,* and *W. T. Kelley* for respondent. Reported below: 139 F. 2d 112.

No. 724. WALKER *v.* SQUIER, WARDEN. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. Wallace Dempsey* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl,* and *Miss Beatrice Rosenberg* for respondent. Reported below: 139 F. 2d 28.

No. 725. NORTHWESTERN OIL CO. *v.* SOCONY-VACUUM OIL CO., INC. ET AL. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William P. Crawford* for petitioner. *Messrs. David T. Searls, H. H. Thomas,* and *William H. Dougherty* for respondents. Reported below: 138 F. 2d 967.

No. 727. VESCELIUS, TRUSTEE IN BANKRUPTCY, *v.* WEDEEN. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William N. Gurtman* for petitioner. *Mr. Leo Guzik* for respondent. Reported below: 139 F. 2d 840.

No. 729. DECKER *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William D. Donnelly* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Shelby Fitze* for the United States. Reported below: 140 F. 2d 375, 378.

No. 752. ARKY, FORMERLY DOING BUSINESS AS LAWRENCE ELECTRIC CONSTRUCTION CO., *v.* ROSENBERG, TRUSTEE. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Michael Halpern* for petitioner. *Mr. Charles E. Bernstein* for respondent. Reported below: 138 F. 2d 669.

No. 723. CITY OF LOS ANGELES ET AL. *v.* NATURAL SODA PRODUCTS CO. March 27, 1944. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Ray L. Chesebro, S. B. Robinson, Samuel Poorman, Jr.,* and *A. E. Chandler* for petitioners. *Messrs. Francis R. Kirkham* and *Jess G. Sutliff* for respondent. Reported below: 23 Cal. 2d 193, 143 P. 2d 12.

No. 632. MISSOURI EX REL. MCKITTRICK, ATTORNEY GENERAL, *v.* MISSOURI PUBLIC SERVICE CORP. March 27, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Roy McKittrick,* Attorney General of Missouri, *Russell N. Pickett, Harry G. Waltner, Jr.,* and *Pross T. Cross* for petitioner. *Messrs. A. Z. Patterson* and *DeWitt C. Chastain* for respondent. Reported below: 174 S. W. 2d 871.

No. 709. IN THE MATTER OF CATANZARO. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Valentine Brookes* for the United States, respondent. Reported below: 138 F. 2d 100.

No. 695. VIERECK *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Leo A. Rover* and *John J. Wilson* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. George A. McNulty* and *Albert E. Arent* for the United States. Reported below: 139 F. 2d 847.

No. 706. MCGEE *v.* KAISER, WARDEN. March 27, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 761. WHITED *v.* WARDEN, ILLINOIS STATE PENITENTIARY, MENARD BRANCH. March 27, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 561. MITCHELL *v.* UNITED STATES. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William Mitchell, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark* and *Messrs. Robert S. Erdahl* and *W. Marvin Smith* for the United States. Reported below: 138 F. 2d 831.

No. 617. TERRELL *v.* PESCOR, WARDEN. March 27, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Henry E. Terrell, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Robert S. Erdahl* and *Valentine Brookes* for respondent. Reported below: 139 F. 2d 32.

No. 782. CULLOTTA *v.* RAGEN, WARDEN. March 27, 1944. Petition for writ of certiorari to the Supreme Court

of Illinois 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.

Nos. 721 and 722. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY ET AL. *v.* UNITED STATES. April 3, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Randell S. Cobb,* Attorney General of Oklahoma, for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Vernon L. Wilkinson* and *Fred W. Smith* for the United States. Reported below: 139 F. 2d 248.

Nos. 730, 731, 732 and 733. KERTESS *v.* UNITED STATES. April 3, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward V. Broderick* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. Reported below: 139 F. 2d 923.

No. 735. BALTIMORE TRANSIT CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Philip B. Perlman, Chas. A. Trageser, Harry Troth Gross,* and *Luther Day* for petitioners. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, David Findling,* and *Millard Cass,* and *Miss Ruth Weyand* for respondent. Reported below: 140 F. 2d 51.

No. 737. ATLANTIC COAST LINE RAILROAD CO. *v.* SIDNEY BLUMENTHAL & CO., INC. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for

the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for petitioner. *Mr. Theodore L. Bailey* for respondent. Reported below: 139 F. 2d 288.

No. 743. DEPAOLI ET UX. *v.* UNITED STATES. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William M. Kearney* for petitioners. *Solicitor General Fahy, Assistant Attorney General Littell,* and *Messrs. Chester T. Lane, Norman MacDonald,* and *John C. Harrington* for the United States. Reported below: 139 F. 2d 225.

No. 746. SPITZER ET AL. *v.* STANDARD GAS & ELECTRIC CO. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Julius Hallheimer* for petitioners. *Mr. William H. Button* for respondent. Reported below: 139 F. 2d 149.

No. 747. WILSON ET AL. *v.* FUHRHOP ET AL. April 3, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Guy A. Thompson* and *Samuel A. Mitchell* for petitioners. *Messrs. Jacob M. Lashly* and *J. Fred Gilster* for respondents. Reported below: 385 Ill. 149, 52 N. E. 2d 267.

No. 678. STROUD *v.* JOHNSTON, WARDEN. April 3, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Robert Stroud, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for respondent. Reported below: 139 F. 2d 171.

No. 744. NELSON *v.* WEBB, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY. April 3, 1944. Pe-

tition for writ of certiorari to the Supreme Court of Washington denied.

No. 736. HARGROVE *v.* UNITED STATES. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Leo Brewer* and *Warren O. Coleman* for petitioner. *Solicitor General Fahy* and *Mr. Robert S. Erdahl* for the United States. Reported below: 139 F. 2d 1014.

No. 753. JOHN A. JOHNSON CONTRACTING CORP., FORMERLY J. A. J. CONSTRUCTION CO., ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF WORTHINGTON PUMP & MACHINERY CORP. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Emanuel Harris* for petitioners. *Mr. Andrew B. Crummy* for respondent. Reported below: 139 F. 2d 274.

No. 755. MOTTAZ ET AL. *v.* SCHEUFLER, SUPERINTENDENT OF INSURANCE, ET AL. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Sam B. Sebree* and *Edgar Shook* for petitioners. *Messrs. Stanley Bassett* and *Preston Estep* for respondents. Reported below: 351 Mo. 1139, 175 S. W. 2d 836.

No. 756. AMERICAN CREOSOTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Kenneth Gardner* for petitioner. *Solicitor General Fahy, Mr. Alvin J. Rockwell,* and *Miss Ruth Weyand* for respondent. Reported below: 139 F. 2d 193.

No. 764. FENTON *v.* WALLING, ADMINISTRATOR; and

No. 765. SMITH *v.* WALLING, ADMINISTRATOR. April 10, 1944. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Louis Ferrari, G. D. Schilling,* and *Philip S. Ehrlich* for petitioners. *Solicitor General Fahy, Messrs. Douglas B. Maggs* and *Joseph I. Nachman,* and *Miss Bessie Margolin* for respondent. Reported below: 139 F. 2d 608.

No. 769. PENNSYLVANIA POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John F. MacLane* for petitioner. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Charles V. Shannon,* and *Howard E. Wahrenbrock* for respondent. Reported below: 139 F. 2d 445.

No. 774. BARG *v.* ILLINOIS. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Richard E. Westbrooks, Brien McMahon,* and *Walter E. Gallagher* for petitioner. *Messrs. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 384 Ill. 172, 51 N. E. 2d 168.

No. 776. DEALER'S TRANSPORT CO. *v.* REESE, ADMINISTRATRIX, ET AL. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. M. Powell* for petitioner. *Messrs. Richard T. Rives* and *A. F. Whiting* for respondents. Reported below: 138 F. 2d 638.

No. 783. CONNECTICUT MUTUAL LIFE INSURANCE CO. *v.* SPERBER; and

No. 784. NEW YORK LIFE INSURANCE CO. *v.* SPERBER.

April 10, 1944. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Jones, Jr.* for petitioners. *Mr. Bert E. Strubinger* for respondent. Reported below: 140 F. 2d 2.

No. 805. CAPETOLA ET AL. *v.* BARCLAY WHITE CO. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John J. McDevitt, Jr.* for petitioners. Reported below: 139 F. 2d 556.

No. 829. BAILEY *v.* ANDERSON, STATE HIGHWAY COMMISSIONER, ET AL. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. The application for a stay is also denied. Reported below: 182 Va. 70, 27 S. E. 2d 914.

No. 687. GILLELAND *v.* UNITED STATES. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Edward G. Jennings* for the United States. Reported below: 139 F. 2d 73.

No. 688. BURT ET AL. *v.* UNITED STATES. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Messrs. Edward G. Jennings* and *Shelby Fitze* for the United States. Reported below: 139 F. 2d 73.

No. 694. BOZEL *v.* UNITED STATES. April 10, 1944. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Emmet H. Bozel, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark,* and *Mr. Robert S. Erdahl* for the United States. Reported below: 139 F. 2d 153.

No. 773. MARBRY *v.* CAIN ET AL. April 10, 1944. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. William G. Cavett* for petitioner. *Mr. Leo E. Bearman* for respondents. Reported below: 176 S. W. 2d 813.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.

No. 91. BAIN PEANUT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 6, 1944. Certiorari, 320 U. S. 721, to the Circuit Court of Appeals for the Fifth Circuit. Dismissed on motion of counsel for the petitioner. *Mr. B. L. Agerton* for petitioner. Reported below: 134 F. 2d 853.

DECISIONS DENYING REHEARING, FROM JANUARY 11, 1944, THROUGH APRIL 10, 1944.*

No. —. EX PARTE ARTHUR S. HUMES. January 17, 1944. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. 320 U. S. 716.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 490. TRICO PRODUCTS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 17, 1944. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. 320 U. S. 799.

No. 29. MAGNOLIA PETROLEUM CO. *v.* HUNT. January 17, 1944. 320 U. S. 430.

No. 492. EQUITABLE LIFE ASSURANCE SOCIETY *v.* COMMISSIONER OF INTERNAL REVENUE. January 17, 1944.

No. 502. SMITH ET AL., CO-PARTNERS, TRADING AS THOMSON & MCKINNON, *v.* LUMMUS, TAX ASSESSOR, ET AL. January 17, 1944. 320 U. S. 717.

No. —. EX PARTE H. ELY GOLDSMITH. January 31, 1944. The applications to individual Justices have been considered by them individually and they are denied. 320 U. S. 719.

No. 43. INTERSTATE COMMERCE COMMISSION ET AL. *v.* HOBOKEN MANUFACTURERS' RAILROAD CO.; and

No. 56. ATLANTIC REFINING CO. *v.* MOLLER. January 31, 1944. 320 U. S. 368, 462.

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